

## Maritime Features in the Public Order of the Oceans: A Jurisprudential Reflection

Charles H. Norchi

Professor of Law and Director, Center for Oceans & Coastal Law,  
University of Maine School of Law, USA

### Abstract

The World Public Order of the Oceans is continually clarified through the practice of states and customary and conventional international law including an important text, the United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS serves to stabilize expectations and outcomes as understood by the parties and enshrines dispute settlement procedures as a formal system of claims. A regular object of oceans claims is land often claimed by more than one State—maritime features—which may be characterized as rocky outcroppings, reefs, low tide elevations or islands under UNCLOS. Owing to the dynamic nature of international law, including the international law of the sea, claims to these features can fluctuate between formal and informal arenas and prescriptions may not remain constant. Conflicting demands, expectations and a stream of outcomes spawned by international incidents can cause norms to be terminated. Thus in this highly decentralized and volatile milieu there is a premium on how one understands and uses law and legal theory, that is, jurisprudence.

### Keywords

Baselines, China, constitutive process, international law, jurisprudence, islands, Korea, law of the sea, maritime features, World Public Order of the Oceans, United Nations Convention on the Law of the Sea.

Our world public order of the oceans emerged during the time of early Asian empires and the later advent of Westphalian nation-states. In 1602 the Dutch East India Company seized a Portuguese galleon in retaliation for Portuguese resistance to Dutch trade in the East Indies. The lawyer and early Dutch publicist Hugo Grotius was commissioned to write a legal brief in the ensuing case. The brief, published in 1609 as *Mare Liberum*, would become the first serious philosophical work on the seas (Grotius 1916). In *Mare Liberum* Grotius set forth reasons why the “high seas,” which came to be defined as the open ocean existing beyond national control, must be open for trade and exploration. All property, he wrote, is grounded upon occupation—the sea then, like the air, cannot be appropriated: “Whatever cannot be seized or enclosed is not capable of being a subject of property ... meaning that the vagrant waters of the ocean are necessarily free” (Grotius 1916). The alternative view was that the seas and its features were subject to appropriation and occupation. The problem was access versus control and it persists today.

Land, described as coastlines and maritime features, has shaped our public order of the oceans in many ways. These maritime features—rocky outcroppings, reefs, low tide elevations and islands—are often claimed by more than one State. The claims are intense because the features may yield assets from the seas. There are such claims from the Arctic to the Caribbean, from the Persian Gulf to the Indian Ocean and from the Gulf of Maine to the Asian Seas raising critical issues of security, fisheries, the environment, energy, seabed mining and the international law of the sea. The outcomes of these disputes might affect the power and wealth of nations and they are most intense across Asian seas.

## “LAW” IN THE LAW OF THE SEA

Since the time of Grotius, elites have claimed control of the seas including maritime features in processes that generates law including the law of the sea. These are not merely formalized procedures put to an authority in a formalized setting. Claims can appear unformulated and the process within informal community settings. Claims are “...made upon participants in the world process to respond...to the extant or probable consequences of acts in [a] particular case[s]” (Reisman 1981). A claim is made whenever an event demands the attention of decision-makers. A claim demands attention and activates a response, which implements and even creates policy. Events cumulatively yield a flow of behavior to which perspectives of authority, as policy, are applied.

Because the international legal system is a highly decentralized milieu there is

a high premium on how one understands and uses law, that is, jurisprudence. “The comprehensiveness and realism with which an observer conceives of his major focus of attention—what he regards as law and how he locates it in its larger community context—are important because they determine how he conceives every detailed part of his study: his framing of problems, his choice of tools and procedures, and his recommendation of alternatives” (McDougal & Lasswell 1971). Many jurisprudential methods equate legal systems with legal rules. Rules rest on the surface of the legal system. Equally and often more important dimensions are found in other places. Other processes in cultures and communities possess legal prevalence and these must be appraised to understand law in context, this includes the context of the oceans.

The law is “...not a ‘something’ impelling obedience; it is a constantly evolving process of decision-making and the way it evolves will depend on the knowledge and insights of the decision-makers” (Dillard 1964). Certain decisions are made and enforced irrespective of community members’ preferences. These are decisions made through naked power. Other decisions are made from perspectives of authority. These latter decisions are made by the individuals expected to make them in accordance with the fundamental policies of the community. They are achieved through established procedures and through accepted structures. The individuals who make these decisions have sufficient bases in power to put them into operation. These are the authoritative decisions of the community and therefore the law (McDougal 1960). “Law is not a closed, mechanical system of decision. Certain interacting participants may reach a wide consensus on the policies that should govern them, but a dispute of social significance imports widely differing perspectives about appropriate goals and policies. The resolutions of such disputes will inevitably be based on subjective choices which can be disguised but not discarded” (Reisman 1971). This is especially true of contemporary maritime disputes across Asia.

International law, including the international law of the sea, amounts to stable patterns of authority and control that purport to limit the options of participants in a largely unorganized global arena. Expectations of authority intersect with the power process. Authoritative decision is inseparable from power, which is an indispensable feature of law. The process yields a public order of the world community and many constituent public orders. The constitutive process that yields our world public order of the oceans is a collective outcome of State practice, decisions accepted as authoritative including those emanating from formal tribunals, treaties and an array of national elite communications.

