Rule of Law and Peace and Order in the South China Sea and the West Philippine Sea:

What the Arbitral Tribunal Award Really Means For Littoral and Affected States, the Aftermath and Way Ahead

By: Catherine S. Panaguiton

“We have to step back and look at all China’s activities and the one you mentioned. The island building in the South China Sea, the declaration of control on airspace in waters over the Senkaku islands in Japan.

Both of those are illegal actions. They’re (PRC) taking territorial control of territories that are not rightfully China’s.”

---- quote from Rex Tillerson, Donald Trump’s pick for and US’s newly confirmed Secretary of State, during his confirmation hearing in January 2017

This sentiment echoes the Arbitral Tribunal ruling in the Republic of the Philippines vs. People’s Republic of China case. The Award discussed the two key phrases in the above statement:

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1This paper was made while the author was under the Fellowship Program at the Japan Institute for International Affairs (JIIA) in Tokyo, Japan. This author wishes to especially acknowledge her colleagues at the JIIA for their kind assistance: Mr. Tetsuo Kotani, Senior Fellow (JIIA), Japan-US Alliance, Maritime Security, Mr. Ryosuke Hanada, Fellow (JIIA), Political and Economic Issues in Australia, India and ASEAN and Ms. Yuko Hirayabashi, Research Assistant (JIIA).

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This paper briefly explains items (i) and (ii). Then it later on goes deeper as to the legal and practical implications of the case to the judicial and political spheres and key actors of littoral and affected states, respectively. Specifically, the paper provides examples of significant legal doctrines that may be useful for and legally permissible actions of littoral and affected states in areas in the SCS and WPS, as per the ruling made by the arbitral tribunal in the *Republic of the Philippines (RP) vs. People’s Republic of China (PRC)* case.

However, be it noted that although the award declares certain legally permissible actions in the South China Sea and West Philippine Sea, there are still issues on the practicability of the full implementation of these actions.

Key states play vital roles in the manner and extent of enforcement of the award. The manner and extent of enforcement of the award are partly determined by the foreign policy of these key states. Presently, the precise direction and/or probability and/or outcome of the enforcement of the award remain uncertain. This paper briefly goes over possible directions and/or probability and/or outcome of the enforcement of the award particularly from RP standpoint vis-à-vis recent notable political events in gauging the current state of Rule of Law in the SCS and WPS. Rule of Law aspects will also be examined and their relation to maintenance of peace and order, in the context of the SCS and WPS dispute. Pre-conceived notions of Rule of Law being automatically synonymous to peace and order may also be reconsidered.

**Brief Background Behind the Institution of the Case**

Chinese incursions in disputed waters in the SCS and WPS started from as early as the 1950s. However, they were scant and far in between. As decades passed, Chinese surveillance and incursions and the incidents between PRC, RP and Vietnam have increased in these areas. Rapid reclamation activities by PRC and the construction of installations on them (many of which are of a military nature), amidst protests by its neighbors (including the Philippines) and claimant states, have likewise increased the tensions.

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3 “*China’s activities*” would refer to iteration of definite Chinese actions in the SCS and WPS. “*are illegal*” would pertain to how these definite Chinese actions violate rules and which specific rules. (In this case, it is international law in general and UNCLOS, in particular).

4 *i.e.* RP, Vietnam etc.

5 Hereinafter, “SCS”.

6 Hereinafter, “WPS.”

After having exhausted political and diplomatic avenues for a peaceful negotiated settlement of its disputes with the PRC over entitlements in the SCS and WPS, which came to a boil when PRC seized Panatag (Scarborough) Shoal off the RP’s Zambales Province in 2012, the RP initiated arbitration in January 2013.\(^8\)

**What the Arbitral Tribunal Award Really Means For Littoral and Affected States**

*Practical Implications of the Case*

1. **The most noteworthy in all implications are the declarations of the status of maritime features in the SCS.** Specifically, these were classified as “rocks”, “islands”\(^10\), “high tide elevations (HTEs) and low-tide elevations (LTEs)” (Kindly refer to Annex A herein to see the table showing descriptions of classifications of maritime features as discussed).

