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## The Value and Viability of the South China Sea Arbitration Ruling: The U.S. Perspective 2016–2020

*Jonathan G. Odom*

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# The Value and Viability of the South China Sea Arbitration Ruling: The U.S. Perspective 2016–2020

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The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

## I. INTRODUCTION

On July 12, 2016, an international arbitral tribunal issued a landmark ruling addressing a number of international law issues in the South China Sea.<sup>1</sup> More than four years have passed since that ruling, and the South China Sea situation is unresolved. To phrase it less diplomatically: during this period, China and the Philippines, the States involved, have made minimal progress toward improving the situation, much less resolving it. Given these stagnant conditions, it should be asked: would Chinese and Philippine compliance with the ruling or adoption of the ruling, including its specific elements, by non-party States make this situation better?

The South China Sea situation is a complex security problem, which involves several interwoven dynamics. These include not only international law but also geopolitical power, economic competition, transnational security threats, food insecurity and frictional nationalism. International law alone is not a solution, but a “rules-based approach” can help frame many security challenges, manage the territorial and maritime disputes between the claimant States and ultimately resolve those disputes.<sup>2</sup> The South China Sea arbitration and the arbitral tribunal’s resulting award were a positive step in applying a rules-based approach to framing, managing and resolving some of the international disputes. To be sure, not every South China Sea legal issue involves the international law of the sea, and not every dispute between China and the Philippines was within the jurisdiction of the arbitral tribunal that issued the 2016 ruling. But if the two parties to the arbitration case fully complied with the tribunal’s ruling and other non-party States voluntarily accepted the tribunal’s findings and decisions, they could collectively eliminate some of the specific disputes between the States involved and improve the overall situation. Thus, the international community should reflect upon the value and viability of the arbitral tribunal’s ruling.

In assessing the arbitral tribunal ruling’s value and viability for a way ahead in the South China Sea, there can be benefits to viewing the situation

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1. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, PCA Case Repository, Award (Perm. Ct. Arb. 2016), <https://pcacases.com/web/sendAttach/2086>.

2. Jonathan G. Odom, *How a ‘Rules-Based Approach’ Could Improve the South China Sea Situation*, in PERSPECTIVES ON THE SOUTH CHINA SEA: DIPLOMATIC, LEGAL AND SECURITY DIMENSIONS OF THE DISPUTE 115 (Murray Hiebert, Phuong Nguyen & Greg Poling eds., 2014), [https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy\\_files/files/publication/140930\\_Hiebert\\_PerspectivesSouthChinaSea\\_Web.pdf](https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/140930_Hiebert_PerspectivesSouthChinaSea_Web.pdf).

and the arbitral decision from the current perspectives of individual States. This includes the States that were parties to the arbitration and those that were not and States that are claimants in the South China Sea disputes and ones that are not. The purpose of this article is to provide a more detailed review and analysis of the perspective of one non-claimant State—the United States—regarding the value and viability of the 2016 arbitration ruling.

This article will examine the U.S. perspective from several vantage points. First, it will take a step back and approach the ruling through several preliminary considerations. This will include providing an overview of the South China Sea arbitration and the tribunal's ruling and the timing of the ruling in relation to the presidential transition from President Barack Obama to President Donald Trump, which occurred around the time of the ruling. Second, it will seek to extract an implied U.S. perspective about the tribunal's ruling by examining the Trump administration's general approach to foreign policy, its policy regarding China and U.S.-China relations, and its policy on the South China Sea situation. Third, it will review the express U.S. perspective about the tribunal's ruling, as derived from official U.S. statements and actions during the four years since the tribunal issued its final award. Ultimately, this article will conclude that the United States has continuously invoked the tribunal's ruling—and particular elements of that ruling—as reflecting international law that could improve the South China Sea situation; however, it will also conclude that the United States faces several self-made credibility challenges in invoking the ruling's value and viability. In conclusion, this article will suggest several ways in which the United States could strengthen its position in promoting the tribunal's ruling as a positive way ahead for improving the South China Sea situation.

## II. PRELIMINARY CONSIDERATIONS

Before attempting to identify and assess the current U.S. perspective on the value and viability of the South China Sea arbitration ruling, one should consider several preliminary matters. These considerations include ensuring that every reader has a solid foundation on the origins of the arbitration, the actual parties involved and their respective postures towards the proceedings, the major legal issues considered in the arbitration and the significant elements of the tribunal's decisions. They also include recognizing the political environment in which the ruling was issued—specifically, the national political environments of individual States.

*A. Overview of the Arbitration and the Tribunal's Ruling*

In January 2013, the Philippines' initiation of the South China Sea arbitration against China raised a significant number of maritime law issues.<sup>3</sup> None of the Philippines' legal issues pertained to the competing territorial claims and sovereignty disputes between the two States regarding specific islands in the South China Sea. Instead, they focused on interpreting and applying provisions of the 1982 U.N. Convention on the Law of the Sea (UNCLOS),<sup>4</sup> a multilateral treaty to which both the Philippines and China are parties.<sup>5</sup>

From the initiation of the arbitration case and throughout the remainder of the proceedings, China refused to participate and questioned the tribunal's jurisdiction. Such jurisdictional determinations under UNCLOS, however, do not reside with the parties: "In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal."<sup>6</sup> The tribunal was constituted in accordance with UNCLOS<sup>7</sup> and composed of five experts in the field of international law of the sea—four of whom had a combined fifty-four years of judicial experience serving as members of the International Tribunal for the Law of the Sea.<sup>8</sup>

In October 2015, the arbitral tribunal issued a 159-page Award on Jurisdiction and Admissibility, which analyzed procedural issues and determined

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3. Albert del Rosario, Secretary of Foreign Affairs, Republic of the Philippines, Statement on the UNCLOS Arbitral Proceedings against China (Jan. 22, 2013), <https://www.officialgazette.gov.ph/2013/01/22/statement-the-secretary-of-foreign-affairs-on-the-unclos-arbitral-proceedings-against-china-january-22-2013/>.

4. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

5. The Philippines became a party to UNCLOS on May 8, 1984, China became a party on June 7, 1996. See *United Nations Convention on the Law of the Sea*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en) (last visited Jan. 6, 2021).

6. UNCLOS, *supra* note 4, art. 288(4).

7. *Id.* pt. XV, § 2, annex VII.

