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In the Wake of Arbitration: Papers from the Sixth Annual CSIS South China Sea Conference

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IN THE WAKE OF ARBITRATION:
PAPERS FROM THE SIXTH ANNUAL CSIS SOUTH CHINA SEA CONFERENCE
By
Kyle B. Ganow*

I. OVERVIEW

The Center for Strategic and International Studies (“CSIS”) was founded in 1962 by David M. Abshire and Admiral Arleigh Burke and is one of the most reputable resources for commentary and analysis of international challenges facing the world.¹ CSIS maintains a staff of over 220 people, which focuses on research and analysis of situations to develop policy initiatives that look to anticipate global problems and provide insight on current events.² The CSIS is a “bipartisan, nonprofit policy research organization” which desires to further public understanding of “strategic insights and policy solutions” to “chart a course toward a better world.”³ Publications from the CSIS, like *In the Wake of Arbitration: Papers from the Sixth Annual CSIS South China Sea Conference* (“*In the Wake of Arbitration*”), present unique and expert perspectives on topical issues which impact global affairs.

Mr. Murray Hiebert is a co-editor of the *In the Wake of Arbitration*.⁴ Currently, Mr. Hiebert serves as senior advisor and deputy director of the Southeast Asia Program at CSIS.⁵ Prior to joining CSIS, Mr. Hiebert worked at the United States Chamber of Commerce, where he was senior director for Southeast Asia, and before that Mr. Hiebert worked as a journalist for the Wall Street Journal’s China bureau.⁶ Mr. Hiebert has a thorough understanding of the Southeast Asia region from his time working as a journalist and his public service at the U.S. Chamber of Commerce.

Additionally, Mr. Gregory B. Poling is a co-editor of the report.⁷ Mr. Poling serves as the director of the Asia Maritime Transparency Initiative and is a Fellow with CSIS in the Southeast

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¹ *About Us*, CENTER FOR STRATEGIC INTERNATIONAL STUDIES, <http://www.csis.org/about-us> (last visited Sept. 8, 2017).

² *Id.*

³ *Id.*

⁴ *IN THE WAKE OF ARBITRATION: PAPERS FROM THE SIXTH ANNUAL CSIS SOUTH CHINA SEA CONFERENCE* (Murray Hiebert et al. eds., 2017).

⁵ *Murray Hiebert*, CENTER FOR STRATEGIC INTERNATIONAL STUDIES, <http://www.csis.org/people/murray-hiebert> (last visited Sept. 8, 2017).

⁶ *Id.*

⁷ *IN THE WAKE OF ARBITRATION*, *supra* note 4.

Asia Program.⁸ Mr. Poling writes extensively on issues in Southeast Asia, but focuses primarily on the nations involved in the South China Sea (“SCS”) dispute.⁹ The final co-editor is Mr. Conor Cronin.¹⁰ Mr. Cronin serves as a research associate at CSIS in the Asia Maritime Transparency Initiative.¹¹ Each chapter is a paper written by separate authors which have been categorized and organized by the editors. The CSIS *In the Wake of Arbitration* conference was held on the same day the arbitral award was released.

II. INTRODUCTION

On July 12, 2016, the long-awaited arbitration decision of the Permanent Court of Arbitration in The Hague (“PCA”) delivered its decision on the United Nations Convention on the Law of the Sea (“UNCLOS”) Annex VII arbitration case between the People’s Republic of China (“China”) and the Republic of the Philippines (“Philippines”).¹² The decision sought to clarify conflicting territorial claims of numerous small islands and to further define the exclusive economic zones that can be claimed by the various sovereign nations with territorial claims to these islands in the SCS.¹³ However, the award from the arbitral tribunal is legally binding only to China and the Philippines.¹⁴ China sought to claim “historic rights” to what is known as the “Nine-Dash-Line,”¹⁵ which China claims existed prior to UNCLOS, while the Philippines sought to restrict expansive territorial claims on the SCS.¹⁶

The Philippines used Articles 286¹⁷ and 287¹⁸ of UNCLOS to initiate the arbitral redress

⁸ Gregory B. Poling, CENTER FOR STRATEGIC INTERNATIONAL STUDIES, <http://www.csis.org/people/gregory-b-poling> (last visited Sept. 8, 2017).

⁹ *Id.*

¹⁰ IN THE WAKE OF ARBITRATION, *supra* note 4.

¹¹ Staff, CENTER FOR STRATEGIC INTERNATIONAL STUDIES, <http://www.csis.org/about-us/staff> (last visited Sept. 8, 2017).

¹² Jay L. Batongbacal, *Philippines v. China: Impact of the Arbitral Tribunal Award on the Merits*, IN THE WAKE OF ARBITRATION, *supra* note 4, at 33.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See generally Raul (Pete) Pedrozo, *China versus Vietnam: An Analysis of the Competing Claims in the South China Sea*, CNA ANALYSIS & SOLUTIONS 1, 17 (Aug. 2014).

¹⁶ Batongbacal, *supra* note 12, at 34; see discussion *infra* Section V for further discussion concerning the PCA decision.

¹⁷ 1833 U.N.T.S. 3, art. 286 (“[A]ny dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.”).

¹⁸ *Id.* at art. 287(1)(c) (“[A]n arbitral tribunal constituted in accordance with Annex VII.”).

available under Article 1 of Annex VII.¹⁹ The Philippines sought an award which: (1) declared both countries' respective "rights and obligations" in regards to the SCS; (2) determined the status of features in the SCS as to whether the features are islands, low tide elevations, or submerged banks, as well as whether these features are entitled to the twelve-mile maritime zone; and (3) enabled the Philippines to "exercise and enjoy the rights" within the economic zone and continental shelf which were established upon ratification of UNCLOS.²⁰ In response, China issued a *Note Verbale* to the Philippines stating that through "consistent and clear" means, China only recognizes "territorial disputes over some islands and reefs of the Nansha Islands," and furthermore, China claimed that the two nations had decided to negotiate bilaterally over these issues rather than take the dispute to UNCLOS arbitration.²¹

The PCA decision will have an impact on many different fields, but *In the Wake of Arbitration* divides the chapters in to four broad categories: (1) "The South China Sea in 2016" (2) "Legal Issues," (3) "Military Modernization and Capacity Building," and (4) "The Environmental Question."²² These four categories provide readers with clear delineation of how issues will be approached and, therefore, readers can focus on the area which most interests them.