The *Table* below provides a summary of maritime features that RP asked the tribunal to rule upon, RP submissions as to their status, PRC positions on the maritime features as per its Position Paper and Diplomatic Communications\(^11\) and finally, the Tribunal ruling on the status of the maritime features.

<table>
<thead>
<tr>
<th>Name of Feature</th>
<th>RP Submissions</th>
<th>PRC Submissions in Diplomatic Comms, PP</th>
<th>Tribunal Ruling</th>
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<td></td>
<td>LTE</td>
<td>HTE</td>
<td>THE</td>
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<td>Rock</td>
<td>Island</td>
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<td>Thitu</td>
<td>✓</td>
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<td>✓</td>
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\(^10\) Fully Entitled Islands. See Explanation in Annex A.

\(^11\) PRC never made any submissions through a pleading throughout the whole case. Its position on the maritime features was determined by the arbitral tribunal through the Position Paper it submitted and Diplomatic Communications to RP and the arbitral tribunal.

\(^12\) See Award, paras. 426–427.

\(^13\) See Award, para. 100.

\(^14\) See Award, para. 625.

\(^15\) See Award, par. 426.

\(^16\) See Award, para. 301
<table>
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<th>18</th>
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<tr>
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<tr>
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<td>HTE</td>
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17 See Award, para. 625.
18 See Award, para. 426.
19 See Award, para. 301.
20 See Award, para. 625.
21 See Award, para. 423.
22 See Award, para. 244. See also Award, paras. 299 and 461.
23 See Award, para. 282. See also Award, paras. 554 and 643.
24 See Award, para. 423.

25 N.A. stands for “Not Applicable”. This means that PRC never made any declaration as regards its position with respect to the indicated features. See Award, para. 302 stating that “Where China has not publicly stated its specific view regarding the status of a particular feature xxx”, meaning China did not give a particular position regarding the status of all maritime features subject of the dispute and para. 472 stating “As far as the Tribunal is aware, China has not made any specific statements about the status of Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), or McKennan Reef for purposes of 121 (3) of the Convention xxx”. However, please see Award, para. 301 stating that “China has (also) commented on the entitlements of the maritime features of the Spratlys Islands collectively, stating that “China’s Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone and Continental Shelf”. Features in the Spratlys Island Group are the following: Itu Aba, Thitu, West York, Spratly Island, Northeast Cay, Southwest Cay, Sin Cowe, Nanshan, Sand Cay, Loaita, Namyit, Amboyna Cay, Flat Island, Lankam Cay.

26 See Award, para. 282.
27 See Award, para. 423.
28 See award, para. 282.
29 See Award, para. 292.
30 See Award, para. 282.
31 See Award, para. 292.
32 See Award, para. 282.
33 See Award, para. 423.
34 See Award, para. 300.
35 See award, para. 282.
36 See Award, para. 292.
37 See Award, para. 300.
Table. Summary of the Tribunal Ruling on Status of Maritime Features\textsuperscript{44}.

There are significant practical implications as to the declaration of the above maritime features. Determining whether a feature is a “rock” or an “island”, or an HTE or LTE, has an effect as to what could be legally permissible actions of the RP and other littoral and affected states within areas of these features.

To illustrate, examples may be helpful.

**Example 1: Mischief Reef as an LTE and not as an HTE**

The tribunal in this case ruled that Mischief Reef is a LTE and not a HTE. And as a LTE, it is deemed to be part of RP’s EEZ\textsuperscript{45}.

As the tribunal discussed in the award, the treatment then of Mischief Reef, per the ruling, shall not even limited to treating it as a “rock” that is entitled to a 12 nautical mile (NM) territorial sea, as some operations by states prior to the ruling treated it to be\textsuperscript{46}. Any transit within 12 NM of such artificial islands consistent with innocent passage would amount to tacit consent to China’s position.

\textsuperscript{38} See Award, para. 381.
\textsuperscript{39} See Award, para. 292.
\textsuperscript{40} See Note at 25.
\textsuperscript{41} See Award, para. 292.
\textsuperscript{42} See Note at 25.
\textsuperscript{43} See Award, para. 383.