8. The five members of the arbitral tribunal in this case were Judge Thomas A. Mensah (president), Judge Jean-Pierre Cot, Judge Stanislaw Pawlak, Professor Alfred H. Soons, and Judge Rüdiger Wolfrum. Four had either previously served or were currently serving as elected members of the International Tribunal for the Law of the Sea for the number of years indicated as of the tribunals award: Judge Mensah, nine years; Judge Cot, fourteen years; Judge Wolfrum, twenty years; and Judge Pawlak, eleven years.

that the tribunal had jurisdiction over these matters as a matter of law.<sup>9</sup> After deciding it had jurisdiction, the tribunal devoted the next nine months to receiving pleadings and evidence presented by the Philippines, deriving likely arguments by China from public statements and documents issued by China's government, and convening a series of hearings for the parties to make oral arguments and answer the tribunal's questions.<sup>10</sup>

Nine months later, the arbitral tribunal issued a 501-page final award, which comprehensively considered, analyzed and decided a number of substantive legal issues and made many valuable findings of fact.<sup>11</sup> In total, the Philippines submitted fifteen discrete legal issues to the tribunal.<sup>12</sup> After analyzing each, the tribunal rendered sixty-five specific findings and declarations.<sup>13</sup> Many of these findings and decisions focused upon ways in which China had violated the Philippines' maritime rights under UNCLOS and had engaged in various activities that breached China's obligations as a party to UNCLOS. Of note, the tribunal's ruling analyzed and invalidated China's infamous "nine-dash line" claim, which encompasses more than 85 percent of the South China Sea.<sup>14</sup>

In its final award, the tribunal interpreted and analyzed numerous key provisions of UNCLOS and reached several legal conclusions. First, submerged features in the South China Sea are not entitled to any maritime entitlements (e.g., a territorial sea).<sup>15</sup> Second, low-tide elevations cannot be appropriated as land,<sup>16</sup> are not entitled to territorial seas of their own,<sup>17</sup> and can increase the breadth of the territorial sea of a nearby high-tide elevation only if they are located within the territorial sea of that high-tide elevation.<sup>18</sup> Third, a State cannot enhance through "human modification" the legal status

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9. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, PCA Case Repository, Jurisdiction and Admissibility, Award (Perm. Ct. Arb. 2015), <https://pcacases.com/web/sendAttach/2579>.

10. Copies of the Philippines' written pleadings and supporting evidence are catalogued on the Permanent Court of Arbitration's website. See *The South Sea Arbitration*, PCA, <https://pca-cpa.org/en/cases/7/> (follow Documents hyperlink) (last visited Jan. 6, 2021).

11. South China Sea Arbitration, *supra* note 1.

12. *Id.* ¶ 112.

13. *Id.* ¶ 203.

14. *Id.* ¶¶ 169–278.

15. *Id.* ¶¶ 309, 693–94.

16. *Id.* ¶ 309.

17. *Id.* ¶ 308.

18. *Id.* ¶¶ 309, 693–94.

or entitlements of a geographic feature beyond what that feature is naturally entitled.<sup>19</sup> Fourth, a non-archipelagic State may neither draw straight baselines around a South China Sea island group nor claim special status to the waters within the group.<sup>20</sup>

Applying these legal conclusions, the tribunal also undertook an exhaustive review of objective evidence about the natural attributes of eleven specific geographic features, which the Philippines had identified in its arbitration pleadings. This objective evidence included satellite imagery and archived nautical charts and sailing directions published by multiple navies that had sailed through the South China Sea for many years (i.e., those of China, France, Japan, the United Kingdom and the United States).<sup>21</sup> These archived charts and directions predated the South China Sea disputes and the filing of the arbitration case, so their veracity could be trusted. More specifically, they were intended to inform mariners of the accurate status of geographic features rather than serve as manufactured evidence to skew the legal status of those features for some future litigation. From this review of objective evidence about these eleven South China Sea features, the tribunal determined that six were “high-tide features”<sup>22</sup> and the other five were “low-tide elevations.”<sup>23</sup>

With regards to the six high-tide features, the arbitral tribunal interpreted and applied Article 121 of UNCLOS in determining their legal status.<sup>24</sup> The tribunal explained that each is either (a) a “rock” that is legally entitled to only a territorial sea or (b) a “fully entitled island” entitled to both a territorial sea and an exclusive economic zone (EEZ).<sup>25</sup> Thereafter, the tribunal further evaluated whether each of those six features is entitled to an EEZ, devoting approximately eighty-five of the award’s 501 pages to that question.<sup>26</sup> In interpreting and applying Article 121(3), the arbitral tribunal focused on

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19. *Id.* ¶¶ 305, 508.

20. *Id.* ¶¶ 571–76.

21. This evidence reviewed by the arbitral tribunal included nautical charts and sailing directions from the British Royal Navy, the Imperial Japanese Navy, the French Navy, the U.S. Navy, and the Chinese Navy. *Id.* ¶¶ 327–81.

22. The high-tide elevations included Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef, and Gaven Reef (North). *Id.* ¶ 382.

23. The low-tide elevations included Hughes Reef, Gaven Reef (South), Subi Reef, Mischief Reef, and Second Thomas Shoal. *Id.* ¶ 383.

24. *Id.* ¶¶ 554–570.

25. *Id.* ¶ 280.

26. *Id.* ¶¶ 385–648.

whether a particular high-tide elevation was capable of sustaining human life. The tribunal stated, “the fact that a feature is not currently inhabited does not prove that it is uninhabitable.”<sup>27</sup> But the tribunal immediately after that stated, “Nevertheless, historical evidence of human habitation and economic life in the past may be relevant for establishing a feature’s capacity.”<sup>28</sup> After examining the ordinary meaning of Article 121 in the context of its object and purpose, the tribunal concluded that the “capacity” of a particular island to sustain human habitation or an economic life of its own “must be assessed on a case-by-case basis.”<sup>29</sup> The tribunal recognized that some geographic features are clearly capable—or clearly incapable—of sustaining human habitation, while for other features the capability is less clear, the tribunal opining that “the most reliable evidence of the capacity of a feature will usually be the historical use to which it has been put.”<sup>30</sup> It also noted that “a purely official or military population, serviced from the outside, does not constitute evidence that a feature is capable of sustaining human habitation.”<sup>31</sup> Applying Article 121 to these six high-tide features, the arbitral tribunal determined that none of them was “capable of sustaining human habitation or economic life of their own” and, therefore, did not “generate entitlements to an exclusive economic zone or continental shelf.”<sup>32</sup>

The tribunal’s legal and factual analysis could provide several valuable functions for the claimant States to frame, manage and ultimately resolve the South China Sea disputes. First, given that China’s nine-dash line is one of

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27. *Id.* ¶ 483.

28. *Id.* ¶¶ 484, 489

The use in Article 121(3) of the term ‘habitation’ includes a qualitative element that is reflected particularly in the notions of settlement and residence that are inherent in that term. The mere presence of a small number of persons on a feature does not constitute permanent or habitual residence there and does not equate to habitation. Rather, the term habitation implies a non-transient presence of persons who have chosen to stay and reside on the feature in a settled manner. Human habitation would thus require all of the elements necessary to keep people alive on the feature, but would also require conditions sufficiently conducive to human life and livelihood for people to inhabit, rather than merely survive on, the feature.

29. *Id.* ¶ 546.

30. *Id.* ¶ 549.

31. *Id.* ¶ 550.

32. *Id.* ¶ 1203(b)(7).

the largest obstacles to the claimant-States finding a zone of possible agreement<sup>33</sup> among their respective bargaining positions and making progress in resolving the disputes, the potential value of the tribunal invalidating this unprecedented and unequalled claim cannot be overstated. Second, each of the tribunal's legal conclusions about which geographic features have maritime entitlements and which do not could, if applied universally among all the South China Sea claimants, significantly reduce the actual geographic areas of dispute. Third, the tribunal's review of specific features with objective evidence provides a useful methodology for claimant States in their international negotiations or other tribunals in future cases to effectively assess the legal and factual status of specific South China Sea features. In short, not only were the tribunal's legal determinations rooted in a thorough application of UNCLOS, but they have a practical value in offering a possible way ahead for addressing several of the unresolved issues in the South China Sea.