Formal agreements and other textual statements such as treaties and other codifications do not fully capture international law. Habitual behavior must also

be appraised. Behavior which in the beginning might be considered unlawful if repeated over time might become regarded as lawful. To make the distinction requires observing a flow of words and a flow of behavior including how a State behaves and how the world reacts. International law is not only found in treaties, agreements and other texts. As Diogenes long ago observed, “There is a written and an unwritten law. The one by which we regulate our constitutions in our cities is the written law; that which arises from custom is the unwritten law” (Diogenes 1925). Unwritten law is an important feature of community decision-making and potentially customary international law. And while a State may obligate itself to an agreement, its post-commitment practice may vary and generate a new norm. This is a law of the sea risk process in Asia.

Consider the critical text in the context of the public order of the oceans. The United Nations Convention on the Law of the Sea (UNCLOS) was ceremonially concluded and opened for State party signature and accession at Montego Bay, Jamaica on 10 December 1982. UNCLOS set the maritime zones, clarified State jurisdiction over zones and activities, preserved freedom of navigation, conservation of fish stocks, environmental protections, procedures for marine scientific research, hydrocarbon extraction, seabed mining and established institutions notably the International Tribunal for the Law of the Sea (ITLOS), the Commission on the Limits of the Continental Shelf (CLCS), The International Seabed Authority (ISA) and the Enterprise. The President of the Third United Nations Conference on the Law of the Sea was Ambassador Tommy T. B. Koh of Singapore who called the final document “A Constitution for the Oceans.”

However, the treaty is not a constitution but it is at the core of a constitutive process of the oceans. Constitutive decisions are those which indicate who are to be the established decision-makers; they result in the allocation of bases of power; create the structures of authority and community; and specify those procedures which must be followed for a legal or lawful decision. The constitutive process evolves via claims to the seas that are critical to the present and future public order of the oceans. “The constitutive process is authoritative power exercised to provide an institutional framework for decision to allocate indispensable functions; the particular decisions emerging from this process, which we call ‘public order’ decisions, may be specialized to the shaping and sharing of wealth, enlightenment, respect and all other values” (McDougal, Lasswell & Reisman 1981). The text must be placed in context and hence jurisprudence is critical. UNCLOS, its antecedents and its post- outcome effects are the flow of words. State practice, opinio juris, and elite reactions to critical incidents are the flow of behavior. To understand the law of the sea as it is obtained today requires understanding both.

## MARITIME FEATURES

We use the term maritime features to designate rocky outcroppings, reefs, low tide elevations and islands because a specific geographic term would connote a legal conclusion and many are claimed by more than one State. For example China, Vietnam, Taiwan, the Philippines, Malaysia, Indonesia, and Brunei each claim sovereignty over parts of the South China Sea, including features comprising the Parcel and Spratly Islands chains. The status of maritime features in international law have been clarified in State practice, codified in the 1958 Geneva Convention on the Law of the Sea, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and confirmed in key decisions of international tribunals.

In customary and codified international law of the sea, the most significant maritime feature is the island which is especially critical in Asian seas claims. UNCLOS defines Islands as naturally formed areas of land surrounded by water which are above water at high tide (UNCLOS art. 121). The maximum breadth of the maritime zones of islands is the same for land areas along the coast: territorial sea not to exceed 12 nautical miles, and Exclusive Economic Zone (EEZ) is not to exceed 200 nautical miles, and a continental shelf of 200 nautical miles. Rocks can be central to maritime and sovereign disputes. These are features which cannot sustain human habitation and have no economic life of their own. They are entitled only to a territorial sea. They are not entitled to an EEZ or continental shelf. Most States with features that might be juridical rocks have claimed EEZs notably Japan's claim to the Okinotorishima. Islands situated on atolls and those possessing fringing reefs for which the baseline is the seaward low-water line of the reef shown on official charts may have a territorial sea breadth as measured from the low-water line (UNCLOS art. 6).

Another feature is the low tide elevation (LTE). LTEs are naturally formed areas of land surrounded by and above water at low tide, but submerged at high tide (UNCLOS art. 13(1)). The low water line on a LTE within the territorial sea of the mainland or an island may be used as the baseline for measuring the breadth of the territorial sea. *i.e.*, it may expand the outer limit of the territorial sea. An LTE situated wholly outside the territorial sea of the mainland or islands has no territorial sea of its own (UNCLOS art. 13). LTEs cannot be appropriated (*Nicaragua v. Colombia*, ICJ 2012). Tribunals have not recognized sovereign claims over features below water at low tide and these are accorded no maritime zones. Artificial islands have emerged as controversial features in Asian seas particularly. Artificial islands, installations and structures do not possess the status of islands under UNCLOS Article 121 and their presence does not affect zonal delimitation (UNCLOS art. 60(8)).

Maritime boundary disputes typically comprise distinct claims: to marine space—the water—and claims to features—sovereign claims. The latter raise issues of territorial acquisition in the context of the seas and which potentially implicates access and control in the public order of the oceans. A feature of the constitutive process that shapes our world public order is competing claims to sovereignty. Thus in *Eastern Greenland* the Permanent Court of International Justice (PCIJ) noted, a “...circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger.” Thus international tribunals have articulated methods and rules for resolving sovereign and associated maritime disputes including long-standing principles pertaining to sovereignty over maritime features (Brownlie 2008).

