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China's Attitude to the International Legal Order in the Xi Era: The Case of the South China Sea

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Introduction

China's evolving outlook on the current international legal system, especially the existing international legal institutions and processes, has attracted global attention for some years. Since Xi Jinping's ascent to power in 2012, the significant changes in the ideologies and politics of the Chinese Communist Party (CCP) have triggered serious questions over China's attitude to the international legal order. As the world's second largest economy with growing strategic might and ambitions, China's practice and perspectives on international law have far-reaching repercussions not only for its neighbouring states, but for the world community in general.

The arbitration proceedings brought by the Philippines against China in 2013 presents a special case for the examination and analysis of China's response to the international judicial process. Whilst the arbitral awards delivered a devastating blow to China's legal claims in the South China Sea (SCS), China's own policy of non-appearance and non-compliance in the case further damaged its position and reputation, and increased tensions over the SCS. A large amount of commentary in the international media and academia criticised China's behaviour and cast doubt on its commitment to the international rule of law. The outcry and pessimism were exacerbated by China's continuing militarisation in the SCS in spite of grave concerns expressed by many governments involved in the region.

In this paper, I will argue that the SCS episode is, upon closer examination, an exceptional case. China's handling of the arbitration deviated from the pre-2013 trend towards growing engagement with the international legal process and appears to a large extent to have been shaped by a distinctive set of circumstances in the arbitral proceedings. Whilst its non-appearance and non-compliance with regard to the arbitration were most regrettable, China's post-award behaviour, despite the harsh rhetoric, has generally stayed within the margins of applicable international law. It is premature to consider the SCS case as epitomising China's general attitude to the international legal order which remains complex and ambivalent.

The SCS Saga: Some Comments in Retrospect

On 22 January 2013, the Philippines instituted arbitral proceedings against China pursuant to the provisions of the United Nations Convention on the Law of the Sea (UNCLOS or "the Convention"). On 19 February 2013, China responded with a *Note Verbale* to the Philippine government, rejecting the Arbitration and announcing, in effect, China's intention not to participate in the arbitral

proceedings. China's non-appearance was wholesale and complete. It refused to appoint an arbitrator or its agent in the case, or participate in any part of the proceedings. Nor did it even advance any fund as requested by the Tribunal towards the cost of arbitration.[1] With its initial decision for non-appearance, China's behaviour throughout the three-year legal process and its reaction to any adverse award came almost to be expected from the very beginning. As the non-appearance decision was so consequential, it may be useful to highlight some critical aspects of China's non-appearance position.

First, China was not the first state to decide not to appear in a case before an international court or tribunal. Non-appearance has occurred in many cases in the past, involving such Western powers as the United States and France,[2] and the statutes of international courts and tribunals now commonly contain rules prescribing the procedures to be followed in the event of non-appearance by a party.[3] As Judges Wolfrum and Kelly indicated, non-appearance by a party not only prejudices the position of both parties, but also cripples the legal discourse among the parties and the cooperation of the parties with the court or tribunal so much so that it should be seen as contrary to the object and purpose of the dispute settlement system under the applicable treaty.[4] It is sometimes argued that non-appearance remains a legitimate option for state parties as a litigation tactic in international proceedings.[5] Yet, the deleterious consequences of non-appearance have been well-documented[6] and it had been 28 years since the last major case of non-appearance in an international judicial proceeding[7] when China decided to boycott the SCS arbitration in 2013.[8] China's decision turned out to be an unmitigated disaster as the Tribunal decided overwhelmingly against China on nearly all issues.

Second, UNCLOS stipulates rules to be applied in the case of non-appearance by a party to an Annex VII arbitration case. Despite its absence from the case, China remains a party bound by the obligation to comply with the awards of the arbitral tribunal.[9] In the event of non-appearance, the tribunal has the responsibility to "satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law."[10] The Tribunal in the SCS case stated that the special requirement "does not operate to change the burden of proof or to raise or lower the standard of proof normally expected of a party to make out its claims or defences."[11] It took several steps to safeguard China's procedural rights in the case.[12] Yet, it could hardly be doubted that China's non-appearance "weaken[ed] its own position concerning the legal dispute."[13] China's non-appearance compels the Tribunal to "discern" China's position on various issues by consulting communications from Chinese officials, statements of those associated with the Chinese government, and even academic literature by individuals closely associated with Chinese authorities.[14] Had China participated in the proceedings, its position on those issues may very well have been presented on a different footing and in a different manner.[15] It would of course be a matter of speculation to consider whether China's participation in the proceedings before a differently constituted Tribunal (including a China-appointed arbitrator) would have led to a less lopsided result in the case. But that might be the only angle from which China's complaint over the