Immediately after the arbitral tribunal issued its final award, however, China announced it would ignore the ruling.<sup>34</sup> Speaking about the ruling, one of China's senior diplomats publicly declared: "It is just a piece of waste paper. You may just chuck it in the bin, leave it on the shelf, or put it in archives."<sup>35</sup> But, as expressly provided in UNCLOS, "[a]ny decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with all the parties to the dispute."<sup>36</sup> Therefore, as a matter of international law, both the Philippines and China are legally obligated to comply with the tribunal's ruling; otherwise, they are in violation of their treaty obligations under UNCLOS.

### B. *Capturing a National Perspective in a Presidential Transition*

When assessing the viability of the tribunal's ruling, at least one political reality must be acknowledged at the outset. More specifically, the ruling's viability has been impacted by an extraneous but nonetheless important factor:

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33. ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES* (2011).

34. Ministry of Foreign Affairs, People's Republic of China, Statement on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines (July 12, 2016), [https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/t1379492.htm](https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm).

35. Vice Foreign Minister Liu Zhenmin, People's Republic of China, Press Conference (July 13, 2013), [https://www.fmprc.gov.cn/nanhai/eng/wjbxw\\_1/t1381980.htm](https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1381980.htm) [hereinafter Zhenmin Press Conference].

36. UNCLOS, *supra* note 4, art. 296(1).

its timing, 2016, the year in which the tribunal issued its final ruling, was also an election year for several States' national political leadership. Most notably, it was a presidential election year for the Philippines.<sup>37</sup> Similarly, it was also a watershed election year in the United States, in which a president of one major political party was succeeded by a president of the other major political party. But unlike the Philippines, where the new president had assumed office before the arbitration ruling was issued, resulting in a unitary view of the actual ruling, the official U.S. "perspective" of the arbitration ruling was viewed twice: initially by President Obama and his outgoing administration and subsequently by President Trump and his incoming administration.

When the tribunal issued its final award in July 2016, President Obama and his administration still had seven remaining months of his second four-year term. During a media interview three months before the tribunal issuing

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37. In the Philippines, political power transitioned from Benigno Aquino III, a president who had been described as the "chief architect" of the arbitration. Nikko Dizon, *Aquino on Arbitral Court Ruling: 'A Victory for All,'* INQUIRER.NET (July 13, 2016), <https://globalnation.inquirer.net/141043/aquino-on-arbitral-court-ruling-a-victory-for-all>. President Aquino was succeeded by Rodrigo Duterte from a rival political party. About the arbitration case, Duterte had announced during the presidential election campaign, "I have a similar position as China's. I don't believe in solving the conflict through an international tribunal." Emily Rauhala, *Rise of Philippines' Duterte Stirs Uncertainty in the South China Sea,* WASHINGTON POST (May 10, 2016), [https://www.washingtonpost.com/world/rise-of-philippines-duterte-stirs-up-uncertainty-in-the-south-china-sea/2016/05/10/d75102e2-1621-11e6-971a-dad9ab18869\\_story.html](https://www.washingtonpost.com/world/rise-of-philippines-duterte-stirs-up-uncertainty-in-the-south-china-sea/2016/05/10/d75102e2-1621-11e6-971a-dad9ab18869_story.html). The new Philippines' president was inaugurated in June 2016, the tribunal issued its ruling only two weeks later. Duterte raised questions about his commitment to upholding the ruling, publicly stating, "In the play of politics now, I will set aside the arbitration ruling." Leila B. Salaverria, *Duterte to Set Aside UN Tribunal Ruling on Maritime Dispute,* INQUIRER.NET (Dec. 18, 2016), <https://globalnation.inquirer.net/150837/duterte-set-aside-un-tribunal-ruling-maritime-dispute>. But after these comments drew both international and domestic criticism, his foreign affairs secretary quickly clarified that the Philippines government "reaffirms its respect for and firm adherence to this milestone ruling and will be guided by its parameters when tackling the issue of maritime claims in the South China Sea" and the new president "will not deviate from the four corners of the ruling." Yuji Vincent Gonzales, *Yasay: Duterte Won't Deviate from South China Sea Ruling,* INQUIRER.NET (Dec. 19, 2016), <https://globalnation.inquirer.net/150895/yasay-duterte-wont-deviate-south-china-sea-ruling>. The following four years of the Duterte administration have seen a hot-cold relationship with Beijing, with some observers continuing to question the extent to which the Philippines is committed to the tribunal's ruling. Renato Cruz De Castro, *After Four Years, the Philippines Acknowledges the 2016 Arbitral Tribunal Award,* ASIA MARITIME TRANSPARENCY INITIATIVE (Jul. 22, 2020), <https://amti.csis.org/after-four-years-the-philippines-acknowledges-the-2016-arbitral-tribunal-award/>.

its final award, Obama personally forecast his hope for how the arbitration could provide a way ahead for the South China Sea situation:

What we are trying to uphold is a basic notion of international rules, norms and order. And, so, for example, if the Filipinos appeal to international tribunals under the treaty of [the] law of the sea, which China and the Philippines are both signatories too, that's a way to resolve a dispute, not by sending out a gunship or threatening fishermen.<sup>38</sup>

Clearly, he was aware of and mindful of the eventual ruling by the tribunal and its significance.

On the day of the ruling's issuance, the Obama administration made three official statements about the ruling. First, State Department spokesperson John Kirby issued a statement that emphasized the United States "strongly supports the rule of law" and "supports efforts to resolve territorial and maritime disputes in the South China Sea peacefully, including through arbitration."<sup>39</sup> It also highlighted that the arbitral tribunal's decision was "final and legally binding on both China and the Philippines" and expressed "hope and expectation that both parties will comply with their obligations."<sup>40</sup> About the substantive elements of the tribunal's ruling, this initial statement withheld judgment: "We are still studying the decision and have no comment on the merits of the case, but some important principles have been clear from the beginning of this case and are worth restating."<sup>41</sup>

Second, Daniel Kritenbrink, who was serving as President Obama's senior advisor on Asia policy, also addressed the tribunal's ruling in public remarks on the day of its issuance. Coincidentally, Mr. Kritenbrink happened to be speaking at an annual conference hosted by a Washington-based think tank focused on the South China Sea. At the outset of this speech, he refer-

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38. Interview by Charlie Rose with President Barack Obama, in Hanover, Germany (Apr. 26, 2016), THE AMERICAN PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/interview-with-charlie-rose-hanover-germany>.

39. John Kirby, Spokesperson, U.S. Department of State, Press Statement on Philippines-China Arbitration (July 12, 2016), [https://kr.usembassy.gov/p\\_gov\\_071216/](https://kr.usembassy.gov/p_gov_071216/).

40. *Id.*

41. *Id.*

enced the State Department's press statement, describing it as "represent[ing] the United States' position on the arbitral ruling."<sup>42</sup> Then, he recited the full statement to the conference audience. In concluding his remarks about the ruling, Mr. Kritenbrink acknowledged, "We will need to study the precise implications of today's ruling."<sup>43</sup> He devoted the remainder of his conference speech to U.S. policy on the South China Sea and the greater Asia-Pacific region.