In the Wake of Arbitration provides a great array of papers from well-informed experts that highlight areas of concern with the PCA decision and the implications for future developments in the region. This review will focus on the category of "Legal Issues" and the expert opinions therein, but summaries of each category will be provided because the PCA arbitral award has far-reaching legal implications across the topic areas discussed within this book.

III. INITIATION AND CONSTITUTION OF THE ARBITRAL TRIBUNAL

The dispute between the Philippines and China raises concerns over the use of the SCS and access to rich fishing grounds, crucial shipping lanes, and what is believed to be large quantities of oil and gas resources.²³ The arbitration proceeding, brought through UNCLOS, was made possible by both the Philippines and China ratifying the treaty within their respective nations.²⁴ Specifically, Part XV of UNCLOS provides a variety of dispute resolution procedures, including compulsory arbitration found in Annex VII.²⁵

Importantly, the PCA does not have the power to grant sovereign rights over land in the SCS because the PCA does not have jurisdiction to do so.²⁶ Additionally, the tribunal did not

¹⁹ The Republic of the Phil. v. China, PCA Case No. 2013-19 i, 15 (Oct. 29, 2015) (Award on Jurisdiction and Admissibility) [hereinafter Award on Jurisdiction and Admissibility].

²⁰ *Id.*

²¹ *Id.* See generally *infra* Section III.

²² IN THE WAKE OF ARBITRATION, *supra* note 4, at Parts 3-4.

²³ The Republic of the Phil. v. China, PCA Case No. 2013-19 i, 1 (July 12, 2016) (Award) [hereinafter Award].

²⁴ *Id.*

²⁵ *Id.*

²⁶ Award, *supra* note 23, at 1-2.

make an express ruling on any maritime boundaries between the two nations because China has excluded that portion of the UNCLOS from compulsory dispute resolution.²⁷ The tribunal made the ruling based on the rights and obligations of the two nations.²⁸

The Philippines sought resolutions and declarations from the tribunal in four categories of disputes, which are: (1) resolve a dispute regarding maritime rights and entitlements in the SCS; (2) resolve disputes concerning entitlements to maritime zones generated by the UNCLOS, with respect to various island features in the SCS; (3) declare whether China is acting pursuant to international law with respect to interfering with Philippines' rights under UNCLOS to exploit natural resources on the SCS and whether China is failing to protect and preserve the marine environment and overfishing of the seas; and (4) find whether China aggravated this dispute by refusing the Philippines access to a detachment of Philippine marines stationed at Second Thomas Shoal.²⁹

Throughout the arbitration, China refused to accept the proceedings and declined to participate in the hearings because in China's view, the tribunal lacked jurisdiction over all the claims made by the Philippines.³⁰ Despite China's lack of cooperation, on January 22, 2013, the Philippines initiated arbitral proceedings against China through UNCLOS articles 286 and 287.³¹ The Philippines submitted a Notification and Statement of Claim which requested a determination on a variety of matters resulting from Chinese action in the SCS.³² China issued a *Note Verbale*,³³ rejecting the arbitration, and noted that bilateral negotiations resolved another dispute over territorial claims in the SCS and bilateral negotiations should resolve this dispute.³⁴

Disregarding China's objections to the arbitral proceedings, the Philippines continued in pursuit of a UNCLOS tribunal and appointed a judge under article 3 of Annex VII.³⁵ By July 12, 2013, the tribunal issued Administrative Directive No. One, which appointed the PCA as registry and set place arrangements and fees to cover the tribunal.³⁶

²⁷Award, *supra* note 23, at 2.

²⁸ *Id.* at 2.

²⁹Award on Jurisdiction and Admissibility, *supra* note 19, at 2-3.

³⁰ *Id.* at 4.

³¹ *Id.* at 11.

³² *Id.*

³³ A diplomatic note that is more formal than an aide-mémoire and less formal than a note, is drafted in the third person, and is never signed. *Note Verbale*, The Merriam-Webster Dictionary (New Ed. 2016).

³⁴ *Id.* at 12.

³⁵ Award on Jurisdiction and Admissibility, *supra* note 19, at 12.

³⁶ *Id.*

IV. PART ONE: THE SOUTH CHINA SEA IN 2016

The Editors of *In the Wake of Arbitration* set the scene of the state of the SCS prior to the PCA ruling with Part One of the book. Using the United States³⁷ and Malaysia³⁸ as examples, the authors of the first two chapters demonstrate how various nations have approached the issues of the SCS. Starting in 2014, the United States, as well as other nations, began to challenge the Chinese claim of territorial sovereignty to the Nine-Dash Line.³⁹ These two papers provide opposing methods of handling the issues presented by Chinese activity in the SCS.

A. *U.S. South China Sea Policy 2015-2016: The Growing role of the Defense Department, by Michael McDevitt*

McDevitt begins with a powerful quote from Secretary of Defense Ashton Carter, “[t]here should be no mistake: the United States will fly, sail and operate wherever international law allows”⁴⁰ This statement has been echoed by many in Washington, D.C., including President Barack Obama, as an attempt to no longer appear “toothless” on the Chinese claim of sovereignty over all land features in the SCS.⁴¹ McDevitt’s introduction effectively sets up the rest of the first chapter because the operational measures undertaken by the United States Navy stem from these initial comments by Secretary Carter.⁴²

Concern over the sovereignty of these islands is not simple; quickly, China is transforming these islands into Chinese military outposts.⁴³ Former Director of National Intelligence, James Clapper, confirmed what many believed: the Chinese “land reclamation and construction” on the islands is aimed to establish a strong People’s Liberation Army Navy (“PLAN”) in the SCS.⁴⁴ Concern for Chinese territorial expansion further into the SCS is not just of concern over military expansion and regional intimidation tactics, but also apprehensions surrounding control over highly profitable trade routes and access to extract natural resources, namely oil and gas, raise alarms in the United States and other regional stakeholders.⁴⁵

The United States began Freedom of Navigation Operations (“FONOP”) on October 27,

³⁷ Michael McDevitt, *U.S. South China Sea Policy 2015-2016: The Growing Role of the Defense Department*, in *IN THE WAKE OF ARBITRATION*, *supra* note 4, at 3.