result of the case might attract a measure of sympathy (subject, of course, to the recognition that the decision not to appear was entirely China's own doing).

Third, if the decision for non-appearance must be seen as a critical mistake by China which determined China's subsequent reaction to the arbitration, a number of special circumstances should be underlined that may have contributed to the mistake. In the first place, China was generally inexperienced and ill-prepared on how to properly respond to the dispute settlement challenges based on UNCLOS. China had never been involved as a party in a contentious case before an international court or tribunal outside the World Trade Organization (WTO). A survey of the academic literature published in the decade prior to the 2013 arbitration[16] indicates that the scholarship of the Chinese academic community on the legal issues relevant to the SCS arbitration was very limited, especially in regard to the dispute settlement system under UNCLOS. The persistent aversion of foreign specialists in matters of important national interests and security[17] aggravated the difficulty. China's insistence that the Philippines had agreed to resolve the SCS disputes only through negotiation and its denunciation of the arbitration as the Philippines' "breach of its own solemn commitment" and "a deliberate act of bad faith"[18] might also betray a lack of foresight on China's part of the legal challenges.

A second factor to be noted is the short time frame prescribed by UNCLOS in which China must take its decision. When the Philippines started the arbitral proceedings by serving its Notification and Statement of Claim on 22 January 2013, China had 30 days to appoint an arbitrator according to UNCLOS.[19] It is of course not merely the identification of a suitable arbitrator that needs to be decided upon in those 30 days. As the appointment of the arbitrator signifies participation in the arbitral proceedings, China would presumably need to review and assess several highly complex and difficult questions such as its legal strategy for both the jurisdiction and the merits aspects of the case, the likelihood and consequences of defeat in the case, the composition of the Tribunal and the composition of the legal team to represent China. The lack of experience and preparedness could have only added to the challenge. In the end, the Chinese government took 28 days to decide for non-appearance. Catastrophic as it turned out to be, the mistake was an easy one to make given the circumstances.

Another significant factor lies in the nature of the arbitral process under UNCLOS. The Convention provides that non-appearance by one party does not bar the proceedings. If the respondent state fails to appoint an arbitrator within 30 days, the claimant state may within two weeks request the President of the International Tribunal for the Law of the Sea (ITLOS) to make the appointment.20 The ITLOS President may also appoint the other three arbitrators if the parties fail to agree on their appointment.21 The Tribunal in the SCS arbitration was formed in this manner. Under this procedure, once a state decides not to appear at the initial point, the decision is all but irredeemable. After the Tribunal was constituted in April 2013 without any input from China, it became almost senseless for China to return to the proceeding even if it were to change its mind, as the Chinese position with regard to the case had been irreparably prejudiced in virtue of the composition of the

Tribunal and the character of the resulting proceedings.

China's position of non-appearance, which pre-ordained what was to happen in later years, was unfortunate as it was a decision that had to be taken in regard to a highly complex set of factors within a short period of time in a matter on which it was not adequately experienced and prepared, and in a process in which there could be no turning back. It was even more unfortunate given the encouraging trend up to that point of time of China's increasing engagement with international judicial institutions. Although China had been extremely cautious about engaging itself with the proceedings in international judicial institutions of any kind, the decade prior to 2013 had witnessed a growing number of instances in which China actively involved itself in the legal proceedings in international and foreign courts and tribunals. Since joining the WTO in 2001, China had participated in numerous cases in the WTO dispute settlement system.[22] In 2009, China participated for the first time in the advisory proceedings of the case on Kosovo's declaration of independence before the International Court of Justice (ICJ).[23]In 2010, China also participated in the advisory proceedings of Case No. 17 before ITLOS.[24] China and Chinese investors started to appear in investment arbitration cases in the late 2000s.[25] The Chinese government increasingly participated or intervened in foreign court proceedings to defend the interest of China or Chinese companies.[26] Against this background, China's hard-line position in the SCS arbitration must be seen as a major setback in what had been a healthy trajectory towards closer engagement with international judicial processes. It was most unfortunate that the SCS case all but wiped out the international goodwill and momentum with the international legal community that had been building up in the previous decade.