Third, an unidentified "Senior State Department Official" provided a "background brief" about the arbitral tribunal's ruling to the news media via teleconference. In this official's opening comment, he or she highlighted the following four "key elements" of the ruling:

[F]irst, the invalidation of the nine-dash line claim; secondly, the determination that the features in the Spratly Islands and the Scarborough Reef are entitled to no more than 12 nautical miles by way of maritime space; that the construction of artificial islands by China and the conduct of Chinese fishing fleets violated the rights of the Philippines; and that the large-scale reclamation and constructing these military outposts in the Spratlys damage the environment.<sup>44</sup>

But the official also acknowledged that the tribunal's ruling was "immensely complex."<sup>45</sup> Therefore, he or she stated, "[E]veryone—all the parties and certainly the United States—need time to digest it and make an assessment of the implications of the ruling."<sup>46</sup> Lastly, the official forecast that the ruling "does create an important diplomatic opportunity" and "opens the door to some very practical and potentially productive discussions among the various claimants in the South China Sea."<sup>47</sup> For the remainder of this background briefing, the official answered questions posed by the news media.

Of note, this background briefer discussed the elements of the ruling that found none of the geographic features analyzed by the tribunal to be

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42. Daniel J. Kritenbrink, Senior Director for Asian Affairs, National Security Council, Remarks at the Sixth Annual Center for Strategic & International Studies South China Sea Conference (July 12, 2016), <https://www.youtube.com/watch?v=HIWEzu10tZA>.

43. *Id.*

44. Senior State Department Official, Background Briefing on South China Sea Arbitration (July 12, 2016), <https://2009-2017.state.gov/r/pa/prs/ps/2016/07/259976.htm>.

45. *Id.*

46. *Id.*

47. *Id.*

islands entitled to a 200 nautical mile EEZ. The briefer stated, “But there are plenty of other features outside of the Spratlys which do generate an EEZ.”<sup>48</sup> Similarly, the briefer later stated, “But there are islands in the South China Sea—just not in the Spratlys—that are presumed to be islands and presumed therefore to generate 200 nautical—or at least generate an EEZ.”<sup>49</sup> Such statements were not contrary to the actual ruling; however, they did appear to acknowledge the ruling’s limited scope—namely, that the tribunal did not address the legal status of every geographic feature located in the South China Sea.

After the Obama administration made these immediate statements on the day of the tribunal’s ruling, there is a limited public record of the extent to which President Obama and senior officials within his administration referenced the ruling in speeches and diplomatic talks during the remaining seven months he was in office. A database search of public statements by President Obama reveals that he appears to have publicly made only one subsequent comment about the ruling. In September 2016, he invoked it when addressing the leaders of the ASEAN States:

With respect to maritime issues, we’ll continue to work to ensure that disputes are resolved peacefully, including in the South China Sea. The landmark arbitration ruling in July, which is binding, helped clarify maritime rights in the region. I recognize this raises tensions, but I also look forward to discussing how we can constructively move forward together to lower tensions and promote diplomacy and regional stability.<sup>50</sup>

On at least one occasion, the Obama administration invoked the ruling. Less than one month before President Obama left office, the State Department delivered a diplomatic note to China concerning its maritime claims in the South China Sea. This note referred to “three papers [circulated by China] regarding its claims in the South China Sea” following the tribunal’s ruling on July 12.<sup>51</sup> The note then responded to substantive elements of those three Chinese documents. Many of these points were consistent with

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48. *Id.*

49. *Id.*

50. President Barack Obama, Remarks at the U.S.-ASEAN Meeting, Vientiane, Laos, (Sept. 8, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/08/remarks-president-obama-us-asean-meeting>.

51. Diplomatic Note to China, 2016 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW ch. 12, §A(2)(b), at 520–21, <https://www.state.gov/wp-content/uploads/2019/05/2016-Digest-United-States.pdf>.

decisions reflected in the tribunal's ruling. But at no point did the diplomatic note expressly refer to the South China Sea arbitration or the tribunal's ruling. Beyond the September 2016 remarks by President Obama and the December 2016 diplomatic note, the public record is unclear whether the Obama administration invoked the tribunal ruling in meetings with government officials of China, the Philippines or any other States. But if the quiet public record mirrors a quiet private record, it could have reflected a deliberate and calculated decision to create strategic decision space for the claimant-States to assess the ruling on their own and a hope that those States would choose to implement elements of the ruling.

Seven months after the tribunal issued its ruling, President Obama transitioned power to his successor in January 2017. Thus, President Trump governed only in a geopolitical world where the arbitration ruling already existed. Hence, it could be somewhat difficult to assess the extent to which the arbitration ruling influenced Trump administration policy. It might be that the ruling was baked into the metaphorical cake of the administration's foreign policy, including, but not limited to, its South China Sea policy. As President Trump's four-year term in office has now concluded, there is ample public record of the administration's foreign policy, including its strategic documents, official statements, and executive actions to identify and assess the U.S. perspective on the value and viability of the tribunal's ruling.

### III. THE IMPLIED U.S. PERSPECTIVE ON THE TRIBUNAL'S RULING

Further complicating any effort to assess the tribunal ruling's influence on the United States is the unavailability or nonexistence of presidential-level statements about the ruling during the Trump administration. As mentioned above, President Obama had expressly addressed the importance of the South China Sea arbitration on at least two occasions. In contrast, President Trump made no known public reference to the arbitration ruling. This includes no mention of the arbitration or the tribunal's ruling in either his official statements<sup>52</sup> or tweets.<sup>53</sup> But if the aphorism "absence of evidence is

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52. A search of President Trump's speeches, statements and documents conducted online of The American Presidency Project, <https://www.presidency.ucsb.edu/>, produced negative results (last search conducted on Jan. 6, 2021).

53. A search of President Trump's tweets conducted online of Trump Twitter Archive, <http://www.trumptwitterarchive.com/archive>, produced negative results (last search conducted on Jan. 6, 2021).

not evidence of absence”<sup>54</sup> is true, then what might be informational sources from which one could glean the U.S. perspective on the arbitration ruling under the Trump administration?

As a practical matter, one should consider several lenses. They include the Trump administration’s general approach to foreign policy, its strategic view of China, its desired end-state in the South China Sea, its public statements specifically about the ruling and its operational actions to effectuate U.S. policy and the ruling. Each of those lenses is examined below.

#### A. U.S. Approach to Foreign Policy

First, consider President Trump’s general philosophy and approach to U.S. foreign policy. Relative to prior presidential administrations, including the Obama administration, President Trump and his administration were more skeptical of the United States joining multilateral treaties and subjecting itself to third-party mechanisms for resolving international disputes. There is plenty of evidence to demonstrate this skepticism.

In particular, President Trump moved away from several significant multilateral agreements, which had been visible hallmarks of his predecessor’s approach to international relations. For example, three days after being inaugurated, President Trump issued a memorandum directing the United States to withdraw from the Trans-Pacific Partnership Agreement negotiations.<sup>55</sup> President Trump later stated during his first official visit to the Asia-Pacific region, “What we will no longer do is enter into large agreements that tie our hands, surrender our sovereignty and make meaningful enforcement practically impossible.”<sup>56</sup> Instead of entering multilateral trade agreements, the Trump administration emphasized that the United States would focus

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54. Made popular by astronomer Carl Sagan, this aphorism is subject to debate as to its actual originator. See *Absence of Evidence Is Not Evidence of Absence*, QUOTE INVESTIGATOR, <https://quoteinvestigator.com/2019/09/17/absence/> (last visited Jan. 6, 2021).