³⁸ Elina Noor, *Understanding Malaysia’s Approach to the South China Sea Dispute*, in *IN THE WAKE OF ARBITRATION*, *supra* note 4, at 18.

³⁹ McDevitt, *supra* note 37, at 15.

⁴⁰ *Id.* at 3 (quoting Ashton Carter, Sec’y of Def., during his presentation at the IISS, Shangri-La Dialogue, Singapore (May 30, 2015)).

⁴¹ *Id.* at 4.

⁴² *Id.*

⁴³ *Id.* at 6.

⁴⁴ McDevitt, *supra* note 37, at 6.

⁴⁵ *Id.* at 7.

2015, with instructions for a U.S. Navy destroyer to sail within twelve-nautical miles of the Subi Reef (a Chinese reclaimed island).⁴⁶ FONOP are aimed to demonstrate that the United States intends on maintaining a strong policy with regards to FONOP rules outlined within UNCLOS.⁴⁷ Illustrated by the initial quote of the chapter, that the United States does not recognize Chinese territorial interests to the Nine-Dash Line.⁴⁸

McDevitt's chapter lays out the United States' concerns with the Chinese territorial claims within the SCS. The historical information provided and the current public policy stance offers readers a basic knowledge of the key players, regional concerns, and future directions that could be taken by the key actors. Furthermore, the chapter sets the stage for the key question of the SCS controversy: whether international law, through UNCLOS arbitration proceedings, can resolve this specific SCS dispute and provide stability to a region in which many countries lay competing claims to significant portions of the sea through their exclusive economic zones.⁴⁹

B. Understanding Malaysia's Approach to the South China Sea Dispute, by Elina Noor

Malaysia's actions, with respect to the Chinese territorial claims on the SCS, are a clear indicator of the importance of the PCA arbitral proceeding. The Malaysian and Chinese governments have always maintained a "special relationship" due to economic and political ties between the two nations.⁵⁰ Many observers of the SCS dispute have commented on Malaysia's approach with "curiosity, puzzlement, frustration, and [. . .] disdain" for what has been described as an insufficient response to the aggressive actions made in the area by Chinese parties.⁵¹

The SCS is an important resource for Malaysia; the country is made up of many islands and stretches 1,600-kilometers from east to west, and West Malaysia is separated from East Malaysia by 600-kilometers of the SCS.⁵² Many observers see massive Chinese investment deals within the nation as a manner of buying support on the SCS; however, Malaysia has maintained close relationships with other regional powers and remains steadfast to defense and security agreements and partnerships with the United States, Japan, and India.⁵³

Noor provides three examples of Malaysia working to maintain the *status quo* of the regional dispute: (1) Malaysia has ceased construction on various installations on five of the Spratlys Islands in the SCS to which Malaysia lays claim; (2) Malaysia refrained from provoking nationalist sentiment by keeping SCS news out of the media; and (3) Malaysia has "resisted

⁴⁶ McDevitt, *supra* note 37, at 7.

⁴⁷ *Id.*

⁴⁸ *Id.* at 15.

⁴⁹ *See generally id.*

⁵⁰ Noor, *supra* note 38, at 18.

⁵¹ *Id.*

⁵² *Id.* at 19.

⁵³ *Id.* nn.1-2.

persuasions” which might allow non-regional third parties into this regional dispute.⁵⁴ Noor claims Malaysian actions have been consistent in respects that: (1) Malaysia rejects the Nine-Dash Line territorial claims by China;⁵⁵ (2) the dispute should be resolved through peaceful means and in compliance within international law established under UNCLOS; and (3) third-party dispute resolution legal mechanisms should be considered, albeit third-party dispute resolution mechanisms are Malaysia’s “lesser preferred” manner in which to resolve the SCS dispute.⁵⁶

Noor summarizes this chapter with an overview of Malaysia’s response after the PCA ruling under Annex VII to the 1982 UNCLOS calling on all parties to maintain “full respect for diplomatic and legal processes.”⁵⁷ This chapter concludes on an ominous note as the author focuses on the issue that Malaysia’s strategy has worked up until this point. However, Malaysia needs to recognize limitations and continue to use practical options within its reach, due to Malaysia’s limited capabilities.⁵⁸ Therefore, Malaysia must continue to balance the needs of its people and the defense of its sovereign territory.

One issue in this chapter is the enforcement of arbitral awards; for example, China will not respect the arbitral award rendered against it. Technically, the UNCLOS arbitration is only binding to the Philippines and China, but the capability of smaller nations to enforce a UNCLOS arbitral award on an ever-expanding power, like China, will be a challenge for the region due to China’s refusal to recognize any decision on the SCS. The only manner in which China will recognize the Award is if the UNCLOS decision acknowledges their sovereignty to the Nine-Dash-Line.

V. PART TWO: LEGAL ISSUES

Part Two of *In the Wake of Arbitration* addresses important legal issues faced by the arbitral proceedings. In this section, the editors selected works which outline issues surrounding the award, the effects on international law, and the effects on military law. Additionally, because of China’s protest to arbitration, China never sent agents or approved of representatives at the arbitral proceedings.⁵⁹ The lack of Chinese participation signaled that China will not adhere to the arbitral award. However, the PCA tribunal went to great lengths to reason each point, even taking steps to interpret the evidence in the most favorable light to Chinese interests.