China's Legal Strategy in the SCS after the Arbitration

In the wake of the delivery of the devastating awards in the SCS arbitration, China's legal claims and position over the SCS fell into an unprecedented crisis. Despite China's non-appearance and China's insistence that the awards are "null and void," the provision of UNCLOS makes clear that the arbitral awards are binding on China who must comply with the awards.[27] Although UNCLOS provision describes the arbitral awards as "final and without appeal," China is not hopeless in terms of formulating a legal strategy to counteract the arbitral awards. In theory at least, China had a number of legal options to reverse or neutralise the adverse effects of the awards. These options may be summarised as follows:

(a) Bilateral agreement with the Philippines

The most straightforward way to neutralise the SCS awards would be for China and the Philippines to enter into bilateral agreements to vary the effect of the awards. In this regard, UNCLOS allows two or more states, as between themselves, to "conclude agreements modifying or suspending the operation of provisions of this Convention," provided that the agreement does not hamper the object and purpose of the Convention, affect the basic principles in the Convention, or prejudice the rights and obligations of other states.[28]

(b) Multilateral agreement

By the same token, the effect of the awards may be modified or restricted by virtue of multilateral agreements between China and other claimants in the SCS. A code of conduct (COC) in the SCS between China and ASEAN states, if legally binding, may also have that effect.

(c) Amendment of UNCLOS

UNCLOS contains provisions on its amendment which could enable any interpretation of the Convention by the SCS Tribunal to be amended. This could be achieved by a simplified procedure of China (or another state) proposing an amendment with no other state party objecting to the amendment in the 12 months after the amendment is circulated.[29] Alternatively, the amendment may be adopted at a diplomatic conference if China proposes the amendment and requests that it be considered in a conference and no less than one half of the state parties reply favourably to the request.[30]

(d) New proceedings

If new cases are brought between China and other SCS claimant states before an UNCLOS arbitral tribunal, the ITLOS or the ICJ, any award or judgment in the new cases that depart from the current SCS awards could redefine the legal landscape in the SCS. Advisory opinion may be sought from the ICJ or the ITLOS that might also reach a different conclusion from the current awards and may, to a lesser degree (since an advisory opinion is not legally binding), change the legal landscape. As between China and the Philippines, the SCS awards could have the effect of res judicata and should presumably be applied in a new case before an international court or tribunal. It may be noted that China has alleged that the Philippines' very act of unilaterally instituting the arbitral proceedings in the SCS case was a violation of international law that infringed upon China's rights.[31] That presumably could provide China with a basis to institute proceedings against the Philippines in relation to the SCS arbitration and enable another court or tribunal to decide on these allegations.

(d) Acts of international organisations

Organs of international organisations, such as the General Assembly of the United Nations, may be made to adopt resolutions or other actions that reject or qualify the findings of the SCS arbitration. These actions will not be legally binding and do not directly alter the legal positions of China and the Philippines under the SCS awards. But they may furnish the basis for further state practice that may affect the interpretation of UNCLOS.

(e) Further state practice

China and other states may adopt and continue with practices that are at variance with the interpretation of UNCLOS in the South China Sea case. If a sufficiently large number of states join in the practice, there is hope for either a new customary international law or new interpretation of UNCLOS that will in time undercut or displace the effect of the arbitral rulings.

Whilst the above options are available for China to counteract the SCS arbitral awards, it is clear that some of them are practically much less attainable than others, and almost all require support and

cooperation from other states. The actual strategy China has pursued since July 2016 has involved a mix of select legal options with strong extra-legal manoeuvres designed to minimise the actual effect of the arbitral decisions. A number of observations may be made in this regard.