In the 1931 dispute between Mexico and France over the sovereignty of *Clipperton Island*, located in the Pacific Ocean southwest of Acapulco, Mexico, the King of Italy as sole arbitrator stated the following:

It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking, and in ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected. But this step is, properly speaking, but a means of procedure to the taking of possession, and, therefore, is not identical with the latter. There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.

In the *Minquiers and Ecrehos Case (France/United Kingdom)* Judge Carneiro indicated the following criteria for determining sovereignty:

...the following rules which were laid down by the Permanent Court of Inter-

national Justice in the case concerning the *Legal Status of Eastern Greenland*:

- (a) The elements necessary to establish a valid title to sovereignty are “the intention and will to exercise such sovereignty and the manifestation of State activity.”
- (b) In many cases international jurisprudence “has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.”
- (c) It is the criterion of the Court in each individual case which decides whether sovereign rights have been displayed and exercised “to an extent sufficient to constitute a valid title to sovereignty.”

And the tribunal in the first *Eritrea/Yemen* Arbitration Award stated:

The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and size of its population, if any.

In cases where resolution of a dispute depends on legally significant facts that occurred, or a treaty concluded, centuries ago, the doctrine of *inter-temporal law* is applied: “in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed at that time, and not as they exist today” (Fitzmaurice 1953). And tribunals grapple with identifying the “critical date or dates.” The ICJ stated in *Nicaragua v. Colombia*:

The Court recalls that, in the context of a dispute related to sovereignty over land, such as the present one, the date upon which the dispute crystallized is of significance. Its significance lies in distinguishing between those acts *à titre de souverain* occurring prior to the date when the dispute crystallized, which should be taken into consideration for the purpose of establishing or ascertaining sovereignty, and those acts occurring after that date...which are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims.

Concerning the effective exercise of sovereignty the Tribunal in the case of Eritrea/Yemen, addressed what in international law are termed “*effectivités*.”

The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and the size of its population, if any.

The tribunal then turned to any analysis of the evidence, applying the following principles:

Evidence of intention to claim the Islands *à titre de souverain* is an essential element of the process of consolidation of title. That intention can be evidenced by showing a public claim of right or assertion of sovereignty to the Islands as well as legislative acts openly seeking to regulate activity on the Islands.

In *Nicaragua v. Colombia*, the ICJ articulated:

The Court recalls that acts and activities considered to be performed *à titre de souverain* are in particular, but not limited to, legislative acts or acts of administrative control, acts relating to the application and enforcement of criminal or civil law, acts regulating immigration, acts regulating fishing and other economic activities, naval patrols as well as search and rescue operations. It further recalls that “sovereignty over minor maritime features...may be established on the basis of a relatively modest display of State powers in terms of quality and quantity.” Finally, a significant element to be taken into account is the extent to which any acts *à titre de souverain* in relation to disputed islands have been carried out by another State with a competing claim to sovereignty.

Claimants often seek to rely on maps. What is the evidentiary value of a map? The tribunal in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case indicated:

Maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so



the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or constitute the real facts.

Further, the ICJ in its 2012 judgment in *Nicaragua v. Colombia* stated: “Moreover, according to the Court’s constant jurisprudence, maps generally have a limited scope as evidence of sovereign title.” Claims over maritime features can unfold in what are presumptively non-adjudicative arenas that may be construed as possessing legal valence. For example, in 2009 China and South Korea protested Japan’s claim to an extended continental shelf from Okinotorishima. China asserted:

Available scientific evidence data fully reveal that the rock of Oki-no-Tori, on its natural conditions, obviously cannot sustain human habitation or economic life of its own, and therefore shall have no economic zone or continental shelf (PRC *note verbale* 2009).

Korea responded that it:

has consistently held the view that Oki-no-Tori Shima, considered as a rock under Article 121, paragraph 3, of the Convention, is not entitled to any continental shelf... (Korea *note verbale* 2009).

On the heels of this disagreement China proposed that the 19th Meetings of States Parties to the UNCLOS consider:

the issue of claiming extended continental shelf with a rock as base point and its legal implication under Article 121 of the Convention, and to discuss how to strengthen the protection of the Area as the common heritage of mankind (SPLOS/196, May 22, 2009).

The issue was discussed at the meeting without resolution. During that debate the United States expressed the following view:

While this is an important issue, we do not believe it is an instance of an unresolved land or maritime dispute. We note that the Commission [on the

Limits of the Continental Shelf] has stated that it has no role on matters relating to the legal interpretation of Article 121 of the Convention. Given that, our view is that the Commission should proceed with its work on such a submission, while acknowledging in its recommendations that there is an unresolved question regarding the interpretation of Article 121. We do not take this position because we have an opinion on the substantive issue; we have not expressed an opinion on that matter. Rather, we believe it would be most efficient and cost-effective for the Commission to consider all the technical and scientific aspects of all parts of the submission, so that it does not have to revisit the submission at a later date (Digest of United States Practice 2009).