A. *Philippines v. China: Impact of the Arbitral Tribunal Award on the Merits*, by Jay L. Batongbacal

Part Two begins with a chapter that examines the arbitral awards on the merits. In the

⁵⁴ Noor, *supra* note 38, at 21-22.

⁵⁵ *Id.* at 22 n.13.

⁵⁶ *Id.* at 22.

⁵⁷ *Id.* at 28.

⁵⁸ *Id.*

⁵⁹ Award on Jurisdiction and Admissibility, *supra* note 19, at i.

chapter by Jay L. Batongbacal, he seeks to provide the legal context of international law and the issues of sovereignty in the SCS, as well as indicate a direction forward.⁶⁰ How the two nations will honor the arbitral award is not clear. The Philippines earned favorable awards on all their submissions to UNCLOS, however, Chinese actions indicate the intention to continue island reclamation in opposition to the award and international law.⁶¹

The PCA tribunal decided in favor of the Philippines in five broad categories, which can guide other parties with SCS disputes on how to interact amongst one another pending the resolution of other SCS disputes.⁶² Importantly, the PCA interpreted and struck down the most expansive territorial claims China maintains in the SCS: the Nine-Dash Line.⁶³ Even though China asserts historic title to the SCS, the tribunal, not waiting for a Chinese explanation (which likely would never arrive, as China was not planning to participate in the PCA tribunal), used statements from past diplomatic communications to demonstrate the “varied and sometimes contradictory” territorial claims.⁶⁴

Interestingly, the author makes note of a portion of the tribunal award which focuses on China’s negotiation of UNCLOS. China could have negotiated for not allowing other states to claim resources within another coastal state’s exclusive economic zone.⁶⁵ Interestingly, China, by negotiating the UNCLOS treaty, had given up historical rights by ratifying the treaty. Additionally, the PCA tribunal notes China is not entitled to claim historic rights because: (1) such a claim was never officially clarified until 2009; (2) China has yet to exercise exclusive control over the waters within the Nine-Dash Line; and (3) no other state affected by Chinese territorial claims accepted these claims.⁶⁶

Batongbacal asserts certain loopholes with respect to “territorial enclaves scattered across the area” could be used, and might start a conflict, as many of the disputed territories are scattered across Philippine territorial water.⁶⁷ Furthermore, the author contends that unilateral actions by China, especially ones which contradict international law, in all likelihood continue to lead towards destabilizing the SCS region and could negatively impact the states which rely on the SCS for years to come.⁶⁸

Chapter three aims to provide a foundation for the understanding of the PCA award and a discussion of the reasoning behind the tribunal’s decision. While focusing on the award, one overarching theme is missing, how will such an expansive award be enforced against China? Additionally, if the award is technically only binding between the two nations involved in this case, does the award fall solely on the Philippines to enforce? Perhaps, one of the main reasons

⁶⁰ Batongbacal, *supra* note 12, at 33.

⁶¹ *Id.* at 46.

⁶² *Id.* at 33.

⁶³ *Id.* at 34.

⁶⁴ *Id.* at 34 (citing Award on Jurisdiction and Admissibility, *supra* note 19, at 71).

⁶⁵ Batongbacal, *supra* note 12, at 36.

⁶⁶ *Id.* at 37.

⁶⁷ *Id.* at 46.

⁶⁸ *Id.*

little information on the impact of the award was discussed was that the award was released the same day as the conference. Thus, international reaction was happening in real time as the authors delivered their remarks. Nevertheless, the editors, prior to publishing the book, should have added an addendum to provide the reader an idea of how the arbitral award has impacted the SCS.

B. The Effects of the South China Sea Dispute and the Arbitral Ruling on UNCLOS and International Law, by Erik Franckx

Although one of the shortest chapters of *In the Wake of Arbitration*, chapter four provides the reader with a plethora of information, including the basis of Annex VII arbitration proceedings and the mechanisms behind the proceedings. The chapter goes into concise detail about how Annex VII and ITLOS arbitrations operate, their similarities and differences, as well as explaining the role of PCA throughout all these UNCLOS arbitration proceedings. This chapter should be placed earlier in the book because the chapter summarizes the vital legal issues in a matter of fact way which allows the reader to understand important aspects of this tribunal.

Erik Franckx, the author of chapter four, begins immediately with a discussion on how his contribution is unlike the other works within the book because his focus aimed towards the effects of the award, and the effects on international law in a broad sense.⁶⁹ As the CSIS *In the Wake of Arbitration* conference was held on the same day as the award was released, this chapter is rather short but includes useful/relevant information on previous UNCLOS Annex VII arbitral awards, the organization of the PCA, and how UNCLOS functions as a matter of international law.

The International Tribunal for the Law of the Sea (“ITLOS”) was one of three conventional bodies established by UNCLOS.⁷⁰ Through Annex VI of UNCLOS, the ITLOS tribunals should hear all disputes arising out of UNCLOS, unless parties agree otherwise.⁷¹ The ITLOS tribunal chose the PCA as the registry of the proceedings and adopted PCA’s Rules of Procedures to govern the ITLOS tribunal between the Philippines and China.⁷² Due to the recent release of the tribunal’s ruling, Franckx opts to look at other cases in which PCA is designated at the registry to examine how Annex VII cases of UNCLOS develop and are received upon issuance.⁷³ While the PCA, which is not the ruling law of these cases, has seen an increase in cases recently, the author notes that nonparticipation is on the rise as well.⁷⁴ Further, the author notes since UNCLOS came into full effect in 1994, PCA has acted as the registry for all Annex VII cases except for one.⁷⁵

⁶⁹ Erik Franckx, *The Effects of the South China Sea Dispute and the Arbitral Ruling on UNCLOS and International Law*, in *IN THE WAKE OF ARBITRATION*, *supra* note 4, at 47.

⁷⁰ *Id.* at 48.

⁷¹ *Id.* nn.3-4.

⁷² *See Id.* at 47-48.

⁷³ *Id.* at 51.

⁷⁴ Franckx, *supra* note 69, at 51-52.