First, on the day the arbitral award on merits was handed down, the Chinese Foreign Ministry immediately issued a statement declaring that the award "is null and void and has no binding force."[32] The statement emphasised that "China's territorial sovereignty and maritime rights and interests in the SCS shall under no circumstances be affected by those awards," and that "China opposes and will never accept any claim or action based on those awards."[33] Since then, the Chinese government's rhetoric has not retreated from that Statement. China has also continued with certain activities that are seemingly incompatible with the rulings of the SCS Tribunal, such as the continued promulgation of the annual fishing moratoriums in part of the SCS.[34] However, in some significant respects, China has modified its behaviour substantially in line with the findings of the Tribunal. After an initial statement reaffirming the "nine-dash line" on 12 July 2016,[35] the Chinese government has not asserted in public the claim of the "nine-dash line" or historic rights within the line. China has also ceased land reclamation and construction of artificial islands in the Spratly Islands that were found unlawful by the Tribunal.[36] Since April 2017, China has allowed Philippine fishing vessels access to the fishing grounds around the Scarborough Shoal,[37] accommodating another concern of the Tribunal.[38] Although it is highly unlikely that China would accord formal recognition to the binding effect of the SCS arbitral awards, and it is far from clear what further accommodation China would concede that would conform with the rulings of the arbitration, the developments mentioned above indicate a significant adjustment of part of China's policy and behaviour in the SCS that appears to move in the direction of factual, if not formal, compliance with the arbitral awards.

Second, since the close of the arbitration in July 2016, China has intensified bilateral diplomacy with the Philippines. The dramatic reversal of foreign policy by the new Philippines administration under President Rodrigo Duterte enabled the two countries to improve bilateral relations in fundamental ways in a short span of time. Meanwhile, China has been actively pushing for progress in the negotiation of a Code of Conduct (COC) in the SCS, with the endorsement of a framework for the COC by the Chinese and ASEAN foreign ministers in August 2017. Whilst it is by no means clear what, if any, agreements may emerge in the future from these efforts, the path remains open for China to try to use bilateral and multilateral agreements to undercut the effect of the SCS arbitral awards (in line with legal options (a) and (b) set out above).

Third, before the Tribunal's delivery of the final award on 12 July 2016 and ever since, the Chinese government has spared no effort criticising the Tribunal and the awards. Whilst these efforts seem in part tailored for China's domestic audience in an attempt to rationalise China's humiliating defeat, they were also China's responses to the arbitral rulings addressed to the international community. It is highly doubtful, however, that these efforts were effective in reshaping the international public opinion and state practice on the relevant issues of the law of the sea. The Chinese efforts started off with a stormy round of disparaging remarks and personal attacks against the awards and the

arbitrators that were extraordinary in international legal discourse.[39] Later, more polished legal arguments were dished out by the Chinese Society of International Law (CSIL), including a 542-page "Critical Study" published bilingually in 2018, in defence of the position of the Chinese government that the arbitral awards are "null and void."[40] Although the CSIL papers carry a semblance of scholarly work, the CSIL's own work report acknowledges that its work was carried out "under the supervision and leadership of the [Chinese] Foreign Ministry."[41] It is highly doubtful if these efforts by the Chinese government could have any effect in swaying the opinion of the international legal community. The lengthy Critical Study, whilst trying to find faults with the reasoning of the SCS awards, was not able to adduce any legal authorities in support of the Chinese assertion that, despite the express provision of UNCLOS, the arbitral awards are "null and void."[42]

The central weakness in China's present legal position on SCS remains its inability to define with clarity the nature of its claims to the "nine-dash line." In its Statement of 12 July 2016, the Chinese government declared that, in addition to the territorial sovereignty over the land features and the UNCLOS-sanctioned maritime rights arising from those features, China claims "historic rights" in the SCS.[43] The Chinese government has not made clear what the substance of those "historic rights" is. Whilst maintaining strategic ambiguity on the matter may well be a deliberate choice, part of the problem may lie simply in the difficulty in gleaning from the existing historical records and materials enough evidence that is needed for making a clear and coherent case of maritime entitlements. Without defining the substance of the "historic rights," it is impossible to formulate and assess the legal basis for such claims. So long as its claims remain broad and ambiguous without even an arguable case of legal support, China would continue to be viewed as a pariah in international law on the matter of the SCS and a nemesis to regional stability and order.