Thereafter China (China *note verbale* 2011) and Korea (Korea *note verbale* 2011) reiterated their positions while noting that the Chairman of the Commission on the Limits of the Continental Shelf (CLCS) had stated that it had no role in matters relating to the legal interpretation of Article 121 (CLCS Statement 2009) and the Commission's decision not to take action on the part of the recommendations prepared by the Sub commission in relation to the rock of Oki-no-Tori, until the Commission decides to do so. The Chinese note added:

...the above-mentioned statement and decision of the Commission are justifiable. As a body consisting of experts in the fields of geology, geophysics and hydrography, the Commission should avoid the situation in which its work influences the interpretation and application of relevant provisions of the Convention, including Article 121. The application of Article 121(3) of the Convention related to the extent of the International Seabed Area as the common heritage of mankind, related to the overall interests of the international community, and is an important legal issue of general nature. To claim continental shelf from the rock of Oki-no-Tori will seriously encroach upon the Area as the common heritage of mankind. If the Commission makes recommendations on the part of Japan's Submission in relation to the rock of Oki-no-Tori before its legal status has been made clear, and recognizes the claim of extended continental shelf measured from the rock of Oki-no-Tori, it would have an adverse impact on the maintenance of an equal and reasonable order for oceans.

## THE ASIAN SEAS CONTEXT

The context of Asian seas includes newly empowered participants, conflicting claims, demands to exploit resources, environmental risks, access and control of littoral waters, and new ideas about international law as applied to the oceans that are as Eastphalian inspired as are the European Westphalian ideas upon which the law of the sea was founded. The context also includes difficult history. In Asia “the past is never dead, it is not even past” (Faulkner 1951). Myths settle in the collective memory of a community. They are an accumulation of national experiences and events, as well as society’s efforts to revise and redefine those events and experiences. What is important for international law and geopolitics is that a collective memory can shape the ways by which a society responds to events.

The People’s Republic of China (PRC) is reshaping the Asian seas context and PRC claims have generated intense counter-claims. The PRC issued a statement setting forth the coordinates of straight baselines in the East China Sea on September 10, 2012 (PRC Baselines Statement 2012). The baseline coordinates enclose two groups of maritime features that are claimed by China, Japan, and Taiwan. They are known variously as the Senkaku (by Japan), Diaoyu (by China), Tiaoyutai (by Taiwan), or Pinnacle (by the United Kingdom) Islands. Japan protested the Chinese straight baseline claim (Japan Diplomatic Note 2012). Japan formally claimed the islands in 1895 and continues to administer the islands and did not draw straight baselines around these features when it promulgated its Territorial Sea Law (Limits in the Seas 1998).

The PRC asserted that the baselines were “in accordance with the ‘Law of the People’s Republic of China on Territorial Sea and Its Contiguous Zone’ of 25 February 1992.” Article 2 of that law claims Diaoyu Island (and associated islands) as part of China’s land territory. Article 3 of the same law provides that “the method of straight baselines composed of all the straight lines joining the adjacent basepoints shall be employed in drawing the baselines of the territorial sea of the People’s Republic of China” (PRC legislation 1992). The government of China stated that these baselines were “consistent with relevant provisions of the UN Convention on the Law of the Sea (“UNCLOS”)” (Le Yucheng Statement 2012). Subsequently the United States protested the Chinese baselines.

During May 2009 in response to a joint submission by Malaysia and Viet Nam to the Commission on the Limits of the Continental Shelf (CLCS) (CLCS Malaysia/Viet Nam joint submission 2009) China stated in a diplomatic note to the UN Secretary-General:

China has indisputable sovereignty over the islands in the South China Sea

and adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (PRC diplomatic note 2009).

In 2011 responding to a Philippines diplomatic note to the UN Secretary General claiming sovereignty over the Kalayan Island Group (KIG) the PRC issued a diplomatic note indicating:

China has indisputable sovereignty over the islands of the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof...

...under the relevant provisions of the 1982 *United Nations Convention on the Law of the Sea*, as well as the *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone* (1992) and the *Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China* (1998), China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf (China diplomatic note to UN Secretary-General 2011).

Claims to maritime features across Asian seas are complex and have intensified. While international tribunals—the International Court of Justice (ICJ), the International Tribunal Law of the Sea (ITLOS) and arbitral institutions—are critical for potentially resolving maritime claims, tribunal proceedings are one phase in the assertion of state competence over the authority and control of ocean zones and territory. The delimitation process begins with events, incidents and coastal state demands. The preferred outcome is a marine boundary that carries the expectation of authority of the world community. Thus every delimitation is a culmination of a complex process of authoritative decision whose outcomes implicate the power, wealth and well-being of coastal states.

And yet some claims are not fully settled, they are managed for the public order of the oceans and in the common interest of States. In *The Gulf of Maine* case the Special Agreement annexed to the Treaty submitting the boundary question to the Chamber of the ICJ requested the Chamber to decide '...in accordance with the principles and rules of international law...the course of the single maritime boundary that divides the continental shelf and fisheries zones of the United States and Canada' (*Gulf of Maine* case 1984). The parties fixed the starting point of the delimitation at 44° 11' 12" north, 67° 16' 46" west which are seaward of Machias Seal Island and North Rock. Hence *seaward* of Machias Seal Island, the

Chamber was asked to describe the course of the maritime boundary in terms of geodetic lines and to depict the course of the boundary on hydrographic charts. Thus the sovereignty over the island remains unresolved and managed in the greater common interest.