⁷⁵ *Id.* at 52 n.39.

Historically speaking, UNCLOS arbitral awards are relatively new, since the first award rendered through the PCA registry was in 2005.⁷⁶ Only seventeen other cases have been brought by nations through the Annex VII arbitration clauses, six of which result in awards on the merits, according to the PCA registry, while the remaining eleven were dismissed, ended by settlement of the parties, or are still pending.⁷⁷

Interestingly, *Philippines v. China* is the first Annex VII arbitration to determine how to handle a defendant unwilling to participate.⁷⁸ However, being a signatory state on the UNCLOS treaty renders a non-appearing state subject to the decisions of the tribunal, as Annex VII tribunals take the non-appearing party's legal interests into account while making any ruling.⁷⁹ Furthermore, Franckx argues that the ITLOS cases and the UNCLOS Annex VII cases, over the same period of time, demonstrate that nations are willing to use the Annex VII arbitration procedures, and that these cases are resulting in more awards on the merits than cases decided through the ITLOS mechanism.⁸⁰ Additionally, international disputes through UNCLOS Annex VII tribunals will help further develop how arbitration can influence international law, and enforcement mechanisms must be put into place to uphold decisions and compensate these developments.

C. *The Law Concerning Military Activities on the Continental Shelf in the Aftermath of the South China Sea Arbitration*, by James Kraska

Chapter five, by James Kraska, begins to examine the legal aspects of military activities and the development and reclamation projects on the islands in the SCS. The chapter points to the deference given, as discussed in chapter four, to non-participating parties and the willingness of an arbitral tribunal to rely on public statements made by Chinese officials concerning military activity in the SCS.⁸¹ Thus, UNCLOS Annex VII tribunals seek to operate in a manner which aims to resolve the issue at hand and to be fair to all parties no matter the level of involvement.⁸²

The tribunal allowed China to label all specific activities in the SCS as “military activities” which, under Part XV of UNCLOS, allows China to effectively ignore much of the arbitral proceedings due to certain mechanisms within the UNCLOS treaty.⁸³ The PCA was required to determine whether the Philippines brought this dispute, which specifically “concerned military activities” and not just a dispute over all “military activities.”⁸⁴ If the PCA

⁷⁶ Franckx, *supra* note 69 at 52.

⁷⁷ *Id.* at 55-56, Table 4.1.

⁷⁸ *Id.* at 54.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ James Kraska, *The Law Concerning Military Activities on the Continental Shelf in the Aftermath of the South China Sea Arbitration*, in *IN THE WAKE OF ARBITRATION*, *supra* note 4, at 58.

⁸² *See id.*

⁸³ *Id.* at 59.

⁸⁴ *Id.* at 59-60.

determined a general dispute over all military activities, then Annex VII arbitration mechanisms could not be used due to an exclusion clause in UNCLOS Article 298, which precludes arbitral jurisdiction of UNCLOS over general military disputes.⁸⁵

Kraska emphasizes the importance of UNCLOS determinations of seascape classifications. The classification of a feature as an island, a high-tide elevation, or a low-tide elevation had different maritime zone entitlements,⁸⁶ which could extend the exclusive economic zone and cause further conflict in the region.⁸⁷

Additionally, Kraska pointedly argues that Chinese construction of artificial islands within the Philippine exclusive economic zone is not inherently unlawful; however, due to the scale and effect of the construction, China violated its responsibility to “environmental stewardship.”⁸⁸ The author uses the end of the chapter to lay groundwork for the important legal aspects of the award relating to the environmental protection of the reefs in the SCS being damaged by island reclamation projects.⁸⁹ Foreign activity within another country’s exclusive economic zone is typically allowed so long as any effect is only incidental.⁹⁰ However, the building of islands through land reclamation and dredging is an intensive process which could have major impacts on the Philippine exclusive economic zone. Additionally, untold environmental damage is taking place to the sea floor during the island reclamation process.

VI. PART THREE: MILITARY MODERNIZATION AND CAPACITY BUILDING

Military implications for Southeast Asia are important, as much of the activity has been seen as a Chinese militarization of the reclaimed islands. Additionally, modernization of the Chinese military has some experts beginning to question what goals China has for these islands.⁹¹ Part Three takes an in depth look at a variety of military issues regarding the nations that have a stake in the ruling of the PCA, and other regional powers within the SCS.

A. *China’s Military Modernization and the South China Sea, by Timothy R. Heath*

The PLAN is increasing capabilities through its eleventh major reorganization since 1952, which has regional stakeholders concerned for what intentions China has with the island reclamation projects upon completion.⁹² Chinese military strategists have regarded the SCS as a

⁸⁵ Kraska, *supra* note 81, at 59-60.

⁸⁶ *Id.* at 61.

⁸⁷ *Id.*

⁸⁸ *Id.* at 66.

⁸⁹ See discussion *infra* Section VII.

⁹⁰ Kraska, *supra* note 81, at 66.

⁹¹ *Id.* at 61

⁹² Timothy R. Heath, *China’s Military Modernization and the South China Sea*, in *IN THE WAKE OF ARBITRATION*, *supra* note 4, at 71.

key security issue, and see dangers in other nations' activities near the SCS as a threat to "China's maritime rights and interest."⁹³ While China does not believe its southern neighbors are of much concern, with respect to military capabilities, China is concerned over the capabilities of the Japanese and Taiwanese militaries.⁹⁴

The People's Liberation Army ("PLA") is undergoing a modernization effort to project power at longer ranges.⁹⁵ China's current inability to protect Chinese reclaimed islands due to lack of long range military support capabilities is of great concern to Chinese military strategists, because these same islands are within striking distance of Vietnam's and the Philippines' military installations.⁹⁶ Modernization of the PLA plays a major role in developing China's capabilities to defend core interests in the SCS as well as conduct peacetime operations and maintain influence in the region.⁹⁷

This chapter mainly focuses on the manners in which China aims to increase their military capabilities. While every United Nations member state has a right to self-defense,⁹⁸ the Chinese expansion of its military capabilities and control into international waters, within the exclusive economic zone of the Philippines, violated the terms of UNCLOS and was among the issues raised in the UNCLOS tribunal.⁹⁹ This chapter clarifies Chinese goals, challenges, and mission in the SCS and provides a detailed look as to how PLA and PLAN activities have focused on supporting the island reclamation projects. These goals seem attainable for the Chinese military because the arbitral tribunal is only binding to the Philippines and China, and while other nations can seek assist in the enforcement of the PCA award, only the Philippines has the legal right to seek enforcement under the UNCLOS treaty.