\textsuperscript{44} Please note that for purposes of reading the table, HTE stands for high tide elevation and LTE stands for low tide elevation. Further, the arbitral tribunal determined the status of these maritime features based on their original state and not after human modifications have been employed upon them (\textit{i.e.} reclamation activities). The table must be read like so: the check marks that are found in the intersection of the name of the island and the PH Submissions, CH Submissions and Arbitral Tribunal Ruling would provide the answers on PH Submissions, CH Submissions and Arbitral Tribunal Ruling of the particular feature. For example, for the maritime feature of Mischief Reef, RP’s position is that it is an LTE or a Low Tide Elevation. PRC on the other hand, believes otherwise-that it is a HTE or a High Tide Elevation based on its Position Paper and/or Diplomatic Communications. The Arbitral Tribunal sided with RP on this note stating that it is a LTE. This format applies to the rest of the table.

Islands discussed in this table will refer to \textit{“Fully Entitled Islands”} as described in Annex A herein.

\textsuperscript{45} See Table.
that these features possess territorial seas — a position directly at odds with UNCLOS.\textsuperscript{47} It should then be treated as part of the PH EEZ, with all the rights and obligations of RP as a coastal state, and with due regard to rights of other states under the UNCLOS.

Specifically, for RP, Mischief Reef being part of EEZ entitles it to all the rights, jurisdiction of the coastal state under \textit{Article 56 of the UNCLOS}, such as,

\begin{quote}
'soverign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.'\textsuperscript{48}
\end{quote}

For states other than RP, they have \“(a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2; (f) freedom of scientific research, subject to Parts VI and XIII.\”\textsuperscript{49} As earlier mentioned, both RP and these other states are not limited only to the right of innocent passage within 12 NM of the Mischief Reef and can even go beyond that. Thus, as this feature is part of PH EEZ, it becomes obvious that China’s occupation and activities\textsuperscript{50} herein are illegal as it fails to respect RP’s rights in this area.

\begin{footnotes}
\item[47] \textit{Ibid.}
\item[48] \textit{Ibid.}
\item[50] Specifically, the tribunal ruled that PRC’s grant of rights to nationals and vessels (issuance of Nansha Certification of Fishing permit to its nationals and Chinese fishermen escorted by CMS vessels pursuant to the permit) in areas in which RP exercises sovereign rights (Mischief Reef) violates \textit{Article 58(3) of the UNCLOS}. It failed to exercise due regard on rights of RP in its EEZ.
\end{footnotes}
Example 2: Cuarteron Reef, Gaven Reef and Fiery Cross Reef are “rocks” and not “islands”

To make the concepts easier to understand, we refer to the above figure. The features circled in red are features declared as “rocks” by the tribunal. As such, these are only entitled up to 12 NM TS. The features circled in green show the same features as “islands” that are entitled up to 200 NM EEZ. In the figure above, the green circles are illustrated to have larger areas than the red circles to show entitlement of “islands” of bigger MZs than “rocks”. (Please note though that these are very rough illustrations. The green and red areas do not purport to show in exact dimensions of 12 NM TS and 200 NM EEZ. These are only drawn to depict the stark difference between the MZs of “rocks” and “islands”).

Now, what is the effect of the tribunal declaration to these features as “rocks” and not “islands” to states other than RP such as the US or Japan, whose ships ply these areas?

There is a significant effect. The declaration of rocks allows not only innocent passage rights within 12 NM from the baseline of these features to ships

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51 Original map is found in the South China Sea Org Website, accessed 25 January 2017, http://www.southchinasea.org/maps/territorial-claims-maps/. However, please note that the circles in red and green were drawn by the author.
such as the US and Japan. Furthermore, from the area outside of the red circles of these features, and outwards, US and Japanese ships, for example, exercise vast high seas freedoms under Articles 87\textsuperscript{52}, 89\textsuperscript{53} and 90\textsuperscript{54} of the UNCLOS.

