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Sovereignty issues in the South China Sea: The Republic of the Philippines vs The People's Republic of China

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ABSTRACT

Sovereignty in the maritime domain is governed by the international laws and conventions, particularly the United Nations Convention on the Law of the Sea (UNCLOS). Maritime sovereignty is deeply contested and the view on it is diverse. While the idea of continental sovereignty got cemented over time, the concept of maritime territorial sovereignty remained fragile until the conclusion of UNCLOS negotiations in 1982. Although China was a part of the negotiating process and has ratified the Convention, its actions in the South China Sea (SCS) have frequently contravened with the UNCLOS. This paper argues, by employing the principles of sovereignty theory, that even though China has discarded the Permanent Court of Arbitration's (PCA) ruling in the case of *The Republic of the Philippines vs The People's Republic of China*, the ruling has set up a clear precedent, which shall be a cornerstone for future references on sovereignty issues in the maritime domain.

KEYWORDS

Maritime sovereignty; South China Sea; UNCLOS; Permanent Court of Arbitration; China; The Philippines

Scholars of political theory, political philosophy, international relations and law have discussed the questions of sovereignty at length and in nuance. Historically, the notion of sovereignty was brought to light by the Peace of Westphalia signed in 1648 and evolved through the post-World Wars period.¹ As a result, there has been limited scholarly agreement on any universal understanding of sovereignty and what it entails. However, despite the lack of consensus, scholars have been successful in charting out the broader contours of sovereignty. It is broadly defined as the right of the states to conduct its affairs within its own defined territorial boundaries with full autonomy. According to the Stanford Encyclopedia of Philosophy, the sovereignty of a state is its “*supreme authority within a territory*”.² The absolutist definitions of sovereignty have been a subject of criticism in the works of scholars like Jacques Maritain and Bertrand de Jouvenel who seek to redefine the notion by incorporating ideas of human rights and by affording higher prominence to international law within the theoretical paradigm of sovereignty. This essay, therefore, endeavours to bring to light the major discussions in political theory on the concept of sovereignty.

Despite the veracity of opinion on sovereignty, territoriality remains one of its core and fundamental characteristics. Sovereignty claims by more than one nation over disputed

territories has been a daunting question for political philosophy and international law as such claims put to scrutiny the idea of absolute sovereignty and its practical applicability in the international context. In the contemporary world, in what has been called by scholars of international relations as the Indo-Pacific region, there are several unanswered questions of sovereignty revolving around territorial disputes in the South China Sea (SCS). This paper strives to look into the questions of sovereignty in the SCS through a case study of *The Republic of the Philippines vs The People's Republic of China*, hereinafter referred to as “*The Philippines vs China*”.

The case of *The Philippines vs China* needs to be seen in the light of broader territorial disputes in the SCS. A basic understanding of demarcation of EEZ³ and territorial waters⁴ under UNCLOS is a prerequisite for discussing the case. Such disputes often arise due to conflicting claims of territorial sovereignty over a region. At the root of the dispute lies the nine-dash line of the Chinese, a pictorial representation, which can be found in [Figure 1](#). The Chinese government's posturing asserts that the maritime territories demarcated by the nine-dash line in the SCS belongs to China and China can, as a result, exercise sovereignty over the entire maritime region. However, such a demarcation infringes upon the rights of other neighbouring countries such as Taiwan, Malaysia, the Philippines and Vietnam to operate and navigate freely in the high seas of the region. The nine-dash line, therefore, is in contravention with the United Nations Convention on the Laws of the Sea (UNCLOS). According to Brookings Institution,

under the ... (UNCLOS), negotiated in the 1970s and 1980s, countries can claim exclusive rights to the fish and mineral resources within Exclusive Economic Zones, which can extend 200 nautical miles from a continental shoreline or around islands that can support habitation.⁵

The case study of *The Philippines vs China* must be understood under the above-mentioned backdrop. A pictorial representation of the overlapping claims over Exclusive Economic Zone (EEZ) and Continental Shelf can be found in [Figures 2](#) and [3](#) respectively. The Government of the Philippines, aggrieved by the aggressive and assertive posturing of China in the SCS, sought to seek arbitration in the Permanent Court of Arbitration (PCA). The Philippines sought arbitration on 15 key aspects of the case. The aspects can be broadly categorised under four heads. First, the Philippines sought a ruling on the source of rights of parties in the SCS and the impact of UNCLOS on the same.



Figure 1. Nine-dash line. Source: Asia Maritime Transparency Initiative.

Notes: “The Arbitration Outcome Mapped”, *Asia Maritime Transparency Initiative*, at <https://amti.csis.org/arbitration-map/> (Accessed January 9, 2020).

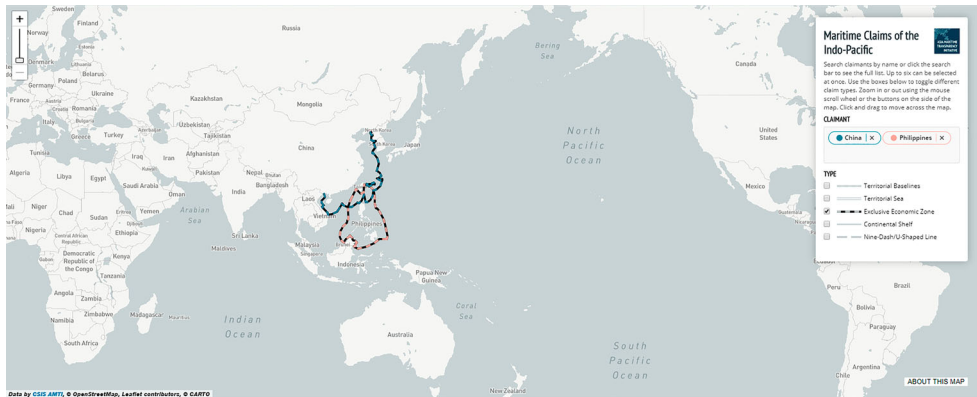


Figure 2. Overlapping claim over EEZ. Source: Asia Maritime Transparency Initiative.