B. Indonesia's Naval and Coast Guard Upgrades and Jokowi's Global Maritime Fulcrum, by Natalie Sambhi

Natalie Sambhi authored chapter seven of *In the Wake of Arbitration*, which looks at another regional power within the SCS.¹⁰⁰ While the Philippines and China are the only nations bound by the rulings of the arbitral proceeding, other regional powers were waiting intently to see how the region power might shift. Sambhi provides insight as to how Indonesia handles its claims to the SCS, what actions have been taken to push back Chinese territorial expansion, and what military options Indonesia is maintaining within this region.

Indonesia consists of approximately 16,000 islands, amounting to roughly three-million-

⁹³ Heath, *supra* note 92, at 71

⁹⁴ *Id.* at 72.

⁹⁵ *Id.* at 71.

⁹⁶ *Id.*

⁹⁷ *Id.* at 78.

⁹⁸ *See generally* U.N. Charter art. 51 ¶ 1.

⁹⁹ Award, *supra* note 23, at 11.

¹⁰⁰ Natalie Sambhi, *Indonesia's Naval and Coast Guard Upgrades and Jokowi's Global Maritime Fulcrum*, in *IN THE WAKE OF ARBITRATION*, *supra* note 4, at 83.

square-miles.¹⁰¹ Water, sea transport, and resources from territorial seas play a vital role in Indonesian national interests and to Indonesian citizens, who depend on these resources.¹⁰² Regional tensions between Indonesia and China center largely on illegal fishing within Indonesian territorial waters.¹⁰³ However, enforcing territorial waters and the boundaries of the Indonesian exclusive economic zone is difficult due to the lack of resources and capabilities of the Indonesian Coast Guard and Navy.¹⁰⁴ Many regional stakeholders, including Indonesia, will look to how the PCA arbitral award impacts Chinese actions and what deterrent future UNCLOS arbitration might have on China's use of the SCS.

This chapter further discusses a 2015 "Defense White Paper" which outlined the Indonesian Defense Ministry's strategy for the near future.¹⁰⁵ The GMF is not highlighted in any significant way, from which Sambhi infers that Indonesia might not be in a position to take on the challenges it faces in the SCS until internal defense is achieved.¹⁰⁶ Further, the United States has expanded assistance to the region and provided training and funding, as well as opportunities for Indonesia to increase cooperation with United States Navy activities,¹⁰⁷ which is counter to the long-standing Indonesian policy of nonalignment with regional and world powers (including China and the United States).¹⁰⁸

Sambhi asserts that future disputes in the SCS will continue to drive Indonesia further towards modernization of maritime capabilities.¹⁰⁹ One issue the author does not discuss is that UNCLOS arbitral rulings can only resolve portions of disputes in the SCS.¹¹⁰ Thus, further diplomatic measures are needed as well to prevent continued intensifying tensions in the region due to military modernization and buildup of the nations with stakes in the SCS. The author ends this chapter with optimism about the future of Indonesia and the clear direction the president wishes to lead the nation.¹¹¹ The PCA ruling set a precedent that will help Indonesia, if necessary, seek any action against China for similar claims to that of the Philippines.

¹⁰¹ Sambhi, *supra* note 100, at 83.

¹⁰² *Id.*

¹⁰³ Sambhi, *supra* note 100, at 84.

¹⁰⁴ *Id.* at 83-85.

¹⁰⁵ *Id.* at 85.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 91-93.

¹⁰⁸ See generally Embassy of the Republic of Indon., Indonesia's Foreign Policy /The Principles of the Foreign Policy (Aug. 30, 2018, 3:25 PM), <https://www.embassyofindonesia.org/index.php/foreign-policy/>.

¹⁰⁹ Sambhi, *supra* note 100, at 94.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 94.

C. *Military Modernization and Capacity Building in the Philippines and Vietnam*, by Carlyle A. Thayer

Much of the SCS dispute revolves around the perceived notion that China is expanding military capabilities within the region and raising tensions through the further development and installation of military equipment on the reclaimed islands.¹¹² Chapter eight begins to focus on the Filipino response to the Chinese efforts as well as focusing primarily on the modernization of both the Armed Forces of the Philippines (“AFP”) and the Vietnam People’s Army (“VPA”).¹¹³ Each country within the region has been looking to modernize its respective military force, and arguably, these modernizations are the main driver behind most of the tensions in the SCS.¹¹⁴

Carlyle A. Thayer divides chapter eight into five sections, and the first section provides historical background on military modernization within both the Philippines and Vietnam.¹¹⁵ Parts two and three cover military capabilities and expansions from 2010 until present day, while part four discusses the role of the United States with respect to these two nations, and part five provides summaries and concluding thoughts of the author.¹¹⁶ This chapter does not discuss any aspect of the PCA arbitral tribunal and only cursorily mentions the issues directly relating to the Philippines complaints against China.¹¹⁷ While this chapter is thoroughly researched and well organized, further discussion of military capabilities is outside the purview of this review.