## A SOUTH CHINA SEA ARBITRATION

The South China Sea has long been an object of demands and claims communicated via diplomatic notes, official media statements, positioning of national symbols and personnel, warship deployments, fishing vessels and positioning of drilling platforms have formally and informally communicated South China Sea claims. The littorals of China, Brunei, Indonesia, Malaysia, the Philippines and Vietnam assert claims to this nearly 3.5 million square kilometer (1.4 million square miles) marine space that is so critical for maritime traffic and resources from fisheries to hydrocarbons. Yet no claim involved a tribunal constituted under widely accepted principles of international law until 22 January 2013 when the Philippines instituted arbitration proceedings against China “with respect to the dispute with China over the maritime jurisdiction of the Philippines in the West Philippine Sea.”

UNCLOS urges provisional agreement prior to seeking formal dispute settlement:

[p]ending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation (Government of the Philippines *note verbale* 2013).

In addition, the Convention requires States Parties to

fulfill in good faith the obligations assumed under this Convention and [to] exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right (Government of the Philippines *note verbale* 2013).

UNCLOS also enables State parties to submit disputes concerning interpretation or application of the Convention to specified means of dispute settlement: (i)

the International Tribunal for the Law of the Sea (ITLOS); (ii) The International Court of Justice; (iii) an arbitral tribunal constituted in accordance with UNCLOS Annex VII; or (iv) a special arbitral tribunal constituted in accordance with UNCLOS Annex VIII. If States have not selected a means of dispute settlement, or, if States have not chosen identical means of dispute settlement, the dispute is to be submitted to an Annex VII Arbitral Tribunal. The Philippines claim is pursuant to Annex VII Arbitral Tribunal and the first South China Sea claim in a formal arena—dispute settlement via UNCLOS-authorized bilateral arbitration.

For parties to UNCLOS, Article 286 provides that any dispute concerning the interpretation or application of the Convention shall, where no settlement has been reached..., be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under section 2, Compulsory Procedures Entailing Binding Decisions. There can be an exception to this provision pertaining to maritime boundary and sovereignty disputes. Article 298(1)(a)(i) permits a State, when signing, ratifying or acceding to the Convention or at any time thereafter to declare that it does not accept one or more of the procedures in section 2 with respect to relating to sea boundary delimitations. Article 298(1)(a)(i) further provides that “any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from” submission to conciliation under Annex V, section 2. As of August 2013, the following 26 States have exercised this right under article 298(1)(a): Angola, Argentina, Australia, Canada, Chile, China, Ecuador, Equatorial Guinea, France, Gabon, Ghana, Italy, Mexico, Montenegro, Nicaragua, Norway, Palau, Portugal, Republic of Korea, Russia, Slovenia, Spain, Thailand, Trinidad and Tobago, Tunisia and Ukraine (United Nations, *Multilateral Treaties Deposited* 2013).

The Philippines initiated arbitral proceedings against China under UNCLOS Annex VII to “clearly establish the sovereign rights and jurisdiction of the Philippines over its maritime entitlements in the West Philippine Sea” on January 22, 2013. Its diplomatic note to China informing of the initiation of these proceedings was “in furtherance of the friendly relations with China, mindful of its obligation under Article 79 of UNCLOS to seek a peaceful and durable resolution of the dispute in the West Philippine Sea by the means indicated in Article 33(1) of the Charter of the United Nations” (Philippine diplomatic note 2013). The Philippine Notification and Statement of Claim expressly disclaimed a determination of which Party has sovereignty of the islands claimed by both of them and delimitation of any maritime boundaries. Rather, the Philippines sought an Award that:

- (1) Declares that the Parties’ respective rights and obligations in regard to the

waters, seabed and maritime features of the South China Sea are governed by UNCLOS, and that China's claims based on its "nine dash line" are inconsistent with the Convention and therefore invalid;

- (2) Determines whether, under Article 121 of UNCLOS, certain of the maritime features claimed by both China and the Philippines are islands, low tide elevations or submerged banks, and whether they are capable of generating entitlement to maritime zones greater than 12 M; and
- (3) Enables the Philippines to exercise and enjoy the rights within and beyond its exclusive economic zone and continental shelf that are established in the Convention (Philippine Notification and Statement of Claim 2013).

The Chinese Ministry of Foreign Affairs on 26 April 2013 stated that the arbitration would involve territorial sovereignty claims pertaining to islands and reefs which place the matter beyond the application or interpretation of UNCLOS. Thus China's default of appearance at this writing is likely. Critically, "the absence of a State cannot be taken as an admission of the facts or the legal views of the applicant, or as showing that the absent party has no, or no convincing counter arguments to the applicant's case"...and hence there is "a sovereign 'right' not to appear" (Talman 2014). Thus China rejects arbitration for the following reasons: First, the dispute involves questions of territorial sovereignty over certain islands and reefs, Second, pursuant to ASEAN-China DOC 2002 the Philippines is bound by a commitment to resolve territorial and jurisdictional disputes with China through friendly negotiations, and Third, China alleges the Philippines *Note Verbale* and the Notification and Statement of Claims "contains serious errors in fact and law as well as false accusations against China." Hence the PRC's preliminary objections to the Philippines claim included lack of jurisdiction of the Arbitral Tribunal, Inadmissibility of the Claims and objections of a Preliminary Character such as indispensable third parties. China continues to refuse to accept The Philippine Notification and Statement of Claim, declining to participate. Five arbitrators were appointed.