Notes: “Maritime Claims of the Indo-Pacific”, *Asia Maritime Transparency Initiative*, at <https://amti.csis.org/maritime-claims-map/> (Accessed January 9, 2020).

Second, the Philippines also sought a ruling on the technical aspects of marine features such as the high tide or low tide features. Third, the Philippines asked whether the Chinese violated the sovereign rights of the Philippines and if it was in contravention to the UNCLOS. Fourth, the Philippines asked whether land reclamation and creation of artificial features by China were tantamount to the unlawful aggravation of the dispute. It is important to note that the case was unilaterally initiated by the Philippines because the Chinese believed that PCA had no jurisdiction over the case under the provisions of UNCLOS.

The case study of *The Philippines vs China* was chosen for the aforementioned reasons. First, the case is of vital importance because it demonstrates that international law is binding and can be exercised by a weaker party in a dispute, like the Philippines, to obtain a ruling on a bigger party, like China. International law, in most cases, brings order to what realists believe to be an anarchic global order. In a world governed by

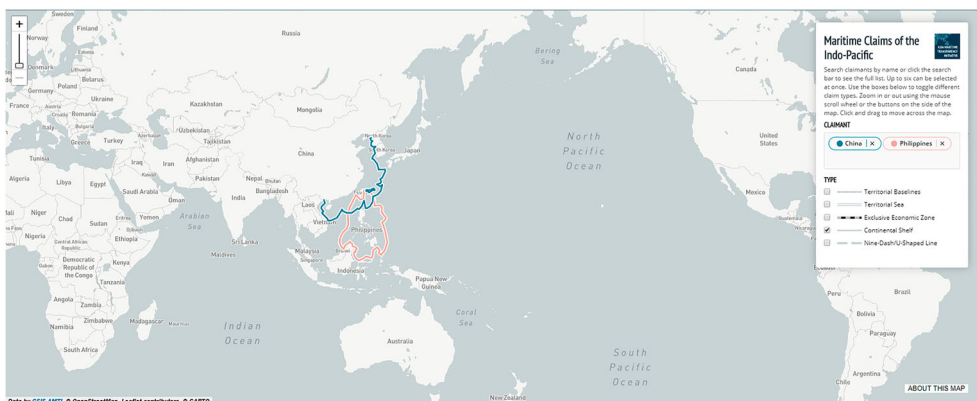


Figure 3. Overlapping claims over continental shelf. Source: Asia Maritime Transparency Initiative.

Notes: “Maritime Claims of the Indo-Pacific”, *Asia Maritime Transparency Initiative*, at <https://amti.csis.org/maritime-claims-map/> (Accessed January 9, 2020).

international law, despite the lack of a world government, the parties that choose to disrespect the law shall do so at their own normative cost and moral burden. The PCA ruled in favour of the Philippines and set a precedent that claims of sovereign rights and jurisdiction would not be entertained if such claims were made in contravention to international laws and conventions. Thus, this ruling brings to the fore the legally fragile and untenable position of China concerning its claims of historical sovereignty over the SCS. China's non-compliance only adds to its normative costs vis-a-vis international standing. China's non-compliance in the SCS offers a stark contrast with a case of maritime boundary dispute wherein the circumstances of the dispute were similar but the resolution of disputes by parties was in adherence to the international law. In the case of a dispute between Bangladesh and India over maritime territory and EEZs in the Bay of Bengal, Bangladesh took India to a UN tribunal under UNCLOS on October 8, 2009. The issue of arbitration encompassed issues such as "the location of land boundary terminus, delimitation of the territorial sea, exclusive economic zone, and the continental shelf within and beyond 200 nautical miles".⁶ After five years of hearing, the tribunal delivered a judgement awarding "nearly four-fifths of an area sprawling 25,000 sq km (9700 sq miles) in the Bay of Bengal"⁷ to Bangladesh. Although India lost the case, it gracefully accepted the verdict. The Ministry of External Affairs issued a statement accepting the verdict stating, "The settlement of the maritime boundary will further enhance mutual understanding and goodwill between India and Bangladesh by bringing to closure a long-pending issue".⁸ Bangladesh, commending India's act said, "We commend India for its willingness to resolve this matter peacefully by legal means and for its acceptance of the tribunal's judgment".⁹ The outcome of the case between India and Bangladesh is significant and has been highlighted along with the case between China and the Philippines owing to the similarities between the two cases. In both cases, a power that is decisively superior to the power filing the case lost the case on the merits of international law. However, while India gracefully accepted the verdict in concurrence with the UNCLOS, China dismissed the judgement of the international tribunal.

Second, the case is of utmost importance as it charts the future course of action concerning freedom of navigation in the Indo-Pacific. It creates a legal precedent that needs to be followed to ensure free and open oceans.

This paper, therefore, explores the contours of sovereignty in the SCS with a special focus on the case of *The Philippines vs China*. This essay shall, first of all, bring to light the major discussions in political theory on the concept of sovereignty. Thereafter, the paper delves into the case study of the case and explores the position of the Philippines and China concerning it. Finally, the paper discusses the rulings of the court itself on the case and deduces the implications of the ruling on the sovereign rights of the Philippines, in particular, and of parties in the SCS, in general.