VII. PART FOUR: THE ENVIRONMENTAL QUESTION

With so much focus on military buildup, modernization of naval fleets, and control over disputed reefs, media and nations often forget the environmental issues facing the SCS. *In the Wake of Arbitration* includes three chapters on various topics relating to the environmental impacts of the activities underway in the SCS. Many of the reclaimed islands are coral reefs, and the authors focus on the coral reefs to raise concerns both for the impact that has already occurred and what concerns exist for extraction of natural resources in the SCS.¹¹⁸

A. *Destroyed Reefs, Vanishing Giant Clams: Marine Imperialism*, by E. D. Gomez

Coral reefs throughout the SCS are being destroyed, estimated at over 311-hectares of coral reefs within the Spratly islands.¹¹⁹ Chinese backers quickly justified their destruction of

¹¹² Carlyle A. Thayer, *Military Modernization and Capacity Building in the Philippines and Vietnam*, in *IN THE WAKE OF ARBITRATION*, *supra* note 4, at 95-96.

¹¹³ Thayer, *supra* note 112, at 95-97.

¹¹⁴ *Id.* at 108-09.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 95-109.

¹¹⁸ E. D. Gomez, *Destroyed Reefs, Vanishing Giant Clams: Marine Imperialism*, in *IN THE WAKE OF ARBITRATION*, *supra* note 4, at 115.

¹¹⁹ *Id.*

these delicate ecosystems by citing other nations' destruction of reefs in the past and currently through reclamation projects.¹²⁰ However, E.D. Gomez, author of chapter nine, quickly points out that by using satellite imagery, researchers have "objectively measure[d] ocean filling" activity, and found that within the Spratly Islands of the SCS, four nations have been responsible for about five-percent of the reclamation damage to the environment, while China is responsible for ninety-five-percent.¹²¹ Additionally, China is solely responsible for environmental damage related to reclamation on the Paracel Islands in the SCS.¹²²

Unfortunately, chapter nine does not discuss any issue relating to the UNCLOS arbitral proceedings or how the arbitral award might impact environmental issues in the SCS.¹²³ However, this is an important chapter for the reader to understand that the SCS issues are more than just militarization and control over economically valuable shipping routes. As an ecologist specializing in coral reefs, Gomez sets the stage for concerns raised in the PCA finding that "China has not cooperated or coordinated with the other States bordering the [SCS] concerning the protection and preservation of the marine environment"¹²⁴ Additionally, the PCA award found China was inflicting severe harm on the environment, and that many of the complaints by the Philippines require Chinese action to mitigate the problems caused by land reclamation projects.¹²⁵ Thus, China is not upholding its duty to protect the marine environment, which is another issue to consider for enforcement of the arbitral award.

B. Offshore Coral Reefs and High-Tide Features of the South China Sea: Origins, Resources, Recent Damage, and Potential Peace Parks, by John W. McManus

James W. McManus, author of chapter ten, provides the most substantial discussion and analysis of environmental issues as they relate to legal responsibilities chapter ten.¹²⁶ While this chapter focuses heavily on coral reef development, growth, and environmental issues surrounding their destruction, a large section of the chapter delves into how UNCLOS handles environmental claims.¹²⁷ The chapter also presents additional information regarding the type of damage being done by dredging and construction on these reefs.¹²⁸

China had maintained that island-building activities on these reefs did not harm the environment, but actually promoted coral reef growth.¹²⁹ However, McManus argues that this is

¹²⁰ Gomez, *supra* note 118, at 115.

¹²¹ *Id.*

¹²² *Id.* at 116, Table 9.1.

¹²³ *See Id.* at 113-23.

¹²⁴ Award, *supra* note 23, at 475.

¹²⁵ *Id.* at 397.

¹²⁶ John W. McManus, *Offshore Coral Reefs and High-Tide Features of the South China Sea: Origins, Resources, Recent Damage, and Potential Peace Parks*, in *IN THE WAKE OF ARBITRATION*, *supra* note 4, at 124.

¹²⁷ *Id.* at 131.

¹²⁸ *Id.* at 137-142.

¹²⁹ McManus, *supra* note 126 at 131.

likely legal posturing under UNCLOS so that China can more easily claim these man-made islands as natural islands or rocks rather than “artificial islands,”¹³⁰ because according to UNCLOS article 60 §8, “[a]rtificial islands . . . do not possess the status of islands. They have no territorial sea of their own”¹³¹ McManus interprets the award from the PCA tribunal as one that would never recognize island building as a means in which a country could have an island qualify for an exclusive economic zone.¹³² According to the UNCLOS treaty, Islands must be natural structures above high tide to be declared a natural island or a rock.¹³³ The PCA ruling implies that if a nation possesses a parcel of land, in an atoll, which the nation needs to augment in any way to raise it above sea level at high tide, then that parcel of land will likely not be designated as a natural island or rock but rather receive a more fitting designation, like coral island.¹³⁴ Thus, the land in question will not receive the protections allotted to that of a natural island or rock, with respect to UNCLOS.¹³⁵

Other parts of the chapter include discussions of habitability of offshore atolls, dredging and island construction within the SCS, and implications for fisheries.¹³⁶ While these topics cover other aspects in relation to SCS and provide analysis for claims of the Philippines, McManus focuses on the environmental impact and what concerns are brought about by these activities.¹³⁷ McManus notes in the conclusion that even if little or no enforcement of the arbitral award comes as a result of the PCA arbitral proceeding between the Philippines and China, the arbitration raises valid concerns, regarding damage to the environment in the SCS due to damage to the sea floor and overfishing.¹³⁸ Of importance, the arbitral proceeding found that China failed to protect the environment from overfishing within the SCS.¹³⁹ Importantly, fishing was occurring in areas of the exclusive economic zone of the Philippines which raised the concern of damage being done to endangered species within the SCS and what measures can be taken to prevent this from occurring in the future.¹⁴⁰ McManus notes that enforcement will play a vital role in conserving the SCS environment.¹⁴¹

¹³⁰ *Id.* at 132.

¹³¹ 1833 U.N.T.S. 3, art. 60, § 8.

¹³² McManus, *supra* note 126, at 132.

¹³³ *Id.*

¹³⁴ *Id.* 132-33.

¹³⁵ *Id.*

¹³⁶ *Id.* at 132-147

¹³⁷ McManus, *supra* note 126, at 132-147.

¹³⁸ *Id.*

¹³⁹ Award, *supra* note 23, at 397.