Compare this if these features are ruled to be “islands”. If these were declared as “islands”, from the area outside of the red circles of these features, and outwards, these ships have to follow the rights and obligations under UNCLOS, i.e. the section on EEZ, as applicable. The areas wherein these ships can exercise high seas freedoms will only be in the areas starting from 200 NM EEZ (or from the areas enclosed in green circles). Furthermore, be it noted that although the said vessels can exercise high seas freedoms starting from 200 NM EEZ and these vessels may legitimately engage in military activities in these EEZs without prior notice to, or consent of, the coastal State concerned\textsuperscript{55}, coastal states’ sovereign rights must still be respected under Article 56 of the UNCLOS, within the 200 NM EEZ. Whereas, in the declaration of these features as “rocks”, ships can exercise full high seas freedoms, without regard to coastal states’ rights under Article 56, in areas as near as for example, 14 NM from the baseline of the maritime feature.

This goes to show that the declaration of maritime features as “rocks” is certainly good news for these states’ vessels as they can exercise more high seas freedoms closer to the features. Please note though that the maritime features\textsuperscript{56}, Gaven Reef, Cuarteron Reef and Fiery Cross Reef, such as the earlier example of Mischief Reef, are occupied by China. This fact must be considered by states in attempting to exercise these high seas freedoms (beyond 12 NM) and even the right to innocent passage (within 12 NM) from the baseline of these “rocks”.

\textsuperscript{52} Article 87 (Freedom of the High Seas) reads: “The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, \textit{inter alia}, both for coastal and land-locked States: (a) freedom of navigation; (b) freedom of over flight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2; (f) freedom of scientific research, subject to Parts VI and XIII.

\textsuperscript{53} Article 89 (Invalidity of Claims of Sovereignty Over the High Seas) reads: “No State may validly purport to subject any part of the high seas to its sovereignty.”

\textsuperscript{54} Article 90 (Right of Navigation) reads: “Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.”


\textsuperscript{56} There are even runways spotted and/or preparations for a runway for some of these features. Nobody is going to try to stop the U.S. Navy from operating! Washington warns Beijing NOT to challenge its flights over South China Sea” (accessed 25 January 2017).http://i.dailymail.co.uk/i/pix/2015/12/16/article-doc-6j05f-FqeQv9hsW372334277514aa60e0-882_634x494.jpg
2. The tribunal ruled that for claims based on “historic rights” to be declared as valid, it must be shown that these rights claimed are formed through: (a) continuous exercise of claimed right by the State asserting the claim and (b) acquiescence on the part of the affected states. This dual requirement, especially (b), prevents situations of other states claiming vast maritime zones on the basis of historic rights unilaterally and without any care for possible claims on “historic rights” as well by other states.

3. The same principle of preventing unilateral claiming of states of vast maritime zones with ease is employed when Article 121(3) of UNCLOS was clarified for the first time on the definition of “Rocks”:

“3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”

This stringent requirement of proving that the feature can sustain human habitation or economic life of its own before a feature can be classified as an “island” (hence entitled to 200 NM EEZ) prevents states from claiming vast maritime zones with ease. It precludes situations wherein states conveniently call a feature an “island” and assigning a handful of military people there to guard it to claim a more expansive 200 NM EEZ, wherein in fact, there is no actual community of people continuously inhabiting it or performing economic activities who are supposed to benefit from the 200 NM EEZ. Be it noted that during the negotiations of the UNCLOS, the vast 200 NM EEZ was a compromise and was granted to states specifically so that exploitation of resources there would benefit the inhabitants of the island living therein. If there is no such living community, then there is no point in granting access to rights to that much larger area (200 NM), as opposed to only 12 NM, if it is just considered as a “rock”.

Legal Implications of the Case

The Arbitral Tribunal Award established and/or re-affirmed several noteworthy legal doctrines. These legal doctrines established in RP vs. PRC are useful for states in similar situations as RP, in case they wish to seek similar legal remedies. These rulings may also be used in states’ policy-making and thus, be influential in the development of state practice and affect international law, in general. The complete listing of legal doctrines and explanation is herein attached as Annex B.