The sovereignty debate in political theory

Sovereignty has been a centrepiece of the international relations and domestic political structures across the world over the centuries. It is derived from a French term, *souveraineté*, which means "to be the equivalent of supreme power".¹⁰ Sovereignty lies at the root of contemporary political – and legal apparatus. The concept has existed for a very long

time, deriving authority, inter alia, from divine rights, hereditary rights, sacred books, and ethnicity. However, the systemic philosophical understanding of the concept started developing in medieval Europe somewhere around the early sixteenth century. Medieval Europe had turbulent geography with many small feudal lords and few kingdoms like Britain and France with limited powers. Most of the power in Europe was vested with two institutions: The Catholic Church based in Rome and the Holy Roman Empire – which included parts of today’s Italy, France, Netherlands and Belgium.¹¹ However, in the sixteenth century, two distinct and very significant historical events took place – one in France and the other in the Holy Roman Empire.

On the one hand, French Philosopher Jean Bodin “used the new concept of sovereignty to bolster the power of the French king over rebellious feudal lords, facilitating the transition from feudalism to nationalism”.¹² Bodin believed that sovereignty must rest with an individual.¹³ On the other hand, Martin Luther challenged the authority of the Catholic Church and led the Protestant Reformation. Luther believed that

under God’s authority, two orders with two forms of government existed. ‘The realm of the spirit’ was the order in which Christ was related to the soul of the believer. The realm of the world was the order of secular society, where civil authorities ran governmental institutions through law and coercion. Both realms furthered the good of believers, but in different senses; they were to be separately organized (sic).¹⁴

Though Luther and other protestant reformers never discussed sovereignty directly, their contribution in reinterpreting the role of the church has greatly contributed to decoupling religion from the state in Europe over the period. Over the decades, these events were followed by the Peace of Augsburg in 1555¹⁵ and the Thirty Years’ War¹⁶, which ended with the Peace of Westphalia in 1648. One of the results of the agreement was that “states emerged as virtually the sole form of substantive constitutional authority in Europe, their authority no longer seriously challenged by the Holy Roman Empire”.¹⁷ (Philpott 2016).

As mentioned earlier, sovereignty can be defined as “supreme authority within a territory”. “The people’s acknowledgement of central governing authority within a specified geographical territory, combined with the recognition of its status by other states, confers on the state its sovereignty” is a broader definition.¹⁸ These definitions talk about the authority and the territory, which are two main pillars of sovereignty. There must exist an individual or an institution that can be termed as a sovereign to exercise the authority within a defined territory. In the modern era, the state is considered as an indisputable sovereign responsible for all the functions within the geographical border. Therefore, Chris Brown and Kirsten Ainley write,

The state is a territorial-based political unit characterized (sic) by a central decision-making and enforcement machinery ... the state is legally ‘sovereign’ in the sense that it recognizes (sic) neither an external superior, nor an internal equal; and the state exists in a world composed of other, similarly characterized (sic), territorial, sovereign political units.¹⁹

This understanding of the state emanates from the Peace of Westphalia, which mentions that

all states were sovereign, meaning that they laid claims to the exclusive right to rule their own territories and to act, in relation to other states, as they themselves saw fit. All states were

formally equal and they had the same rights and obligations. Taken together, the states interacted with each other in a system in which there was no overarching power. Sovereignty and formal equality led to the problem of anarchy.²⁰

Though the concept of nation-state cemented across the West over the centuries and eventually, across the globe, as most of the world was colonised by western countries, the idea remained vague until it was clearly defined in the Montevideo Convention on the Rights and Duties of the State, 1933. Article 1 of the Convention stipulates that the state has the following four qualifications: “defined territory”, “a permanent population”, “an effective government” and “the capacity to enter into relations with other states”.²¹ While the state was defined as per international law during the Montevideo convention, the role of the state in international relations became clear only after the end of the Second World War, that is, after the formation of the United Nations (UN). One of the principles under Article 2 of the UN Charter states, “The Organization (sic) is based on the principle of the sovereign equality of all its Members”.²² Clarifying the role of the state, Griffiths et al. write that the sovereign equality mentioned in the UN charter consists of the following elements:²³

1. “States are legally equal”.
2. “Every state enjoys the rights inherent in full sovereignty”.
3. “Every state is obligated to respect the fact of the legal entity of other states”.
4. “The territorial integrity and political independence of a state are inviolable”.
5. “Each state has the right to freely choose and develop its own political, social, economic, and cultural systems”.
6. “Each state is obligated to carry out its international obligations fully and conscientiously and to live in peace with other states”.

The description of the state’s role given by Griffiths et al. can be termed as External Sovereignty – the role of the state concerning other states and international actors. The dominant strategic thoughts like Realism and Liberalism also place the state as the main actor in the field of international relations. There is another aspect of sovereignty known as Internal Sovereignty, which Andrew Heywood defines as, “The notion of a supreme power/authority within the state, located in a body that makes decisions that are binding on all citizens, groups and institutions within the state’s territorial borders”.²⁴ These two aspects are not mutually exclusive. While the initial elements of sovereignty in the early modern era were mostly related to External Sovereignty, philosophers also contributed to strengthening the understanding of Internal Sovereignty through the notion of popular sovereignty. Popular sovereignty deals with the relationship between the state and the citizens, where the legitimacy of the state in the eyes of the people is at the decisive characteristic feature.