China's recent military build-up on the islands and reefs under its occupation have raised widespread concerns in the international community. It is interesting to note that China has consistently based the legal justification for the militarisation activities on China's claimed territorial sovereignty over these features.[44] Although these claims are disputed by other claimant states in the SCS, it is not easy to find legal objection to the sovereignty-based justification of the Chinese activities. China's legal arguments do not appear to contravene the SCS arbitral awards[45] or the provisions of UNCLOS. One possible source of objection against China may be the 2002 Declaration on the Conduct of Parties in the SCS (DOC) whereby China "undert[ook] to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability."[46] Paradoxically, China appears to have maintained that the undertakings in the DOC constituted binding legal obligations,[47] whereas the SCS Tribunal took an opposite view.[48] Overall, it would seem that, although China's militarisation activities since the conclusion of the SCS arbitration may be seen as menacing and destabilising in geo-political terms, they have generally stayed within the broad confines of international law in the context of continuing disputes over territorial sovereignty and maritime rights in the SCS. Indeed, from China's point of view, in a situation where its economic and military might overwhelms other littoral states, it would seem both possible and sensible to achieve its policy objective of gaining strategic control of the SCS by means within the current framework of

international law.

International Rule of Law with Chinese Characteristics: Conclusion

The SCS Arbitration started shortly after Xi Jinping assumed the top leadership role in the Chinese Communist Party and has since overshadowed a large part of China's foreign policy rhetoric. In a 2014 speech on China's Five Principles of Peaceful Coexistence, Xi touted China's commitment to "jointly promote the rule of law in international relations" and "uphold the authority and sanctity of international law and the international order."[49] According to this rhetoric, China has "always promoted world peace, contributed to global development, and safeguarded the international order."[50] Xi's outlook on the international order was later developed into the slogan of "building a community with a shared future for mankind" which was elaborated in his address to the 19th National Congress of the CCP.[51] The limits to Xi's notion of the international rule of law are almost always set out in clear and blunt terms. As Xi put it, "[n]o country should entertain the fantasy that China will barter away its core national interests or allow its sovereignty, security, and development interests to be infringed upon."[52] A 2016 joint declaration between China and Russia on the "promotion of international law" offered a selective reinterpretation of international legal principles that suited the interests of the two countries, including a pointed reference to the need for international dispute settlement mechanisms "not [to] be undermined by abusive practices."[53]

In its engagement with the international legal order, China's overall rhetoric and behaviour have evolved in a way that is not fundamentally different from many other countries. The SCS Arbitration marked a major setback in that process. However, as argued in this paper, the SCS case should probably be seen as a special case with a unique set of circumstances that drew China into a major and irrecoverable mistake. Since the conclusion of the case, China's behaviour in the SCS has generally occurred within the bounds of current international law despite its outrageous rhetoric against the SCS arbitration. Although China made clear its refusal to accept third party dispute settlement in territorial and maritime delimitation disputes,[54] China's engagement with other aspects of the international legal process seems to have regained some momentum. The Chinese government participated in the proceedings of the latest advisory case in ICJ on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965. China's engagement with the dispute settlement processes under the WTO and the investor-state dispute settlement (ISDS) systems has remained largely uninterrupted. China's attitude towards the current international legal order, especially the international judicial system, remains complex and ambivalent. There is little doubt that China is increasingly integrating the use of international law and process in its foreign policy and is becoming more adept in that endeavour. As Foreign Minister Wang Yi put it, "[p]romoting international rule of law serves China's inevitable needs for peaceful development."[55] One could only hope that China subscribes to the internationally accepted notion of rule of law not only in word, but also in deed.

* Professor of Chinese law, the University of Sydney Law School. The paper is based on my presentation at a roundtable discussion at the Japanese Institute of International Affairs (JIIA) on 28 March 2018. The author thanks JIIA for its support that enables the completion of the paper. The author also thanks Ms Shihui Guo, JD student at the University of Sydney, for her research assistance. Responsibility for the views expressed in the paper remains solely mine. 1 This was presumably in contravention of China's obligation to pay the expenses arising from the case under UNCLOS, Annex VII, article 7. Chinese officials would later attack the neutrality of the Tribunal for "providing paid service to the Philippines." See "Veil of the Arbitral Tribunal Must Be Torn Down," 13 July 2016, Chinese Ministry of Foreign Affairs (MFA) website, at http://www.fmprc.gov.cn/mfa_eng/wjbxw/t1381879.shtml.