On 29 October 2015 the Tribunal issued a unanimous Award on Jurisdiction and Admissibility. It treated the official Government of China Position Paper as constituting a plea concerning the Tribunal's jurisdiction. It held that the Philippines' Submissions reflect disputes between the two States concerning the interpretation or application of the Convention and that no other States would be indispensable to the proceedings.

The Tribunal concluded that it has jurisdiction with respect to the matters raised in seven of the Philippines' Submissions. It concluded that jurisdiction with respect to seven other Submissions by the Philippines must be considered in conjunction with the merits. The Tribunal requested the Philippines to clarify and narrow one Submission. Predicting how the Tribunal will decide is beyond the purpose and scope of this paper. However a practical jurisprudence compels appraising multiple paths to decision outcomes.

China may have valid objections to jurisdiction under UNCLOS Article 297 regarding fisheries and/or the exercise of sovereign rights and jurisdiction in its exclusive economic zone. Whether the Tribunal will assert jurisdiction to address China's claims to historic rights in the South China Sea would depend upon the Tribunal's appraisal of the character of China's claimed rights. Whether the Tribunal might have jurisdiction to address Chinese activities in the South China Sea may depend upon the Tribunal's decision on whether any of the maritime features claimed by China are islands capable of generating maritime zones overlapping those of the Philippines.

The Tribunal will likely address maritime zone entitlements to the following features: Scarborough Shoal, Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef, McKenan Reef, Hughes Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef. It will adhere to UNCLOS standards notably Article 121, determining whether these features might generate a territorial sea, EEZ, and a continental shelf. The Philippines did not request a ruling on questions of territorial sovereignty and the Tribunal has confirmed that such matters are beyond its jurisdiction.

Will the Tribunal's decision on the merits recognize that the small reefs and islands at issue are entitled to no or minimal maritime zones? Previous international cases minimized entitlements to isolated mid-ocean features thus reducing their zonal impact. For example in the 2009 *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* the International Court of Justice was presented with an opportunity to define and give meaning to the phrase in UNCLOS Article 121(3)—“[r]ocks which cannot sustain human habitation or economic life of their own.” The court declined to provide a definitive clarification in its opinion however by determining that Ukraine's tiny Serpents' Island should have no impact on the maritime boundary, the Court reconfirmed that small uninhabited islands will generally have limited or no impact on delimitations and that such features should not generate extended maritime zones (Van Dyke 2007). The court held that: “to count [Snake] Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of Geography.” The Tribunal in the Philippines/China Arbitration



would be hard pressed to side-step that conclusion.

If the Tribunal finds that a maritime feature claimed by China is an island within the meaning of UNCLOS Article 121 and that its EEZ or continental shelf overlaps with those generated by the Philippines would jurisdiction be thwarted? Would the Tribunal decline jurisdiction if it determines that China's activities in the South China Sea concern "military activities" or "law enforcement activities." The Tribunal's jurisdiction over certain claims may be affected by UNCLOS exception for military activities. And should the Tribunal find that China's claims to historic rights are permitted by the Convention within the scope of Article 298 of UNCLOS, jurisdiction would be imperiled.

The Tribunal will also consider whether China's island reclamation activities are consistent with its obligations to protect and preserve the marine environment under article 92 of UNCLOS. It may conclude that China should have conducted an environmental impact assessment of its activities. The decisional outcome will depend on the interpretation of UNCLOS provisions and the facts established during the proceedings on the merits. As of this writing a subsequent hearing is scheduled at the headquarters of the Permanent Court of Arbitration in the Peace Palace in The Hague. The point to underscore is that resort to arbitration is but one strategic arena where Asia seas claims may be advanced. Adjudication is but one of many modalities in securing the Public Order of the Oceans.

The process of State interactions that crystallize in formal arbitral claims can generate authoritative decisions that become accepted as international law. The calculus by which a State decides to assert a formal claim and the attendant choice of arena, is strategic. The benefits and costs of that choice will have been carefully considered as will the cost and benefit of a default of appearance by the other party. In the South China Sea, the opening strategic choices have been made and the arbitration has now been inserted into the constitutive process of the World Public Order of the Oceans.

## **AN AMERICAN POSITION ON ASIAN MARITIME FEATURES**

On August 3, 2012, the U.S. Department of State issued a press statement on the U.S. position on territorial and maritime disputes in the South China Sea, as follows:

As a Pacific nation and resident power, the United States has a national interest in the maintenance of peace and stability, respect for international law, freedom of navigation, and unimpeded lawful commerce in the South China

Sea. We do not take a position on competing territorial claims over land features and have no territorial ambitions in the South China Sea; however, we believe the nations of the region should work collaboratively and diplomatically to resolve disputes without coercion, without intimidation, without threats, and without the use of force.

We are concerned by the increase in tensions in the South China Sea and are monitoring the situation closely. Recent developments include an uptick in confrontational rhetoric, disagreements over resource exploitation, coercive economic actions, and the incidents around the Scarborough Reef, including the use of barriers to deny access. In particular, China's upgrading of the administrative level of Sansha City and establishment of a new military garrison there covering disputed areas of the South China Sea run counter to collaborative diplomatic efforts to resolve differences and risk further escalating tensions in the region.

The United States urges all parties to take steps to lower tensions in keeping with the spirit of the 1992 ASEAN Declaration on the South China Sea and the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea. We strongly support ASEAN's efforts to build consensus on a principles-based mechanism for managing and preventing disputes. We encourage ASEAN and China to make meaningful progress toward finalizing a comprehensive Code of Conduct in order to establish rules of the road and clear procedures for peacefully addressing disagreements. In this context, the United States endorses the recent ASEAN Six-Point Principles on the South China Sea.