Thomas Hobbes was the first philosopher to discuss the ruler’s legitimacy in his book, *Leviathan*, and interestingly, he wrote it in 1651, three years after the end of the Thirty Years’ War. Building upon Bodin’s arguments, in *Leviathan*, Thomas Hobbes sourced the monarch’s legitimacy in the form a social contract, which is derived from a thought experiment, State of Nature. Hence, Hobbes argued that people, in return for protection, legitimately handed over some freedom to the monarch. However, similar to “Bodin’s

sovereign, Hobbes' Leviathan was above the law, a mortal god unbound by any constitution or contractual obligations with any external party".²⁵ While Hobbes was still trying to justify the absolute authority of the ruler, philosophers like John Locke, Jean-Jacques Rousseau later formulated the scenarios – using thought experiments akin to Hobbes – in which the state's powers can be limited. These scenarios radically changed the perceptions of the state among the masses, who started demanding the rights they deserved. Constitutional monarchy in the United Kingdom, the world's first-ever constitutional democracy in the United States (US), French Revolutions and many such significant historical events were results of the philosophical contributions of popular sovereignty.

A key point to be noted is that the idea of popular sovereignty revolves less around the political system of a country and more around the legitimacy of the central authority. "Sovereignty flows from the recognition of the legitimacy of some central governing power and not the acceptance of the moral or legal validity of the acts carried out by the central authority".²⁶ While in the case of democracies it is easy to recognise legitimacy, it is difficult to do so for other forms of political systems. Since the end of the cold war, the UN Security Council of the unipolar world is accused of having undermined the sovereign status of several non-democratic nations, especially with weak state capacities, in the name of Humanitarian Intervention, or Responsibility to Protect.

For the past many decades, the absolutist notion of the state's sovereignty is getting diluted as nations have been entering international agreements where they are legally mandated to oblige with the agreed terms. There also exists a radically unique case, the European Union, where nation-states with diluted sovereignty co-exist within a supranational state. However, it can be argued that the states are still completely sovereign as the decision to concede sovereignty on trade or monetary policy still rests on the nation-state. However, in the cases of humanitarian interventions, the answer to questions of sovereignty becomes more complicated. Arguing about humanitarian intervention, Brown and Ainley write that "Its emergence can be linked to the increasing strength of the human rights regime, particularly the regime's conception of legitimate state sovereignty as flowing from the rights of individuals".²⁷ While Brown and Ainley have driven home a valid point, the interaction of international law and geopolitics of nation-states poses questions on how the notions of sovereignty and sovereign rights and jurisdiction may shape in future.

Mentioned above is a limited literature review about the notion of sovereignty since an exhaustive review is beyond the scope of this paper's concern. This paper discusses issues such as historical evolution of sovereignty, popular sovereignty, external sovereignty, internal sovereignty and violation of international norms for the holistic understanding of the concept. However, in further discussions, this paper would limit its arguments to a violation of international convention and norms concerning external sovereignty. The arguments would be made referring to the case between China and the Philippines in the Permanent Court of Arbitration (PCA) where the latter petitioned against the former for violating UNCLOS in SCS.

It is in the given context that this paper views China's aggression in the SCS through a lens of sovereignty. China has territorial disputes with most of its neighbours. It has even fought a full-scale war with India in 1962. From the mid-2000s, when China's clout in the world began expanding, China's behaviour has worried many of its neighbours, especially the maritime ones. Several countries have expressed concerns over violations of sovereign

rights and jurisdiction, and sometimes even territorial sovereignty, as bestowed upon the sovereign nations by UNCLOS. China's ambitions stem from two sources: the objective to establish global dominance through projects such as BRI on the back of already achieved decades of economic growth; and, claims of historical sovereignty over territories, which it says were part of the nation's past kingdoms. China's cost of violating sovereignty in SCS has decreased with an increase in its international power. China has prioritised self-interest over international law, norms and conventions, which is in line with realist understanding of global politics.

Furthermore, the very concept of international law is differently interpreted in China, which is a Marxist-Leninist state. According to Tim Rühlig, China's understanding of law constitutes a functionalist approach, that is, laws for the Chinese are a means to achieve an end.²⁸ Compliance with the law becomes a matter of cost-benefit analysis, and the Chinese acquiesce to following international law if it contradicts their cost-benefit calculus.²⁹ Thus, the Chinese conception of international law comes at loggerheads with the liberal conception of international law, which is based on norms and normative values. Although China alludes and refers to international law, it takes a functionalist view of the law. Accordingly, the Chinese view of the SCS issue is shaped by its warped view of international law and conventions.

Assessing how the Chinese deal with international law when their self-interest is at stake is important. This paper shall, therefore, look at the Chinese position in the case in light of the factors mentioned above.

Position of the People's Republic of China

Based only on the official documents of China – namely (a) Declaration of the Government of the People's Republic of China on China's Territorial Sea, 1958, (b) Law on the Territorial Sea and the Contiguous Zone, 1992, (c) Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea, 1996, and (d) Law on the Exclusive Economic Zone and the Continental Shelf, 1998 – it is difficult to find a clear enunciation of the Chinese claim in the SCS. The official Chinese position about its claim is abstruse and vague. Beijing has not only obscured the nature and scope of its claim in the SCS but also provided no clarity about its interpretation of the nine-dash line.

However, enough signalling has been done by China through official cartography to stake claims in the territory marked by the nine-dash line. According to official cartographic maps of China, the area under the nine-dash line is demarcated as the sovereign territorial boundary of China. The first version of such a map was released in 1948 and has been used since then. Before 1953, when two dashes near the Gulf of Tonkin were removed, it was effectively an eleven-dash line. According to Note Verbale CML/17/2009, submitted by the Permanent Mission of The People's Republic of China to United Nations (UN) Secretary-General, "China has indisputable sovereignty over the islands in the SCS and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof".³⁰ Vietnam, Malaysia, the Philippines and Indonesia took exception to such a submission. Though this paper provides a detailed explanation of the Philippines' position in the next section, it suffices to say for now that the Philippines took exception to CML/17/2009 by submitting