55. Memorandum from President Donald J. Trump to the United States Trade Representative Regarding Withdrawal of the United States from the Trans-Pacific Negotiations and Agreement (Jan. 23, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific-partnership-negotiations-agreement/>.

56. President Donald Trump, Remarks at APEC CEO Summit, Da Nang, Vietnam, (Nov. 10, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-apec-ceo-summit-da-nang-vietnam/> [hereinafter APEC CEO Summit Remarks].

on negotiating and concluding “bilateral” ones.<sup>57</sup> Five months into his presidency, President Trump also announced the U.S. withdrawal from the Paris Climate Accord. He described this agreement as “the latest example of Washington entering into an agreement that disadvantages the United States to the exclusive benefit of other countries.”<sup>58</sup>

Five days after President Trump’s inauguration, the text of a draft executive order for the new administration entitled, “Moratorium on New Multilateral Treaties”<sup>59</sup> was made public. It expressed concern that “there has been a proliferation of multilateral treaties that purport to regulate activities that are domestic in nature.”<sup>60</sup> To address this concern, this order would have created a “high-level” treaty review committee, composed of the Secretary of State, the Secretary of Defense, the President’s National Security Advisor, the Counsel to the President and several other high-ranking officials of the Executive Branch. This committee’s ordered duties and functions would be to assess “any new treaties – other than treaties that are clearly appropriate matters of international concern.”<sup>61</sup> The order would have also imposed a “moratorium on new treaties (other than those involving natural security, extradition and international trade), except on the Treaty Review Committee’s review and recommendation.” This committee would also have been tasked to “[r]eview all multilateral treaties that have been negotiated and are awaiting the President’s signature and recommend to the President whether he should sign any such treaty.”<sup>62</sup> While there is no subsequent public record to indicate President Trump ever issued this executive order,<sup>63</sup> the

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57. WHITE HOUSE, NATIONAL SECURITY STRATEGY (2017), <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>; see also APEC CEO Summit Remarks, *supra* note 56 (“I will make bilateral trade agreements with any Indo-Pacific nation that wants to be our partner and that will abide by the principles of fair and reciprocal trade.”).

58. President Donald Trump, Statement on the Paris Climate Accord (June 1, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/>.

59. *Explanatory Statement: Moratorium on New Treaties*, <https://perma.cc/8NKK-T6L5> (last visited on Jan. 6, 2021).

60. *Id.* at 1

61. *Id.*

62. *Id.* at 2.

63. A search of all executive orders issued by President Trump, conducted online of databases maintained by the National Archives, <https://www.federalregister.gov/presidential-documents/executive-orders>, produced negative results (last search conducted on Jan. 6, 2021).

fact it was proposed demonstrates the Trump administration's philosophical skepticism of multilateral treaties.

Additionally, President Trump and his administration were concerned about other countries using international courts in their disputes with the United States and skeptical of those courts handling of the disputes. For example, in October 2018, the Trump administration announced that the United States was terminating the 1955 Treaty of Amity with Iran.<sup>64</sup> At the time, Secretary of State Pompeo stated that the decision to terminate the treaty was in response to Iran bringing "a meritless case in the International Court of Justice alleging violations of the Treaty of Amity."<sup>65</sup> Secretary Pompeo further stated that Iran was "attempting to interfere with the sovereign rights of the United States to take lawful actions necessary to protect our national security."<sup>66</sup> Lastly, he characterized Iran as "abusing the ICJ [International Court of Justice] for political and propaganda purposes and their case, as you can see from the decision, lacked merit."<sup>67</sup>

On that same day in October 2018, the Trump administration announced that the United States was withdrawing from the Optional Protocol and Dispute Resolution to the Vienna Convention on Diplomatic Relations.<sup>68</sup> Serving as President Trump's National Security Advisor at the time, Ambassador John Bolton announced the decision to withdraw was in response to Palestine bringing a case against the United States in the International Court of Justice for its decision to move the U.S. Embassy from Tel Aviv to Jerusalem.<sup>69</sup> Speaking about the decisions to terminate the Iran treaty and withdraw from the Optional Protocol, Ambassador Bolton stated, "we will commence a review of all international agreements that may still expose the United States to purported binding jurisdiction dispute resolution in the

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64. Treaty of Amity, Economic Relations and Consular Rights, Iran-U.S., Aug. 15, 1955, 284 U.N.T.S. 93.

65. Michael R. Pompeo, U.S. Secretary of State, Remarks to the Media (Oct. 3, 2018), <https://www.state.gov/remarks-to-the-media-3/>.

66. *Id.*

67. *Id.*

68. Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, 23 U.S.T. 3374, 500 U.N.T.S. 241.

69. Sarah Sanders, Press Secretary; Linda McMahon, Small Business Administrator; & John Bolton, National Security Advisor, Press Briefing (Oct. 3, 2018), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-small-business-administrator-linda-mcmahon-national-security-advisor-100318/> [hereinafter Bolton Press Briefing].

International Court of Justice.”<sup>70</sup> He further declared, “The United States will not sit idly by as baseless, politicized claims are brought against us.”<sup>71</sup> When questioned by reporters about these two decisions, he shared candidly:

Look, this is really — has less to do with Iran and the Palestinians than with the continued consistent policy of the United States to reject the jurisdiction of the International Court of Justice, which we think is politicized and ineffective. It relates, obviously, in part, to our views on the International Criminal Court and to the nature of so-called purported international courts to be able to bind the United States. . . . It’s closing doors that shouldn’t be opened to politicized abuse, which is what we’ve consistently seen in the ICJ.<sup>72</sup>

Thus, in explaining these two specific decisions to terminate U.S. treaty obligations, the Trump administration identified the philosophical underpinning of those decisions.

Regarding the viability of other existing third-party mechanisms for resolving international disputes under another treaty to which the United States is a party, the Trump administration was also highly critical of the World Trade Organization’s (WTO) dispute settlement bodies. In March 2019, the Office of the U.S. Trade Representative issued its annual report to Congress, which complained, “The WTO’s dispute settlement system, particularly at the Appellate Body level, has strayed extensively from original understandings, substantially eroding the political sustainability of the current system.”<sup>73</sup> Consequently, the report declared, “We will not allow the WTO Appellate Body and dispute settlement system to force the United States into a straitjacket of obligations to which we never agreed.”<sup>74</sup> Likewise, in January 2020, the Deputy U.S. Trade Representative and ambassador to the WTO stated publicly at a ministerial meeting in Davos, Switzerland:

With respect to dispute settlement, the United States has repeatedly articulated our longstanding concerns with the functioning of the Appellate Body. Let me be clear: the Appellate Body is not a court and its members

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70. *Id.*

71. *Id.*

72. *Id.*

73. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2019 TRADE POLICY AGENDA AND 2018 ANNUAL REPORT 102 (2019), [https://ustr.gov/sites/default/files/2019\\_Trade\\_Policy\\_Agenda\\_and\\_2018\\_Annual\\_Report.pdf](https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf).