We continue to urge all parties to clarify and pursue their territorial and maritime claims in accordance with international law, including the Law of the Sea Convention. We believe that claimants should explore every diplomatic or other peaceful avenue for resolution, including the use of arbitration or other international legal mechanisms as needed. We also encourage relevant parties to explore new cooperative arrangements for managing the responsible exploitation of resources in the South China Sea (US Department of State 2012).

## THE PUBLIC ORDER OF THE OCEANS: A COMMON INTEREST?

UNCLOS was intended to stabilize expectations, that is, to ensure a stream of prescribed outcomes as understood by the parties. The process of agreement flows from and is undertaken in, a factual content, and formalizes reciprocally beneficial commitment to collaborative behavior. The moment of formulation of a treaty between parties represents a comparatively high level of consensus that may later shift owing to performance or non-performance of original terms. This is a risk the world community faces in Asian Seas.

It is in the dynamic nature of international law, including the international law of the sea, that prescriptions do not remain constant. Conflicting demands, expectations and a stream of outcomes spawned by international incidents can cause norms to be terminated. This is why flows of behavior in the international system must be appraised against clarified world public order goals. Elite responses to claims and incidents can have a corroding effect upon prescriptions. At the very least, norms can erode over time. Daniel Bell wrote, “[T]he future is not an overarching leap into the distance; it begins in the present” (Bell 1967). Anyone seriously concerned with contemporary Asian seas events should ask about the present with a view to the future, “Who says what, in which channel to whom, with what effect?” (Lasswell 1964) The extent to which particular laws advance the common interest of the community, or discriminate in favor of a particular group in large measure depends on the distribution of power in the community. Asian sea actors seek to enhance power through a variety of means including the establishment of policy as law. A cautionary tale is that of Thrasymachus in Plato’s *Republic* who declared “I say that justice, or right, is simply what is in the interest of the stronger party” (Plato 338c).

When community expectation is such that a decision is authoritative, the decision-maker has license to create and maintain practices and institutions. Authority joined with control or power, can establish and maintain processes of authoritative decision which amount to public order (McDougal, Reisman & Willard 1985). A cumulative pattern of authority develops a logic of its own. That process is unfolding in Asian Seas today. Law is a “process of human beings making choices” (Reisman & Schreiber 1987). The laws of the community are decision outcomes consistent with community members’ expectations about what is right and effective. It is through that process that disputes over marine space and maritime features might be resolved in the greater common interest. The capacity to contribute to, and advance that outcome, will turn on how the observer or participant understands and uses law and legal theory that pertain to the oceans, that is, jurisprudence.

## References

- Brownlie, Ian (2008). *Principles of Public International Law*. London, UK: Oxford University Press.
- Bell, Daniel (1967). The year 2000—the trajectory of an idea. *Daedalus* 96(3), 639-51.
- Commission on the Limits of the Continental Shelf (2009, April 20) Statement by the chairman of the commission on the limits of the continental shelf on the progress of work in the commission. Retrieved from [http://www.un.org/Depts/los/clcs\\_new/commission\\_documents.htm](http://www.un.org/Depts/los/clcs_new/commission_documents.htm).
- Commission on the Limits of the Continental Shelf (2009, May 6). Joint submission to the CLCS by Malaysia and Viet Nam in the southern portion of the South China Sea. Retrieved from [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_mysvnm\\_33\\_2009.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm).
- Dillard, H. (1964). The policy-oriented approach to law. *Virginia Law Review* 40(4).
- Diogenes, Laertius (1925). *Lives of Eminent Philosophers*. New York, USA: Loeb Classic Library.
- Eritrea/Yemen Arbitration (1998) Retrieved from [http://untreaty.un.org/cod/riaa/cases/vol\\_XXII](http://untreaty.un.org/cod/riaa/cases/vol_XXII).
- Faulkner, William (1951) *Requiem for a Nun*. New York, USA: Knopf Doubleday.
- Fitzmaurice, Sir Gerald (1953). The law and procedure of the International Court of Justice. *British Yearbook of International Law* 30.
- Grotius, Hugo (1916). *The Freedom of the Seas*. New York, USA: Oxford University Press.
- International Court of Justice Report (1953). The Minquiers and Ecrehos Case (France v. United Kingdom). Retrieved from <http://www.icj-cij.org/docket/files/17/2023.pdf>.
- International Court of Justice Report (1984). Delimitation of the maritime boundary in the Gulf of Maine area, Judgment, p. 24. Retrieved from <http://www.icj-cij.org/docket/files/67/6369.pdf>.
- International Court of Justice Report (1986). Frontier dispute, Judgment, p. 554. Retrieved from <http://www.icj-cij.org/docket/files/69/6447.pdf>.
- International Court of Justice Report (2007). Territorial and maritime dispute in the Caribbean Sea (Nicaragua v. Honduras), Judgement.
- International Court of Justice Report (2009). Maritime delimitation in the Black Sea (Romania v. Ukraine), Judgment, p. 61. Retrieved from <http://www.icj-cij.org/docket/files/132/14987.pdf>.
- International Court of Justice Report (2012). Territorial and maritime dispute (Nicaragua v. Colombia), Judgement. Retrieved from <http://www.icj-cij.org/docket/files/124/17164.pdf>.
- Lasswell, Harold (1964). The structure and function of communication in society. Lyman Bryson. (Ed.), *The Communication of Ideas*. New York, USA: Knopf.
- McDougal, Myres S. & William T. Burke (1987). *The Public Order of the Oceans: A Contemporary International Law of the Sea*. New Haven, USA: Yale University Press.
- McDougal, Myres S. & Harold Lasswell. (1971) Criteria for a theory about law. *Southern California Law Review* 2, 362.
- McDougal, Myres S. & W. Michael Reisman (1981). The world constitutive process of authoritative decision. Myres S. McDougal & W. Michael Reisman (Eds.), *International Law Essays*. Mineola, USA: Foundation Press.
- McDougal, Myres S., W. Michael Reisman & Andrew Willard (1985). The world process of effective power: The global war system. Myres S. McDougal & W. Michael Reisman (Eds.), *Power and Policy in Quest of Law*. Dordrecht, Netherlands: Martinus Nijhoff Publishers.
- Office of the Legal Adviser United States Department of State (2009). *Digest of United States Practice in International Law 2009*. Elizabeth R. Wilcox (Ed.). London, UK: Oxford University