58 See Award, par. 621.

59 If similar suits are filed against PRC and PRC interposes these defences to render the case dismissible, applicant states can use doctrines from this ruling to support their arguments in these suits. (Caveat: Please note though that this is true provided that similar facts and circumstances exist and metrics employed in the case are used.)
The Aftermath

After the arbitral tribunal handed down its ruling, the main concern is its enforcement. Avoiding a “paper judgment” in international law depends a lot on the political will of the international community, most especially its leading states to influence its neighbour PRC to act in accordance with international law.\(^{60}\)

Spotlight has been with RP after the award was rendered. Emerging foreign policy\(^ {61}\) under the Duterte administration suggests that PH will pursue the route of resolving the SCS issue with China through peaceful bilateral dialogue\(^ {62}\) and not through resort of other legal means that are more confrontational by nature versus China\(^ {63}\) . Should the US undertake Freedom of Navigation Operations (FONops) in the SCS or make provocative statements against PRC\(^ {64}\), the Philippines will play no part in these.\(^ {65}\) However, RP is still adamant in protecting its rights through measured actions such as the lodging of diplomatic protests against PRC over Beijing's installation in 2016 of anti-aircraft and anti-missile systems on its manmade islands in the disputed SCS.\(^ {66}\)

The Way Ahead

AV Dicey\(^ {67}\) provided three (3) components on the Rule of Law in his seminal work “The Law of the Constitution”, \textit{viz}:

\begin{itemize}
\item Employment of legal remedies can provide pressure to China to comply with its international obligations. Alternative routes to resolve the dispute can be undertaken such as development of Joint Development Zones by claimant states. Operations that are in accord with the ruling to change the \textit{status quo} to be more in line with the award may also be undertaken, but with utmost care of the consequences.

\item Duterte's foreign policy shift away from traditional ally the United States and towards doing more regional deals for loans and business under his "pro-Filipino" policy. http://www.cnbc.com/2017/01/23/china-philippines-agree-to-cooperate-on-30-projects-worth-37-billion.html

\item “New Dynamics in ASEAN’s Stance in South China Sea” by Henry Hing Chan and other sources.

\item \textit{i.e.} UN General Assembly.

\item \textit{i.e.} U.S. nominee for Secretary of State, Rex Tillerson’s strong statement that Beijing should be repelled from, and then denied access to, the controversial islets (in the SCS).


\item \textit{Ibid.}

\end{itemize}
1. Sovereignty of law over man;
2. Equality of men over the law; and
3. Judicial decisions applying prevailing laws be enforced.

As per the above, enforcement of judicial decisions forms part and parcel of “Rule of Law”. However, in the case of *RP vs. PRC*[^68^], the decision of undertaking full enforcement, while ideal, must be made whilst ever so mindful of its aftereffects. **What is legally permissible may not exactly be practicable.** If not well thought out and handled appropriately, employment of legally permissible actions can lead to dire consequences.

“Rule of law” in the international setting has been regarded to “suit those states that are resistant to a broader understanding of international legal obligations”[^69^]. However, be it noted Simon Chesterman’s view of “Rule of Law”: *While it makes a well-ordered society possible, but it is a means rather than an end.*[^70^] Dicey’s concepts in items 1-3 above are just means that must be employed judiciously and in such a manner as to accomplish the ultimate end of ensuring a well-ordered and peaceful setting among states.

As earlier explained, to maintain peace and order, it is **not enough that the ruling must be followed to the letter** (This could mean following newly installed US Secretary of State Rex Tillerson’s prescribed action that ‘China be denied access to the reefs’[^71^]). **Further care must be made to ensure that tensions in the region do not escalate.** Dicey had a point that yes, enforcement of the judgment is one of the components in saying that there is indeed Rule of law in the SCS and WPS. However, per Chesterman’s view, the notion that all Rule of Law concepts being put into play is **not automatically synonymous to ensuring peace and order.** One must always bear this in mind in the consideration of full enforcement of judgment as an aspect of Rule of Law.

Moreover and as a final note, whether or not actions undertaken thereafter would depart from the decision as they seem to appear at the present, it is of primordial importance that **ALL states continue on harping on the validity of the decision.**[^72^]

[^68^]: Ibid.