Note Verbale No. 000228 (UNCLCS 2011a).³¹ Thereafter, China released CML/8/2011, which reaffirmed the position stated in CML/17/2009 and added that “China’s sovereignty and related rights and jurisdiction in the SCS are supported by abundant historical and legal evidence. The contents of the Note Verbale No 000228 of the Republic of the Philippines are totally unacceptable to the Chinese Government”.³²

The Chinese, therefore, claim sovereignty over the islands of the SCS based on historical rights and argues that its territorial sovereignty over the region is historical. China has consistently maintained this position. For example, in 2015, when the tribunal issued an Award on Jurisdiction, Ministry of Foreign Affairs of China pointed out that the arbitration was unilaterally initiated by the Philippines and reasserted that

China has indisputable sovereignty over the South China Sea Islands and the adjacent waters. China’s sovereignty and relevant rights in the South China Sea, formed in the long historical course, are upheld by successive Chinese governments, reaffirmed by China’s domestic laws on many occasions, and protected under international law including the ... UNCLOS. (Statement of the Ministry of Foreign Affairs of the People’s Republic of China 2015)³³

The content of the above-mentioned documents reaffirms China’s position, albeit legally vague, on the nine-dash line and its claims over islands in the SCS. China, however, did not send a representative to represent its case in front of the tribunal. Hence, claims made in official documents, statements and laws have been represented by this paper as official Chinese claims. Chinese non-participation in the affairs of the tribunal was due to Beijing’s belief that the tribunal lacked jurisdiction in the matter.

This paper shall now delve into the Philippines’ position in detail since the Philippines initiated the proceedings under UNCLOS.

Position of the Republic of the Philippines

The Philippines has remained very clear in articulating its position concerning Chinese claim in the SCS. Manila has asserted, based on a close reading of Chinese statements, that

the most logical way to construe China’s language is as an assertion of sovereignty over the islands of the South China Sea and their ‘adjacent waters’, or territorial seas; and a claim of sovereign rights and jurisdiction – short of sovereignty – in the waters that lie between the territorial seas claimed by China and the nine-dash line. (*The Republic of the Philippines vs. The People’s Republic of China* 2016, 79)³⁴

The distinction made between sovereignty, on the one hand, and sovereign rights and jurisdiction, on the other is important for this paper. Claims of sovereign rights and jurisdiction over the region that falls within the nine-dash line mean that the party claims full rights over the maritime resources in the region. Claims of sovereignty mean that overhead flights and shipping vessels of other nations would have to take prior permission from China to have rights to passage through the region. Sovereignty is a super-set of sovereign rights and jurisdiction. The Chinese have consistently claimed sovereignty over the islands of the SCS and sovereign rights and jurisdiction over the region marked by the nine-dash line. As a result, the Chinese have blocked oil explorations, fishing and other forms of resource extractions by other sovereigns but has not yet hindered the passage of overhead flights and shipping vessels. Manila’s position is that

China never exercised full sovereignty over the islands of the SCS and, therefore, its claims about exercising historic rights over the islands is baseless. Furthermore, Manila states that even if one assumes that the Chinese did exercise historical sovereign rights over the islands of the SCS, such rights were rendered null and void the moment Beijing signed accession to UNCLOS.

Thereafter, the Philippines debunks the Chinese claims of historical rights. Manila's legal argument provides, keeping in mind the legal distinction between sovereignty and sovereign rights and jurisdiction, that China cannot claim an exception under Article 298 of UNCLOS³⁵ (pertaining to optional exceptions to applicability of section 2 of part XV of UNCLOS) because China claims only sovereign rights and jurisdiction in the area demarcated by the nine-dash line and not sovereignty. Hence, the exception given under provisions of Article 298 for "historic bays and titles"³⁶ is not applicable. Furthermore, assuming that the Chinese claims were to a historic title, provisions of Article 298 would still not be applicable because the provisions hold only for disputes concerning the delimitation of boundaries and not for disputes over status itself.

Based on the above-mentioned articulated position, Manila has called upon the international tribunal set up under the auspices of UNCLOS to provide a ruling on fifteen crucial points. The Philippines petitions the following. First, China is entitled to only as much territorial sovereignty and Exclusive Economic Zone (EEZ) as is provided by the UNCLOS. Second, Chinese claim of historic rights over the region outlined by the nine-dash line is without lawful effect and in contravention to the UNCLOS. Third, Scarborough Shoal cannot be used as a benchmark to demarcate rights over EEZ and continental shelf. Fourth, Mischief Reef, Second Thomas Shoal, and Subi Reef, similarly, cannot be used as a benchmark to demarcate rights over EEZ and continental shelf since they are low-tide elevations. Fifth, Mischief Reef and Second Thomas Shoal, therefore, belong to the EEZ of the Philippines under UNCLOS. Sixth, Gaven Reef and McKennan Reef (including Hughes Reef) cannot be used as a benchmark to demarcate rights over EEZ and continental shelf since they are low-tide elevations. However, the low-water line of these reefs may determine the territorial sea of Namyt Island and Sin Cowe Island. Seventh, Johnson Reef, Cuarteron Reef and Fiery Cross Reef cannot be used as a benchmark to demarcate rights over EEZ. Eighth, Chinese interventions in SCS are unlawfully infringing on the sovereign rights of the Philippines over its EEZ and continental shelves. Ninth, Beijing has failed to respect the EEZ of the Philippines by failing to prevent its vessels from exploring resources in the region. Tenth, Chinese intervention against Philippine fishermen at Scarborough Shoal is unlawful. It also affects the livelihoods of the fishermen. Eleventh, China has failed to comply with UNCLOS concerning the preservation of marine ecosystem at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef. Twelfth, construction activities undertaken in the Mischief Reef are tantamount to unlawful appropriation, and in contravention to the UNCLOS provisions on the safety of the marine ecosystem and artificial islands, installations and structures. Thirteenth, activities of Chinese law enforcement agencies threaten the safety of the Philippine fishermen at Scarborough Shoal and are in contravention to UNCLOS. Fourteenth, the Chinese have unlawfully aggravated the dispute by infringing upon rights to freedom of navigation, by undertaking artificial reclamation activities at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef, and by interfering with the supply

requirements of Philippine military personnel at Second Thomas Shoal. Finally, Manila petitioned that the Chinese should exercise their freedoms only in compliance with UNCLOS and not beyond that.