- Press. Retrieved from <http://www.state.gov/documents/organization/155452.pdf>.
- People's Republic of China (2009, May 7). Diplomatic note to the Un Secretary-General, Doc. CML/17/2009. Retrieved from [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf).
- People's Republic of China (2011, April 14). Diplomatic note to the Un Secretary-General, Doc. CML/8/2011. Retrieved from [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2011\\_re\\_phl\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf).
- People's Republic of China (2011, August 3). Note verbale to the UN Secretary-General, Doc. CML/59/2011. Retrieved from [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/jpn08/chn\\_3aug\\_11\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_3aug_11_e.pdf).
- People's Republic of China, Assistant Foreign Minister Le Yucheng (2012, September 14). Remarks at the China Institute of International Studies, Beijing Youth Federation and Xinhuanet Symposium on the issue of Diaoyu Dao [Diaoyutai]. Retrieved from <http://www.chinese-embassy.org.za/eng/zt/topic1/t971220.htm>.
- People's Republic of China Maritime Legislation. Retrieved from [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN\\_1992\\_Law.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf).
- People's Republic of China's baseline statement. Retrieved from <http://www.un.org/Depts/los/>.
- Permanent Court of Arbitration (2015, October 29). Award on jurisdiction and admissibility, Republic of Philippines v. The People's Republic of China, Case No. 2013-19. Retrieved from <http://www.pcacases.com/web/sendAttach/1506>.
- Permanent Court of International Justice (1933). *Legal Status of Eastern Greenland*. Leiden, Netherlands: A. W. Sijthoff's Publishing Company. Retrieved from [http://www.icj-cij.org/pcij/serie\\_AB/AB\\_48/01\\_Groenland\\_ordonnance\\_1932080.pdf](http://www.icj-cij.org/pcij/serie_AB/AB_48/01_Groenland_ordonnance_1932080.pdf).
- Philippine (2013, January 22). Diplomatic note to the Chinese Embassy in Manila Doc. 13-0211. Retrieved from <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos>.
- Philippine (2013, January 22). Notification and statement of claims, paras. 6 & 7. Retrieved from <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos>.
- Plato. *The Republic*, 338c.
- Reisman, W. Michael (1971). *Nullity and Revision, The Review and Enforcement of International Judgments and Awards*. New Haven, USA: Yale University Press.
- Reisman, W. Michael (1981). Private armies in a global war system: Prologue to decision. Myres S McDougal & W. Michael Reisman (Eds.), *International Law Essays*. Mineola, USA: Foundation Press.
- Reisman, W. Michael & Aaron Schreiber (1987). *Jurisprudence: Understanding and Shaping Law*. New Haven, USA: New Haven Press.
- Republic of Korea (2011, August 11). Note verbale to the UN Secretary-General. Retrieved from [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/jpn08/kor11aug11.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/kor11aug11.pdf).
- Roach, Ashley (2013). China's straight baseline claim: Senkaku (Diaoyu) Islands. *ASIL Insights* 17(7). Retrieved from <http://www.asil.org/pdfs/insights/insight130213.pdf>.
- Talmon, Stefan & Bing Bing Jia (Eds.) (2014). *The South China Sea Arbitration: A Chinese Perspective*. Oxford, UK: Hart Publishing.
- United Nations Office of Legal Affairs (1982). United Nations Convention on the Law of the Sea.
- United States Department of State Bureau of Oceans and International Environmental and Sci-

entific Affairs (1996, July 9). Straight baseline claim: China. *Limits in the Seas*, No. 117.

Retrieved from <http://www.state.gov/documents/organization/57692.pdf>.

United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs (1998, April 30). Straight baseline and territorial sea claims: Japan. *Limits in the Seas*, No. 120. Retrieved from <http://www.state.gov/documents/organization/57684.pdf>.

Van Dyke, Jon (2007). Legal issues related to sovereignty over Dokdo and its maritime boundary. *Ocean Development and International Law* 38, 157.



동북아역사재단  
NORTHEAST ASIAN HISTORY FOUNDATION