[^69^]: Ibid.


[^72^]: i.e. should RP enter into bilateral negotiations with PRC, it should still do so while still affirming the validity of the judgment.
The *RP vs. PRC* judgment is significant not only as to provide a peaceful resolution to the issues in the SCS and WPS. The doctrines established therein that aim to prevent and declare illegal unilateral claiming by states of vast maritime zones can likewise shape and influence later behaviour of states and hopefully, effect a more stable and rules-based state conduct in seas worldwide. Thus, to ensure Rule of Law and maintenance of peace and order in the oceans, the significance of affirming the validity of the judgment over and over again cannot be overemphasised.
## ANNEX A

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<th>High Tide Elevations</th>
<th>Low Tide Elevations</th>
<th>Submerged Features</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>General Term: Islands</strong></td>
<td><strong>Submerged Features</strong></td>
<td>Art. 13 UNCLOS, Exposed at low tide, covered with water at high tide; not land territory; no measure of occupation or control can establish sovereignty of features; sovereignty/sovereign rights depend on its distance to a HTE; although its status depends on HTE near it, it is not land, but merely as part of the TS, or EEZ of that HTE. Features that are fully submerged both at high or low tide.</td>
</tr>
<tr>
<td><strong>Fully Entitled Islands</strong></td>
<td>Above water at high tide</td>
<td>Art. 121 (3), UNCLOS.</td>
</tr>
<tr>
<td>HAS the capacity to “sustain human habitation or economic life of its own”</td>
<td>CANNOT “sustain human habitation or economic life of its own”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(Art. 121 (3), UNCLOS)</td>
<td>(Art. 121 (3), UNCLOS)</td>
</tr>
</tbody>
</table>

| Generate: | NO to ALL; No entitlement to TS, EEZ or CS; No features capable of appropriation by occupation or otherwise | NO to ALL; No entitlement to TS, EEZ or CS; No features capable of appropriation by occupation or otherwise |
| 12 NM TS | YES | YES |
| Continental Shelf (CS) | YES | NO (Art. 121 (3), UNCLOS) |
| 200 NM EEZ | YES | NO |
| “Sustain human habitation or economic life on its own” | YES | NO |

### Annex A. Maritime Features vis-à-vis Entitlement to Maritime Zones (MZs)

they are capable of generating\(^3\) and General Characteristics

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\(^3\) The table provides a simplistic explanation of the maritime features vis-à-vis entitlement to MZs they are capable of generating and their General Characteristics. The Table is divided into three (3) columns: High Tide Elevations (HTEs), Low Tide Elevations (LTEs) and Submerged Features. The rows below provide information on each. HTEs are divided into two categories: a) Fully entitled Islands and b) Rocks. Both are considered as High Tide Elevations or “Islands” and above water at high tide. However, there are significant differences for a Rock to be called as such (although it remains under the category of Island), and a Fully Entitled Island (that is not a Rock). Based on the table, a (Fully Entitled) Island has the capacity to “sustain human habitation or economic life of its own”, whereas, a Rock could not. Hence, a (Fully Entitled) Island is entitled to more vast maritime zones under the UNCLOS as opposed to a rock. Specifically, a (Fully Entitled) Island is entitled to 12 NM Territorial Sea (TS), 200 NM Exclusive Economic Zone (EEZ) and Continental Shelf; whereas, among the three (3), a rock is entitled only to a 12 NM TS.
ANNEX B

Complete Listing of the Significant Legal Doctrines of the Case

1. The case solidified compulsory arbitration under Annex VII of the UNCLOS as a valid means to settle disputes.74

2. The award addressed unanswered and significant questions on jurisdiction and admissibility. Particularly, it ruled that:

   a. PRC’s non-participation to the arbitration case at any stage is not a ground to dismiss the case.

      The general rule in institution of suits is that everyone has a right to due process. That is, if a state is not able to be heard and defend itself before the court, a judgment rendered against it has no binding effect. This covers states that have suits filed against it in international courts such as PRC. PRC contends that as it has not appeared before the tribunal and explained its position, judgment rendered against it has no binding effect.