Tribunal's jurisdiction on the case

Having faced non-participation of China on the grounds that the tribunal lacked jurisdiction on the issues raised by the Philippines, the tribunal considered the legal aspect of Chinese claim about the lack of jurisdiction on the issue. The tribunal has meticulously commented upon the legal aspects of its jurisdiction both in the Award on Jurisdiction, 2015 and in the final judgement, 2016.³⁷

First, the tribunal categorically emphasised that it had been duly convened under the provisions of Annex VII of UNCLOS.³⁸ Given that both China and the Philippines are party to the Convention, Chinese non-participation did not mean that the Philippines could not seek a ruling on the case. The tribunal stated that provisions for convening a tribunal in absence of one party exists under Annex VII of UNCLOS and that such a process, in no way, was in contravention to the Convention. Second, the tribunal rejected Chinese claims that since the case revolved around territorial sovereignty over islands in the SCS, the tribunal lacked jurisdiction. The tribunal conceded that as far as the issue of sovereignty over the islands is concerned, it did lack jurisdiction. However, it explained that the rulings sought by the Philippines do not concern sovereignty and that the judgement will not improve territorial claims of either of the parties over the islands. Thus, the matters submitted by Manila could be subject to the jurisdiction of the tribunal without deciding upon the territorial sovereignty of the islands. The legal corollary of the above-mentioned arguments is that a dispute between UNCLOS and other rights, which is historic rights, is a matter that falls within the jurisdiction of the tribunal.

Chinese position papers also challenged the tribunal's jurisdiction on grounds of articles 281 and 282 of the UNCLOS. The articles state that if two parties have agreed to resolve disputes bilaterally or by other means, the provisions of the Convention may no longer remain applicable.³⁹ The Chinese were quick to point out that the China-ASEAN Declaration on the Conduct of Parties in the South China Sea, 2002 brought articles 281 and 282 under effect. The tribunal, however, rejected the Chinese claims since the China-ASEAN Declaration was a political statement that was legally non-binding. It, therefore, did not have legal status. Finally, Chinese objections to jurisdiction under article 298 of the Convention have already been discussed in the previous section of this paper.

The tribunal, therefore, debunked the Chinese claim that it did not have jurisdiction over the petitions of the Philippines under the provisions of the Convention. The following section explains the judgement of the tribunal in the given case.

The tribunal's judgement

This section shall thematically delve into the rulings of the tribunal on the fifteen submissions of the Philippines.⁴⁰ The themes under which the award of the tribunal could be broadly categorised are as follows: status of historic rights and its relations with the Convention, geographical, hydro-graphical and legal status of SCS islands, legality of

Chinese law enforcement operations, legality of Chinese construction and reclamation projects, and expectations about future course of conduct in SCS.

First, concerning the status of historic rights and its relations with the Convention, the tribunal declared that the Chinese claims about historic rights over the region demarcated by the nine-dash line were incompatible with the provisions of UNCLOS. Any rights that the parties might have held before the coming into force of the Convention were extinguished by signing the Convention. Furthermore, the tribunal adjudicated that before the Convention, the area claimed by China were a part of high seas. Hence, the claims about historic rights were debunked both at a legal and historical level.

Second, with respect to the geographical, hydro-graphical and legal status of SCS islands, the tribunal adjudicated, maintaining consistency with Article 13 and Article 121 of UNCLOS⁴¹, that Scarborough Shoal, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North) and McKennan Reef were high-tide features and that Subi Reef, Hughes Reef, Mischief Reef, and Second Thomas Shoal were low tide elevations under natural conditions. Thus, the tribunal concurred with all the claims of the Philippines, except claims regarding the status of Gaven Reef (North) and McKennan Reef. Also, the tribunal added that only those features could generate an entitlement to an EEZ that could sustain human life on its own, has a functional human settlement and is not extractive or dependent on external resources. Historical records, as well as current resource profile, was used to assess the characteristics that define entitlement to EEZ. As a corollary, features of Spratly Islands, including the high tide features, were legally incapable of generating entitlement to an EEZ. Furthermore, it was adjudicated that the Spratly Islands would not generate entitlements to EEZ as a collective unit but rather as individual islands of the collective.

Third, on the legality of Chinese law enforcement operations, the tribunal adjudicated that the sovereign rights of the Philippines were violated by China. Chinese violations include interventions in petroleum exploration by the Philippines at Reed Bank, intervening with the Philippine fishing trawlers in the EEZ of the Philippines, failing to prevent resource extraction by Chinese fishermen in the EEZ of the Philippines and by constructing in Mischief Reef without the legal permission of the Philippines. In the case of Scarborough Shoal, the tribunal adjudicated, although not on the territorial sovereignty of the feature, that the shoal was a high tide feature capable of generating territorial sovereignty but incapable of generating an EEZ. Hence, any country, including China and the Philippines, was free to undertake resource extraction in the high seas. Given that China blocked the Philippines' access to Scarborough Shoal, the tribunal found China in non-observance of Article 94 of UNCLOS⁴² and the Convention on the International Regulations for Preventing Collisions at Sea, 1972. Furthermore, China was also found to be in contravention of Article 192⁴³ and Article 194⁴⁴ of UNCLOS as its construction activities led to the deterioration of the maritime environment in the coral reefs of the Spratly Islands. A pictorial representation of the outcome of the tribunal's judgement can be found in [Figure 4](#).