74. *Id.* at 27.

are not judges. Its role is a very limited one—to review the legal findings of panels to correct for egregious errors. The Appellate Body must not engage in fact-finding and its rulings do not constitute binding precedent absent undefined “cogent reasons.” The Appellate Body must not issue advisory opinions unrelated to resolving a dispute and it may not add to or diminish the rights and obligations of WTO members. The Appellate Body must decide appeals within a 90-day deadline, as mandated by the DSU [Dispute Settlement Understanding] and it has no right to appoint its own members. The Appellate Body was meant to be a component of the dispute settlement system, not its centerpiece.<sup>75</sup>

Given these concerns, the Trump administration opposed the reappointment of members WTO Appellate Body as their terms expired, which resulted in reducing the number of members below that necessary for a quorum, thereby tactically preventing the body from taking actions in pending and new cases.<sup>76</sup>

Lastly, the Department of State during Trump’s presidency never published a treaty priority list. Customarily, the treaty priority list has been a tool that previous presidents and their administrations utilized to communicate on which treaties they wanted the Senate to focus its attention when providing its constitutional advice and consent.<sup>77</sup> As the Legal Adviser to the Department of State in the previous presidential administration explained in a speech delivered three months before leaving office:

It’s also important for the executive branch and Senate to prioritize work on treaties. For the executive branch’s part, this requires giving early and consistent attention to treaties and how they fit into a broader policy agenda. This can be done in part through of the “treaty priority list” that

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75. Dennis Shea, U.S. Deputy Trade Representative and Ambassador to the World Trade Organization, Statement at the Davos Informal WTO Ministerial Gathering (Jan. 24, 2020), <https://geneva.usmission.gov/2020/01/27/statement-by-ambassador-shea-at-davos-informal-wto-ministerial-gathering/>.

76. BRANDON J. MURRILL, CONG. RESEARCH SERVICE, LSB10385, THE WTO’S APPELLATE BODY LOSES ITS QUORUM: IS THIS THE BEGINNING OF THE END FOR THE “RULES-BASED TRADING SYSTEM”? (2019), <https://crsreports.congress.gov/product/pdf/LSB/LSB10385>.

77. U.S. CONST. art. II, § 2, cl. 2.

the State Department usually transmits to the Congress at the beginning of a new Congress.<sup>78</sup>

Of note, the three presidential administrations immediately preceding the Trump administration (i.e., Clinton, Bush, and Obama) issued treaty priority lists that included UNCLOS. But over President Trump's four years in office, his administration did not submit a treaty priority list to the Senate.<sup>79</sup> The non-issuance of such a prioritized list raises reasonable questions whether any pending treaty was a "priority" for action for the United States under his administration.

Given all of these concerns expressed and demonstrated by the Trump administration, one might wonder what this means for the U.S. perspective of the *South China Sea* arbitration ruling. The Trump administration demonstrated a preference for negotiating and concluding bilateral agreements. It was also extremely skeptical of joining multilateral treaties and UNCLOS is famously known as the multilateral "Constitution for the Oceans."<sup>80</sup> Moreover, unlike his three immediate predecessors, President Trump did not make it a policy priority for the United States to accede to UNCLOS. Additionally, his administration's views on the International Court of Justice<sup>81</sup> may have extended to all international dispute resolution mechanisms. Each of these data points raises potential questions about the extent to which the U.S. perspective under the Trump administration assessed the value and viability of the tribunal's ruling in the South China Sea arbitration. Moreover,

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78. Brian J. Egan, U.S. Department of State Legal Adviser, Remarks at Yale-Duke Foreign Relations Law Roundtable: The Future of International Agreements (Oct. 15, 2016), <https://2009-2017.state.gov/s/1/releases/remarks/263221.htm>.

79. See Curtis Bradley, Oona Hathaway & Jack Goldsmith, *The Death of Article II Treaties?*, LAWFARE (Dec. 13, 2018), <https://www.lawfareblog.com/death-article-ii-treaties>. Additionally, a Google search for any references to "treaty priority list" subsequent to January 20, 2017 (i.e., the date of President Trump's inauguration) produced negative results (last search conducted on Jan. 6, 2021).

80. Tommy T.B. Koh, Ambassador-at-Large, Ministry of Foreign Affairs, Singapore, Remarks to the Final Session of the Third U.N. Conference on the Law of the Sea: A Constitution for the Oceans (Dec. 11, 1982), [https://www.un.org/Depts/los/convention\\_agreements/texts/koh\\_english.pdf](https://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf).

81. See *supra* text accompanying notes 69–72.

it complicated any effort by the U.S. government to criticize China for not complying with the tribunal's ruling.<sup>82</sup>

### B. U.S. Policy on China

Next, consider President Trump's foreign policy on China, including, but not limited to, his administration's policy on U.S.-China relations. Relative to the Obama administration, the Trump administration was arguably more realistic in assessing and more direct in describing the significance of China's international behavior.

The Trump administration openly emphasized the nature of the relationship between the United States and China as competition. President Obama sought early on to cultivate and maintain a positive relationship with China, but eventually began to recognize China's posture in the international arena was changing in a way that was impacting U.S. interests. In his first *National Security Strategy*, he declared, "[The United States] will continue to pursue a positive, constructive and comprehensive relationship with China."<sup>83</sup> In his second *National Security Strategy*, the Obama administration had refined the envisioned nature of the U.S.-China relationship to be a "constructive" one.<sup>84</sup> While seeking cooperation when possible, President Obama recognized that the United States and China were competing in some international situations and some elements of their bilateral relationship: "While there will be competition, we reject the inevitability of confrontation. At the same

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82. See John B. Bellinger III, *The Trump Administration's Approach to International Law and Courts: Are We Seeing a Turn for the Worse?*, 51 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 7, 20–21 (2019)

A [U.S.] withdrawal from the two Iran cases [before the International Court of Justice] might be popular with some critics of international courts, but it would further damage the reputation of the United States as a country committed to international law. It would also make it virtually impossible for the United States to criticize China, or any other country, that refuses to appear before an international tribunal.

During the George W. Bush administration, Bellinger served as Legal Advisor to the National Security Council and as Legal Adviser to the U.S. Department of State.

83. WHITE HOUSE, NATIONAL SECURITY STRATEGY 43 (2010), [https://obama.whitehouse.archives.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](https://obama.whitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf) [hereinafter 2010 NATIONAL SECURITY STRATEGY].

84. WHITE HOUSE, NATIONAL SECURITY STRATEGY 24 (2015), [https://obama.whitehouse.archives.gov/sites/default/files/docs/2015\\_national\\_security\\_strategy\\_2.pdf](https://obama.whitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf) [hereinafter 2015 NATIONAL SECURITY STRATEGY].

time, we will manage competition from a position of strength while insisting that China uphold international rules and norms on issues ranging from maritime security to trade and human rights.”<sup>85</sup> Yet, the Obama administration apparently sought to downplay the competition element, particularly in the security dimension. For example, three months before President Obama concluded his second term; the White House reportedly directed the Pentagon to avoid the word “competition” when describing the relationship between the United States and China.<sup>86</sup>

Less than one year into office, President Trump issued his one and only *National Security Strategy*, which perceived the U.S.-China relationship in a significantly different way. This *Strategy* did not merely use the word “competition” to describe the U.S. relationship with China, but it notably elevated “great power competition”<sup>87</sup> with China to the top of the U.S. list of security concerns.