¹⁴⁰ McManus, *supra* note 126, at 142-147.

¹⁴¹ McManus, *supra* note 126, at 147.

C. *Marine Biodiversity at the Spratly Islands and Proposal for Establishing Marine Protected Areas*, by Kwang-Tsa Shao

The final chapter of *In the Wake of Arbitration* concerns itself with developing protected areas in the SCS.¹⁴² The author, Kwang-Tsao Shao, begins the chapter by describing the SCS, the nations with a stake in the future of the SCS, and the various protected areas that currently exist in the SCS.¹⁴³ Part of the reason the Philippines brought these disputes before the UNCLOS tribunal was due to the fact China was not allowing access to various areas of the SCS within the Philippines own exclusive economic zone.¹⁴⁴ While Shao thoroughly explains the environmental concerns, and the ecological factors that are present in the SCS, he includes little discussion of the arbitral proceedings.¹⁴⁵

However, the chapter presents an interesting alternative for how to handle the disputes on the SCS by turning the area into a protected marine environment and seeks other existing means to protect the SCS.¹⁴⁶ Shao's suggestion is to develop the disputed territories into international marine preserves which would act to conserve the environment and allow a nongovernmental organization to control and monitor the area.¹⁴⁷ This idea would take international cooperation to accomplish and would likely be among the most peaceful ways to resolve all SCS disputes without the need for further arbitration.

Similar to chapter eight, chapter eleven gives little information on the impact of the arbitral award, likely due to the authors writing their opinions on the day the award was released. However, the PCA tribunal advocates for the preservation of the marine environment and that Chinese island reclamation projects have done irreparable harm to many of the reefs and islands in the SCS.¹⁴⁸ The author, in agreement with the arbitral award, seeks to provide environmentally friendly ways to not only protect the SCS environment, but to help the world avoid calamity over these valuable waters.¹⁴⁹

VIII. ARBITRAL AWARD

As Batongbacal wrote in chapter two, the Philippines “made a clean sweep of nearly all its submissions” to the arbitral tribunal.¹⁵⁰ In the published award ruling, the tribunal carefully

¹⁴² Kwang-Tsao Shao, *Marine Biodiversity at Spratly Islands and Proposal for Establishing Marine Protected Areas*, in *IN THE WAKE OF ARBITRATION*, *supra* note 4, at 148.

¹⁴³ Shao, *supra* note 142, at 148.

¹⁴⁴ *See Award*, *supra* note 23, at 2-3.

¹⁴⁵ Shao, *supra* note 142, at 148-158.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 154.

¹⁴⁸ *Award*, *supra* note 23, at 475-477.

¹⁴⁹ Shao, *supra* note 142, at 157-58.

¹⁵⁰ Batongbacal, *supra* note 12, at 33.

laid out its reasoning as to the four main categories of complaints of the Philippines. The arbitrators evaluated and categorized each submission.¹⁵¹ Noticeably, each category contains positions of both the Philippines and China; even though China was not participating in the tribunal, the tribunal did go to great lengths to consider Chinese interests.¹⁵²

The arbitral award summary elaborates on how the parties involved need to conduct their respective activities after this award.¹⁵³ The award declares that China has breached its obligations under UNCLOS articles 279, 296, and 300, as well as general international law.¹⁵⁴ Moreover, both parties are to respect “rights and freedoms” of each other as well as other states under UNCLOS.¹⁵⁵ Additionally, the tribunal stated both the Philippines and China will be assumed to be acting in good faith within the merits of this award, and the award shall be complied with while any further grievances shall be resolved through a peaceful manner in accordance with UNCLOS.¹⁵⁶ The tribunal concluded that because Chinese fishing vessels were all but ignored by Chinese marine surveillance vessels, China failed to exercise due diligence, thus, is at fault for not preventing exploitation of the Philippine’s exclusive economic zone through illegal fishing.¹⁵⁷

IX. CONCLUSIONS

While the book’s chapters were organized into discrete parts, the order in which the chapters were presented could be improved. The editors chose to begin the book with a chapter on United States policy with respect to the SCS. While this seems like a logical starting point for an American think-tank, a major problem is that the United States has yet to ratify UNCLOS and only recognizes the treaty as customary international law.¹⁵⁸ Additionally, as Batongbacal wrote in chapter three, the award technically is only legally binding to the Philippines and China.¹⁵⁹ Thus, the editors’ choice to begin with a country that has not formally adopted UNCLOS and is not legally bound by any award of the PCA tribunal comes off as a little puzzling. Currently, there is no adherence to the arbitral award by the Chinese, and as a Chinese diplomat said ruling is no more than “waste paper.”¹⁶⁰

In the Wake of Arbitration is a good survey to begin researching issues regarding the

¹⁵¹ See Award, *supra* note 23, at iii-viii.

¹⁵² Award, *supra* note 23, at iii-viii.

¹⁵³ Award, *supra* note 23, at 465-469.

¹⁵⁴ *Id.* at 477.

¹⁵⁵ *Id.* at 469.

¹⁵⁶ *Id.* at 468.

¹⁵⁷ Award, *supra* note 23, at 297.

¹⁵⁸ See generally 1833 U.N.T.S. 3.

¹⁵⁹ Batongbacal, *supra* note 12, at 33.

¹⁶⁰ David Tweed, *Why the South China Sea Fuels U.S.-China Tensions*, BLOOMBERG (last updated Feb. 13, 2019), <https://www.bloomberg.com/news/articles/2018-10-07/why-the-south-china-sea-fuels-u-s-china-tensions-quicktake/>.

disputed claims of the SCS due to the wide variety of topics covered by the book. Each chapter is thoughtful and well-written by the individual authors. The book allowed experts in many fields to comment, describe concerns, and provide solutions to mitigate problems in their particular field of expertise. While each chapter takes on a specific topic related to the arbitral proceedings, the manner and the proceedings were not as thoroughly discussed in relation to each topic. Overall, the book provides excellent resources for further research into an assortment of topics that were affected by the arbitral proceedings.