      However, in the instant case, an exception was applied by the arbitral tribunal75. The tribunal ruled that PRC was given notice in every step of the suit

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75 Article 9( Default of appearance ) of Annex VII, UNCLOS states:

   “If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.” x x x

   “Despite CH’s non-appearance, it remains a Party to the proceedings, with the ensuing rights and obligations, including that it will be bound by any decision of the Tribunal.” (citing, “Artic Sunrise Case” Kingdom of Netherlands vs. Russian Federation and Nicaragua vs. United States; See Award on Jurisdiction, para. 114, citing Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment, ICJ Reports 1986, p. 14 at p. 24, para.

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and multiple chances to explain its side and defend itself. PRC refused to avail of the opportunities given to it pursuant to procedural rules and RP will not be prejudiced by this refusal. 76

b. The RP vs. PRC 77 case is not a sovereignty dispute. It is a dispute concerning the interpretation or application of the Convention, and thus, it is a matter within the jurisdiction of the tribunal.

PRC contends that the suit is a sovereignty dispute and not a dispute concerning the interpretation or application of the Convention. Under Article 288 of the UNCLOS, the tribunal only has jurisdiction over disputes concerning the interpretation or application of the Convention and NOT sovereignty disputes. PRC contends that it is of such nature because only after the extent of CH’s territorial sovereignty in SCS is determined can a decision be made on whether CH’s maritime claims in SCS have exceeded the extent allowed under the Convention. 78 Further, PRC furthers that the question of the legality of CH actions in SCS is dependent upon the resolution of the question of its sovereignty over relevant maritime features and maritime rights derived therefrom.

The tribunal in the case disagreed with the foregoing PRC position. It ruled that the case is a dispute concerning the status of maritime features in the SCS. It therefore involves the interpretation and application of UNCLOS.

And even assuming arguendo that passing upon questions of sovereignty is unavoidable, this does not render the case dismissible. As stated in the United States Diplomatic Consular Staff in Tehran case 79:

“There are no grounds to decline to take cognizance of one aspect of the dispute merely because that disputes has other aspects, however important.”

For as long as the case primarily involves the determination of the status of maritime features, even if there are questions of sovereignty that are involved, but for as long as these questions are just in the periphery, the tribunal has jurisdiction to the case 80.

c. The RP vs. PRC case is not a maritime boundary delimitation case.

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76 See Award, paras. 116-128, p.113.
77 See Award, paras. 628-633, pp 255-256.
78 United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, ICJ Reports 1980, p. 3 at p. 43, para. 93.
79 See Award on Jurisdiction, paras. 401, 403.
PRC submitted that the subject matter of the proceedings is an integral part of the dispute of maritime boundary delimitation between RP and PRC. Thus, this makes the case accordingly excluded from the Tribunal’s jurisdiction under Article 298 of the UNCLOS.”

The tribunal disagreed with this position. Following the doctrine (and in the process, firming up the doctrine) in Nicaragua vs. Colombia that “Maritime boundary delimitation does not arise unless there are overlapping maritime entitlements”81, it outlined several steps that ought to be undertaken to determine whether or not it is a maritime boundary delimitation case.

These steps are in the below and in this particular order:

(1) Determine the character and nature of the maritime features;
(2) Consequently, determine the entitlement to maritime zones based on (1) and;
(3) Determine the existence of overlapping zones between the two states asking this question

After the foregoing steps are undertaken and there were indeed found to be overlapping zones between the two states, then the case is a maritime boundary limitation case. PRC conflated all the steps, which the tribunal corrected in this case. In the end, the tribunal ruled that after determining the status of maritime features, there are no overlapping zones in this case. Hence, the case is not a maritime boundary delimitation case.82

d. All other preliminary questions that may be applicable to states in similar situations as RP, had been addressed in the case.