Fourth, the tribunal's adjudication regarding the legality of Chinese construction and reclamation projects was clearly stated. The tribunal arbitrated that Chinese constructions in the Mischief Reef, located in the EEZ of the Philippines, had not only caused irreparable damage to the ecosystem but has also resulted in aggravation of conflict during the trial period, that is, when the matter remained sub-judice.



Figure 4. Map of arbitration outcome. Source: Asia Maritime Transparency Initiative.

Notes: "The Arbitration Outcome Mapped", *Asia Maritime Transparency Initiative*, at <https://amti.csis.org/arbitration-map/> (Accessed January 9, 2020).

Finally, the tribunal called upon the maxims of international law for good faith to prevail and reiterated the finality of an award under Article 11 of Annex VII of UNCLOS, which states that "the award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute".⁴⁵ The tribunal's judgement was in the spirit of the international law and conventions, and legally binding. However, China has rejected to comply with the fine points of the judgement on grounds of historical sovereignty. Thus, China has created a conflict not only in the SCS but also between international law and sovereign rights.

Conclusion

The case study of *The Philippines vs China* is a unique case that can be analysed for studying the relationship between international law, its interpretation by states and how it struggles to coexist with absolutist ideas of sovereignty, and sovereign rights and jurisdiction. In the period that followed the award, China dismissed the award, thus demonstrating absolute disdain for international law and the Convention. Although compliance with international law is as much a matter of self-interest since the Chinese follow an end-centric and cost-benefit view of international law, it is a subject of another paper to discuss the geopolitics, strategic consequences, the implications and the remedies of Chinese aggression in the SCS. This paper focuses only on the legal aspects of the idea of sovereign rights and jurisdiction over the region claimed by China as its sovereign backyard. As far as the legal aspect is concerned, Chinese activity in the SCS is grossly in violation of the international law and all the statutes that international law holds dear. China denies that the tribunal lacked the jurisdiction to adjudicate on the matter but the decision of the tribunal, and by corollary international law itself, is binding. Thus, the fact that China is not abiding by it, renders Chinese activity in the SCS region illegal.

In the given case, the tribunal conceded that it was not providing a jurisdiction on the territorial sovereignty of the disputed features of SCS but only on the delimitation of the sovereign rights that such features generate to EEZ and continental shelf. The tribunal was clear about the matters that it was adjudicating upon and followed the procedures thoroughly. The arbitration tribunal dismissed the matters on which it did not have

jurisdiction and adjudicated only on matters that fell under its jurisdiction. China, being a signatory to the UNCLOS, was under legal obligations to comply but the Dragon seems to have other plans for its maritime backyard. However, the fact that China did not comply with the law does not make it non-binding or ineffective.

There is a general tendency among scholarly advocates of absolute sovereignty to belittle international law under the pretext that it invades the sovereignty of nation-states. This paper argues that such a notion falls short in understanding the fact that, in a situation of global anarchy (lack of a global governing body), international law, norms and conventions provide the essential fillip to further the rules-based international order. However, a rules-based international order often locks horns with the interest of expansionist and aggressive powers. China's sovereignty or sovereign rights and jurisdiction, in this case, historical sovereignty, became a tool for China to justify its non-compliance of international law. Furthermore, China's historical sovereignty has also been a pretext for its violation of the sovereignty of the Philippines that the international law has vested upon the Philippines. Given China's end-centric view of international law, sovereignty has increasingly been interpreted by China as a norm that transcends the limitations imposed by international law. Sovereignty is an end in itself. However, the Chinese will do good to remember that the notion of sovereignty and sovereign rights is deeply ingrained in international law and guaranteed through it. Sovereignty itself is a binding principle of international law. Thus, it is illegal, based on the tenets of international law, to enter into the sovereign territory of the Philippines and bar the Philippine people from extracting resources in their own EEZ. China's disregard for the sovereignty of the Philippines and other maritime neighbours is contradictory, illegal and appalling, especially when seen in the light of Chinese positions on issues where its sovereignty is under discussion. While China has claimed sovereignty over the islands of SCS and rendered a position of sanctity to such sovereign claims, it has disregarded the sovereignty of its neighbours in the same breath.

In the SCS, China is following the old maxim that might is right. China's non-compliance with the judgement can be seen in the light of its warped functionalist view of international law, which is based on cold calculus of gain and loss. Whilst having a different approach to rule of law does not absolve China of compliance with international law, understanding China's approach towards international law and conventions will help other nations deal with the Chinese world view in a more holistic manner.

Notes

1. Daniel Philpott, "Sovereignty," *Stanford Encyclopedia of Philosophy*, March 25, 2016, at <https://plato.stanford.edu/entries/sovereignty/> (accessed March 28, 2019).
2. *Ibid.*
3. Rules of the Convention regarding EEZ is mentioned in Part V of the Convention. Article 55 of the Convention states: "... the exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention." "UNCLOS," *United Nations*, 1833 UNTC 31363 (English), December 10, 1982 (entered into force 16 November 1994), at <https://treaties.un.org/doc/Publication/UNTS/Volume%201833/volume-1833-A-31363-English.pdf> (accessed April 26, 2019), 418. Article 57 of the Convention states: "... the

exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured” (Ibid, 419).