2 The US did not appear in the merits phase of the Military and Paramilitary Activities in and against Nicaragua case, ICJ Report, 1986, p. 14, whilst France refused to appear in the Nuclear Tests cases, ICJ Report 1974, p. 253.

3 See, e.g., ICJ Statute, article 53; UNCLOS, Annex VI, article 28 & Annex VII, article 9.

4 Joint separate opinion of Judges Wolfrum and Kelly, Arctic Sunrise Case, ITLOS Case No. 22, paragraph 6, available at https://www.itlos.org/cases/list-of-cases/case-no-22/.

5 Curiously, the SCS Tribunal (which includes Judge Rüdiger Wolfrum) seems to endorse that view. See Award in the Matter of the South China Sea Arbitration, 12 July 2016, PCA Case no. 2013-19, paragraph 1180, available at http://www.pcacases.com/web/view/7.

6 See, generally, HWA Thirlway, *Non-Appearance before the International Court of Justice* (1985); Jerome B. Elkind, *Non-Appearance before the International Court of Justice* (1984).

7 In January 1985, the United States withdrew from the merits phase of the Nicaragua case after participating in the jurisdiction and admissibility phase.

8 The Russian non-appearance in the Arctic Sunrise case occurred in November 2013.

9 UNCLOS, Annex VII, article 11.

10 Id., article 9.

11 Award, supra, note 5, paragraph 131.

12 Id., paragraph 121.

13 Joint separate opinion of Judges Wolfrum and Kelly, supra, note 4, paragraph 5.

14 Award, supra, note 5, paragraph 126.

15 One example may be the Tribunal's dismissal of a possible jurisdictional challenge in regard to China's activities at Mischief Reef to the effect that the Tribunal drew upon China's own statements in refusing to consider China's acts as military activities. Id., paragraphs 1027-28.

16 A search in the Chinese academic journals database and major library catalogues show that, during 2004-2013, only one book and two articles were published on the subject of dispute settlement under UNCLOS. Only the book (by Gao Jianjun) touched upon some of the issues raised in the SCS arbitration.

17 It is telling that amongst the 78 individuals named as contributors to China's comprehensive rebuttal of SCS awards, none were non-Chinese. See Chinese Society of International Law, "The South China Sea Arbitration Awards: A Critical Study," 17 *Chinese Journal of International Law* 207 (2018), at 748.

18 PRC State Council Information Office, "China Adheres to the Position of Settling Through Negotiation the Relevant

Disputes Between China and the Philippines in the South China Sea," 13 July 2016, paragraph 116, MFA website, at http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1380615.shtml.

[19] UNCLOS, Annex VII, article 3(c).

[20] Id., article 3(e).

[21] Id., article 3(d).

[22] By 2018, China has appeared as complainant in 17 cases, as respondent in 45 cases and as third party in 145 cases in WTO dispute settlements. See https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

[23] China's written and oral statements in the case are at http://www.icj-cij.org/en/case/141.

[24] China's written statement in the case is at https://www.itlos.org/cases/list-of-cases/case-no-17/#c583.

[25] Chinese investors first used ISDS mechanisms in 2007, whilst the first ISDS case against China was initiated in 2011. See Dilini Pathirana, "A Look into China's Slowly Increasing Appearance in ISDS Cases," *Investment Treaty News*, 26 September 2017, available at https://www.iisd.org/itn/2017/09/26/a-look-into-chinas-slowly-increasing-appearance-in-isds-cases-dilini-pathirana/#_edn9.

[26] See Treaty and Law Department of PRC Ministry of Foreign Affairs, *Selected Cases on China's Practice in International Law* [in Chinese] (2018).

[27] UNCLOS, Annex VII, article 11.

[28] Id., article 311(3).

[29] Id., article 313.

[30] Id., article 312.