(1) RP’s act of initiating arbitration does not per se constitute an abuse of process. To be considered as abuse of process, requirements under the law must be proven. (What is most noteworthy though in this case is that the arbitral tribunal avoided passing upon this question. The tribunal ruled that the question of whether or not there is an abuse of process will only be passed upon by the tribunal provided that there is a “blatant showing” of abuse. In the instant case, there is no such blatant showing of abuse, so the tribunal even refused to consider this as a valid question.83)

(2) The arbitral tribunal ruled that the Parties (RP and PRC) have already exchanged views as required by Article 283 of the Convention84. (What is noteworthy in this case are the evidence presented in which the tribunal considered as satisfying the

81 See Award, para. 392, p. 177.
82 See Award on Jurisdiction, para. 146.
83 See Award on Jurisdiction, para. 128.
84 See Award on Jurisdiction, para. 342.
requirement that there have already been an exchange of views. This may be instructive to states in similar circumstances as RP.)

(3) The tribunal ruled that the following instruments/statements do not preclude recourse to compulsory settlement procedures available under Section 2 of Part XV of the Convention. Hence, the case can proceed\(^8^5\).

a) **2002 China-ASEAN Declaration on Conduct of Parties** in the SCS
b) Joint statements of the Parties referred to in pars. 231-232 of the Award
c) **Treaty of Amity and Cooperation in the Southeast Asia**
d) **Convention on Biological Diversity**

As for \((a)\) and \((b)\), the tribunal stated that the non-binding nature of these instruments and the lack of prescribed procedures do not preclude recourse to arbitration.\(^8^6\) As for \((c)\) and \((d)\), although these are considered as binding instruments, the lack of declaration in these instruments specifically barring recourse to arbitration makes for arbitration still a valid action for RP.\(^8^7\)

3. **China’s nine-dashed line was formally declared to be invalid**\(^8^8\). In the award, PRC’s obfuscation of its claims as encapsulated in its “nine-dashed line” and refusal to elucidate the same before the tribunal worked against it. This can be a warning for those claiming the said rights and refusing to explain the same before the tribunal and courts. It was determined in this case that PRC would not benefit from its obfuscation and hence, its claims based on the nine dashed line were declared to be invalid.

4. **The case declared that maritime entitlements are determined based on a feature’s natural state, without consideration of its state after human modification**\(^8^9\) (*i.e.* reclamation activities).

The effect of this declaration is two-fold. For suits by states in similar situations, they must be mindful of this fact if they are asking for a declaration on maritime entitlements of a particular feature. Practically speaking, this doctrine also prevents situations of states altering features and on the basis of features that have already been altered, claim vast maritime zones.

5. **The case stated that once a state becomes a party to the UNCLOS, historic rights contrary to UNCLOS are abandoned automatically**\(^9^0\).

\(^8^5\) See Award, para, 159 p. 60.
\(^8^6\) Ibid.
\(^8^7\) Ibid.
\(^8^8\) See Award, para, 238 (d) p. 100.
\(^8^9\) See Award, para. 511.
\(^9^0\) See Award, paras. 238 (d), 260 and 261.
Although not particularly applied in this case\textsuperscript{91}, its mention is very significant. This has a profound effect for states in similar situations and a good case for further study.

6. **In making declarations regarding maritime features, the arbitral tribunal relied on similar cases with features having same dimensions to rule on features in SCS case** (\textit{i.e. dimensions in Quitasueño} in \textit{Nicaragua vs. Colombia} case\textsuperscript{92} that were considered as “rock” were made a basis for declaration of “rocks” of maritime features in the instant case\textsuperscript{93}).

Finding validity in this practice is instructive for other states, who are in similar situations and contemplating of filing similar suits.

Please also note that the \textit{Nicaragua vs. Colombia} case was an ICJ case. The direct manner by which the arbitral tribunal applied the doctrine in this case decrease doubts on questions of propriety of direct application of ICJ cases in PCA rulings\textsuperscript{94}.

\textsuperscript{91} The doctrine was not applied in the case because the tribunal found that PRC never had historic rights prior to entering into UNCLOS. See Award, para. 270.

\textsuperscript{92} \textit{Territorial and Maritime Dispute (Nicaragua v. Colombia)}, Judgment, ICJ Reports 2012, p. 624.

\textsuperscript{93} See Award, para. 480.