4. Rules of Convention regarding territorial waters and contiguous zones are mentioned in Part II of the Convention; Article 2 discusses the legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil; and Article 3 defines the extent of the territorial water by stating: “... every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention”; See, Ibid, 400.
5. “The U.S. and China’s Nine-Dash Line: Ending the Ambiguity,” *Brookings*, February 6, 2014, at <https://www.brookings.edu/opinions/the-u-s-and-chinas-nine-dash-line-ending-the-ambiguity-2/> (accessed March 28, 2019).
6. Haroon Habib, “Bangladesh Wins a Maritime Dispute with India,” *The Hindu*, July 9, 2014, at <https://www.thehindu.com/news/national/bangladesh-wins-maritime-dispute-with-india/article6191797.ece> (accessed November 18, 2019).
7. Ruma Paul, “U.N. Tribunal Rules for Bangladesh in Sea Border Dispute with India,” *Reuters*, July 8, 2014, at <https://uk.reuters.com/article/uk-bangladesh-india-seaborder/u-n-tribunal-rules-for-bangladesh-in-sea-border-dispute-with-india-idUKKBN0FD15N20140708> (accessed November 18, 2019).
8. Ibid.
9. Ibid.
10. The Editors of Encyclopaedia Britannica, “Sovereignty,” *Encyclopædia Britannica*, at <https://www.britannica.com/topic/sovereignty> (accessed August 6, 2019).
11. Erik Ringmar, “The Making of the Modern World,” in *International Relations*, ed. Stephen McGlinchey (Bristol, England: E-International Relations Publishing, 2017), at <https://www.e-ir.info/publication/beginners-textbook-international-relations/> (accessed March 25, 2019), 9–10.
12. See, Editors of Encyclopaedia Britannica, note 10.
13. See, (short form) Philpott, note 1.
14. Ibid.
15. “... first permanent legal basis for the coexistence of Lutheranism and Catholicism ... by the Diet of the Holy Roman Empire ... The Peace allowed the state princes to select either Lutheranism or Catholicism as the religion of their domain and permitted the free emigration of residents who dissented. The legislation officially ended the conflict between the two groups, though it made no provisions for other Protestant denominations, such as Calvinism.” The Editors of Encyclopaedia Britannica, “Peace of Augsburg,” *Encyclopædia Britannica*, at <https://www.britannica.com/event/Peace-of-Augsburg> (accessed August 29, 2019).
16. “... the bloodiest and most protracted military confrontation of the era ... The Thirty Years’ War is often called a religious conflict since Catholic states confronted Protestants. Yet, Protestant and Catholic countries sometimes fought on the same side and religious dogma was clearly not the first thing on the minds of the combatants. Instead, the war concerned which state should have hegemony (or dominance) over Europe.” See, (short form) Ringmar, note 14, 12.
17. See, Philpott, note 1.
18. Martin Griffiths, Terry O’Callaghan, and Steven C. Roach, *International Relations: The Key Concepts*, 2nd ed. (London: Routledge, 2008), 299.
19. Chris Brown and Kirsten Ainley, *Understanding International Relations*, 3rd ed. (Basingstoke: Palgrave Macmillan, 2005), 63–4.
20. See, Ringmar, note 11, 12.
21. Andrew Heywood, *Global Politics*, 1st ed. (Basingstoke: Palgrave Macmillan, 2011), 112.
22. “Chapter I,” *United Nations*, at <https://www.un.org/en/sections/un-charter/chapter-i/index.html> (accessed August 29, 2019).
23. See, (short form) Griffiths, O’Callaghan, and Roach, note 18, 299–300.
24. See, (short form), Heywood, note 21, 113.
25. See, Philpott, note 1.
26. See, Griffiths, O’Callaghan, and Roach, note 18, 299.

27. See, (short form) Brown and Ainley, note 19, 222.
28. Tim Rühlig, “How China Approaches International Law: Implications for Europe,” *European Institute for Asian Studies*, May 2018, at https://www.eias.org/wp-content/uploads/2016/03/EU_Asia_at_a_Glance_Ruhlig_2018_China_International_Law.pdf (accessed March 28, 2019).
29. *Ibid.*
30. UNCLCS, “Note Verbale cml/17/2009,” *United Nations*, May 7, 2009, at https://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf (accessed May 15, 2019).
31. UNCLCS, “Note Verbale 000228,” *United Nations*, April 5, 2011, at https://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf (accessed May 15, 2019).
32. UNCLCS, “Note Verbale CML/8/2011,” *United Nations*, April 14, 2011, at https://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf (accessed May 15, 2019); also see, UNCLCS, note 33.
33. “Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines,” *Ministry of Foreign Affairs of the People’s Republic of China*, October 30, 2015, at https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml (accessed August 29, 2019).
34. “The Republic of the Philippines vs. The People’s Republic of China,” *Permanent Court of Arbitration*, PCA Case no. 2013–19, July 12, 2016, at <https://pcacases.com/web/sendAttach/2086> (accessed April 26, 2019); for additional reference, also see, “PCA Press Release: The South China Sea Arbitration (The Republic of the Philippines v. The People’s Republic of China),” *Permanent of Court Arbitration*, July 12, 2016, at <https://pca-cpa.org/en/news/pca-press-release-the-south-china-sea-arbitration-the-republic-of-the-philippines-v-the-peoples-republic-of-china/> (accessed August 29, 2019).
35. See, “UNCLOS,” note 3, 515.
36. *Ibid.*
37. See both references in note 34.
38. See, “UNCLOS,” note 3, 571.
39. *Ibid.*, 508.
40. See both references in note 34.
41. See, “UNCLOS,” note 3, 403; *Ibid.*, 442; also see note 34.
42. See, “UNCLOS,” note 3, 434; also see note 34.
43. See, “UNCLOS,” note 3, 477; also see note 34.
44. See, “UNCLOS,” note 3, 478; also see note 34.
45. See note 34; see, “UNCLOS,” note 3, 574.

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