The Trump administration also candidly described the ways in which China’s international behavior challenged the existing international rules-based order. Perhaps given his education and background as an attorney, President Obama strategically emphasized the importance of preserving an international order based upon rules. His first *National Security Strategy* declared, “As [the United States] did after World War II, we must pursue a rules-based international system that can advance our own interests by serving mutual interests.”<sup>88</sup> Similarly, his second *National Security Strategy* “affirm[ed] America’s leadership role within a rules-based international order that works best through empowered citizens, responsible States and effective regional and international organizations.”<sup>89</sup> It also recognized that “our rules-based system is now competing against alternative, less-open models,”<sup>90</sup> without identifying who were the actual proponents of those alternative systems. Yet, occasionally he did discuss China’s behavior in relation to

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85. *Id.*

86. David B. Larter, *White House Tells Pentagon to Quit Talking about “Competition” with China*, NAVYTIMES (Sept. 26, 2016), <https://www.navytimes.com/news/your-navy/2016/09/26/white-house-tells-the-pentagon-to-quit-talking-about-competition-with-china/>.

87. WHITE HOUSE, NATIONAL SECURITY STRATEGY 27 (2017), <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> [hereinafter 2017 NATIONAL SECURITY STRATEGY].

88. 2010 NATIONAL SECURITY STRATEGY, *supra* note 83, at 1.

89. 2015 NATIONAL SECURITY STRATEGY, *supra* note 84, at 1.

90. *Id.* at 15.

the rules-based international order, albeit with an exhortatory tone. For example, at the 2011 APEC Summit, President Obama stated, “[W]hat I’ve said since I first came into office and what we’ve exhibited in terms of our interactions with the Chinese, is we want you to play by the rules.”<sup>91</sup>

Like Trump’s approach to describing the competitive nature of the U.S.-China relationship, President Trump also highlighted how China deliberately sought to undermine the international order, including the rules component of that order. Specifically, Trump’s *National Security Strategy* assessed that China seeks to “deny America access” and “change the international order in [its] favor.”<sup>92</sup> In general, the *Strategy* declared it is “vital to U.S. prosperity and security” that “international institutions” that establish the “rules” for how States “interact with each other” will “uphold the rules that keep these common domains open and free.”<sup>93</sup> Additionally, it recognized that States in the Asia-Pacific region were “calling for sustained U.S. leadership in a collective response that upholds a regional order respectful of sovereignty and independence.”<sup>94</sup> More recently, Trump’s White House published the *United States Strategic Approach to the People’s Republic of China* in May 2020, which also identified China’s efforts to undermine those international rules. Specifically, it observed: “The [Chinese Communist Party (CCP)] has chosen instead to exploit the free and open rules-based order and attempt to reshape the international system in its favor. Beijing openly acknowledges that it seeks to transform the international order to align with CCP interests and ideology.”<sup>95</sup> In response, the White House declared, “[T]he United States does not and will not accommodate Beijing’s actions that weaken a free, open and rules-based international order.”<sup>96</sup>

A noteworthy example of the Trump administration’s more direct approach to criticizing China’s international behavior that challenged the existing rules-based international order was how it highlighted China’s efforts to restrict the maritime freedom of other States, including the United States.

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91. President Barack Obama, Remarks at the APEC CEO Business Summit, Honolulu, Hawaii (Nov. 12, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/12/remarks-president-obama-apec-ceo-business-summit-qa>.

92. 2017 NATIONAL SECURITY STRATEGY, *supra* note 87, at 27.

93. *Id.* at 40.

94. *Id.*

95. WHITE HOUSE, UNITED STATES STRATEGIC APPROACH TO THE PEOPLE’S REPUBLIC OF CHINA 1 (2020), <https://www.whitehouse.gov/wp-content/uploads/2020/05/U.S.-Strategic-Approach-to-The-Peoples-Republic-of-China-Report-5.24v1.pdf>.

96. *Id.* at 8.

When discussing U.S. interests in the Asia-Pacific region generally, the Obama administration began messaging in public diplomacy that the United States will “fly, sail and operate wherever international law allows.”<sup>97</sup> Often, senior administration officials employed this message without expressly linking it to China,<sup>98</sup> even though many listeners and readers might have assumed that this universally-phrased message was about China. The Trump administration, however, arguably took it to the next level. Senior officials consistently echoed the substance of the “fly, sail and operate wherever international law allows” message.<sup>99</sup> But additionally, those officials linked this

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97. The first known public usage of the “fly, sail and operate wherever international law allows” is believed to be by Ash Carter, in which he said,

[T]he United States will continue to protect freedom of navigation and overflight—principles that have ensured security and prosperity in this region for decades. There should be no mistake: the United States will fly, sail and operate wherever international law allows, as U.S. forces do all over the world.

Ash Carter, U.S. Secretary of Defense, Address at the IISS Shangri-La Dialogue: A Regional Security Architecture Where Everyone Rises (May 30, 2015), <https://www.defense.gov/Newsroom/Speeches/Speech/Article/606676/iiss-shangri-la-dialogue-a-regional-security-architecture-where-everyone-rises/>; *see also* U.S. DEPARTMENT OF DEFENSE, ASIA-PACIFIC MARITIME SECURITY STRATEGY preface (2015), [https://dod.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P\\_Maritime\\_Security\\_Strategy-08142015-1300-FINALFORMAT.PDF](https://dod.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P_Maritime_Security_Strategy-08142015-1300-FINALFORMAT.PDF) (“As it does around the world, the Department will continue to fly, sail and operate wherever international law allows, in support of these goals and in order to preserve the peace and security the Asia-Pacific region has enjoyed for the past 70 years.”).

98. *See, e.g.*, President Barack Obama, Remarks at the U.S.-ASEAN Press Conference, (Feb. 16, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/02/16/remarks-president-obama-us-asean-press-conference> (“Freedom of navigation must be upheld and lawful commerce should not be impeded. I reiterated that the United States will continue to fly, sail and operate wherever international law allows and we will support the right of all countries to do the same.”); *see also* Ash Carter, U.S. Secretary of Defense, Remarks at the Shangri-La Dialogue, Singapore (June 5, 2016), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/791472/remarks-by-secretary-carter-and-qa-at-the-shangri-la-dialogue-singapore/> (“As I affirmed here last year and America’s Freedom of Navigation Operations in the South China Sea have demonstrated, the United States will continue to fly, sail and operate wherever international law allows, so that everyone in the region can do the same.”).

99. *See, e.g.*, James Mattis, U.S. Secretary of Defense, Remarks at the Shangri-La Dialogue (June 3, 2017), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1201780/remarks-by-secretary-mattis-at-shangri-la-dialogue/> [hereinafter Mattis, Re-

message directly to China and concerns about China's international behavior. This included linkages during public speeches about the Trump administration's policy regarding China,<sup>100</sup> remarks during press briefings about

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marks at the Shangri-La Dialogue] ("We will continue to fly, sail and operate wherever international law allows and demonstrate resolve through operational presence in the South China Sea and beyond."); *see also* James Mattis, U.S. Secretary of Defense, Remarks at the Plenary Session of the 2018 Shangri-La Dialogue (June 2, 2018), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1538599/remarks-by-secretary-mattis-at-plenary-session-of-the-2018-shangri-la-dialogue/> [hereinafter Mattis, Remarks at the Plenary Session of the 2018 Shangri-La Dialogue]

We will continue to fly, sail and operate wherever international law allows and demonstrate resolve through operational presence in the South China Sea and beyond. Our operations throughout the region are an expression of our willingness to defend both our interests and the freedoms enshrined in international law.