[31] "Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines," 12 July 2016, paragraph 3, MFA website, at http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1379492.shtml.

[32] Statement of the Ministry of Foreign Affairs, supra, note 31, preamble.

[33] Id., paragraph 4.

[34] See Award, supra, note 5, paragraphs 711-2.

35 "Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea," 12 July 2016, paragraph III, MFA website, at http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379493.htm.

[36] See Award, supra, note 5, paragraphs 976-993, 1029-43 & 1174-81.

[37] See "Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on April 10, 2017," MFA website, at http://www.fmprc.gov.cn/nanhai/eng/fyrbt_1/t1452560.htm.

[38] See Award, supra, note 5, paragraphs 805-14.

[39] For instance, a former premier called the awards "nothing more than a scrap of waste paper." "Speech by Dai Bingguo at China-US Dialogue on South China Sea Between Chinese and US Think Tanks (5 July 2017)," MFA website, at http://www.mfa.gov.cn/nanhai/chn/wjbxw/t1377746.htm. A Vice Foreign Minister condemned the arbitration as a "political farce." "Full Text: SCIO Briefing on South China Sea Disputes," available at http://www.scio.gov.cn/32618/Document/1483804/1483804.htm. The official Xinhua New Agency denounced the arbitral tribunal as "fraudulent freaks." "Fraudulent Freaks – True Colour of SCS Arbitral Tribunal Exposed," Xinhua, 17

July 2016, available at http://www.xinhuanet.com/2016-07/17/c_1119231354.htm.

[40] CSIL, supra, note 17. See also Chinese Society of International Law, "Tribunal's Award in the 'South China Sea Arbitration' Initiated by the Philippines Is Null and Void," 10 June 2016, available at http://www.csil.cn/News/Detail.aspx?AId=201.

[41] "Working Report of the Council of CSIL (2013-18)," available at https://mp.weixin.qq.com/s/Xv8Kij_bDuqMETULvUfMqg.

[42] The only reference that is marginally relevant is the discussions on the *non ultra petita* rule where the Critical Study cited without elaboration some academic works in support of the view that an arbitral award violating that rule would somehow be invalid. CSIL, supra, note 17, at 388.

[43] "Statement of the PRC Government," supra, note 35, paragraph III.

[44] See, most recently, "Foreign Ministry Spokesperson Lu Kang's Regular Press Conference on May 24, 2018," MFA website, at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1562307.shtml; "Spokesman: US Disinvitation from RIMPAC-2018 Exercise Is Non-constructive", Ministry of Defense website, at http://eng.mod.gov.cn/news/2018-05/24/content_4815046.htm.

[45] The SCS Tribunal did find several of the features under China's occupation and militarisation to be low-tide elevations that are incapable of appropriation or occupation. See Award, supra, note 5, dispositif B(3-5) & paragraphs 307-9. The Tribunal's finding would appear to negate China's sovereignty claims over these features. However, the SCS Tribunal admittedly has no jurisdiction over territorial disputes. As the Tribunal emphasised itself, "to the extent that it reaches the merits of any of the Philippines' Submissions, [the Tribunal] intends to ensure that its decision neither advances nor detracts from either Party's claims to land sovereignty in the South China Sea." Award on Jurisdiction and Admissibility, 29 October 2015, PCA Case no. 2013-19, paragraph 153, available at http://www.pcacases.com/web/view/7. It must follow, therefore, that the territorial disputes between China and other claimant states remain unsettled and the legal positions of China and other claimants remain unaffected.

[46] Declaration on the Conduct of Parties in the South China Sea, 4 November 2002, paragraph 5, available at http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2.

[47] See Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014, paragraphs 35-39, available at http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm.

[48] Award on Jurisdiction and Admissibility, supra, note 45, paragraphs 212-8.

[49] Xi Jinping, "Carry Forward the Five Principles of Peaceful Coexistence to Build a Better World Through Win-Win Cooperation," 1 July 2014, available at http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1170143.shtml.

[50] Xi Jinping, "Speech at a Ceremony Marking the 95th Anniversary of the Founding of the Communist Party of China," 1 July 2016, available at http://english.qstheory.cn/2016-12/20/c_1120042032.htm.

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