Mark T. Esper, U.S. Secretary of Defense, Remarks at the Diplomatic Academy of Vietnam, Hanoi, Vietnam (Nov. 20, 2019), <https://vn.usembassy.gov/secretary-of-defense-mark-t-esper-remarks-at-diplomatic-academy-of-vietnam/>

We will not accept attempts to assert unlawful maritime claims at the expense of law-abiding nations. The United States military will continue to fly, sail and operate wherever international law allows and we will encourage other nations to affirm their rights in the same manner. Freedom of Navigation Operations remain central to our demonstration of leadership in upholding the rules-based order.

100. *See, e.g.*, Vice-President Mike Pence, Remarks on the Administration's Policy Toward China, The Hudson Institute (Oct. 4, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-administrations-policy-toward-china/>

China's aggression was on display this week, when a Chinese naval vessel came within 45 yards of the USS Decatur as it conducted freedom-of-navigation operations in the South China Sea, forcing our ship to quickly maneuver to avoid collision. Despite such reckless harassment, the United States Navy will continue to fly, sail and operate wherever international law allows and our national interests demand. We will not be intimidated and we will not stand down.

*See also* Vice-President Mike Pence, Remarks at the Fredric V. Malek Memorial Lecture, (Oct. 24, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-frederic-v-malek-memorial-lecture/>

And to make it clear to Beijing that no nation has a right to claim the maritime commons as territorial seas, the United States, in the last year, has increased the tempo and scope of our freedom of navigation operations and strengthened our military presence across the Indo-Pacific.

China's military development,<sup>101</sup> and in private meetings between senior U.S. officials and their Chinese counterparts.<sup>102</sup>

Admittedly, none of these discussions about China's international behavior expressly mentions the arbitration ruling. But they do highlight the U.S. perspective under the Trump administration on the "great power competition" between the United States and China, in which senior U.S. officials characterized the United States as seeking to "uphold" the rules-based international order and China as attempting to "reshape" and "transform" that order. If the authority of the South China Sea arbitral tribunal to issue legally-binding rulings that interpret and apply UNCLOS is an element of that rules-based international order, then an argument could be made that the Trump administration implicitly endorsed what that tribunal's ruling represents for the rules-based international order as it pertains to China's excessive maritime claims in the South China Sea and its attempts to restrict the maritime rights and freedom of other countries.

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101. *See, e.g.*, Randall Schriver, Assistant Secretary of Defense for Indo-Pacific Security Affairs, Press Briefing on the 2019 Report on Military and Security Developments in China (May 3, 2019), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1837011/assistant-secretary-of-defense-for-indo-pacific-security-affairs-schriver-press/>

I don't know what steps China will take beyond what they've already done. I think those steps at militarizing the outposts are designed with a certain aim. And they seek to operationalize an illegal expansive sovereignty claim; basically everything inside the Nine-Dash Line, or the entire South China Sea. So what we'd do about it is, we fly, sail and operate where international law allows, we're increasingly joined by other countries, to make sure that no one country can change international law and international norms, that that water remains international water; in other words, making that investment that the Chinese have made as insignificant as possible, particularly where their core goal is aimed at.

102. *See, e.g.*, James Mattis, U.S. Secretary of Defense, Remarks at Press Availability, (Nov. 9, 2018), <https://www.state.gov/press-availability-with-secretary-of-defense-james-mattis-chinese-politburo-member-yang-jiechi-and-chinese-state-councilor-and-defense-minister-general-wei-fenghe/> ("And we made clear [to Chinese leaders] that the United States will continue to fly, sail and operate wherever international law allows.").

*C. U.S. Policy on the South China Sea Situation*

Last, consider President Trump's policy on the South China Sea situation. Prior to President Trump entering office, the Bush,<sup>103</sup> Clinton,<sup>104</sup> and Obama<sup>105</sup> administrations had collectively developed and refined several

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103. Jonathan G. Odom, *A China in the Bull Shop?, Comparing the Rhetoric of a Rising China with the Reality of the International Law of the Sea*, 17 OCEAN AND COASTAL LAW JOURNAL 201 (2012), <https://digitalcommons.maine.edu/cgi/viewcontent.cgi?article=1051&context=oclj> (Undersecretary of State Robert Zoellick summarizing the George H. W. Bush administration's views on the South China Sea as follows: the United States would not make judgments on the merits of the claims, wanted freedom of navigation to be preserved, and supported a peaceful resolution of disputes).

104. *See, e.g.*, Christine Shelly, Spokesperson, U.S. Department of State, Press Briefing, (May 10, 1995), *quoted in* MICHAEL MEDEVITT, *THE SOUTH CHINA SEA: ASSESSING U.S. POLICY AND OPTIONS FOR THE FUTURE* 1 (2014), [https://www.cna.org/cna\\_files/pdf/iop-2014-u-009109.pdf](https://www.cna.org/cna_files/pdf/iop-2014-u-009109.pdf) [hereinafter Shelly Press Briefing]

The United States is concerned that a pattern of unilateral actions and reactions in the South China Sea has increased tensions in that region. The United States strongly opposes the use or threat of force to resolve competing claims and urges all claimants to exercise restraint and to avoid destabilizing actions. The United States has an abiding interest in the maintenance of peace and stability in the South China Sea. The United States calls upon claimants to intensify diplomatic efforts which address issues related to competing claims, taking into account the interests of all parties and which contribute to peace and prosperity in the region. The United States is willing to assist in any way that claimants deem helpful. The United States reaffirms its welcome of the 1992 ASEAN Declaration on the South China Sea. Maintaining freedom of navigation is a fundamental interest of the United States. Unhindered navigation by all ships and aircraft in the South China Sea is essential for the peace and prosperity of the entire Asia-Pacific region, including the United States. The United States takes no position on the legal merits of the competing claims to sovereignty over the various islands, reefs, atolls and cays in the South China Sea. The United States would, however, view with serious concern any maritime claim, or restriction on maritime activity, in the South China Sea that was not consistent with international law, including the 1982 United Nations Convention on the Law of the Sea.

105. *See, e.g.*, Hillary Clinton, U.S. Secretary of State, Remarks at Press Availability, National Convention Center, Hanoi, Vietnam (July 23, 2010), <https://2009-2017.state.gov/secretary/20092013clinton/rm/2010/07/145095.htm>

The United States, like every nation, has a national interest in freedom of navigation, open access to Asia's maritime commons and respect for international law in the South China Sea. We share these interests not only with ASEAN members or ASEAN Regional Forum participants, but with other maritime nations and the broader international community. The United States supports a collaborative diplomatic process by all claimants for resolving the various territorial disputes without coercion. We oppose the use or threat of force by any claimant. While the United States does not take sides on the competing territorial disputes

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over land features in the South China Sea, we believe claimants should pursue their territorial claims and accompanying rights to maritime space in accordance with the UN convention on the law of the sea. Consistent with customary international law, legitimate claims to maritime space in the South China Sea should be derived solely from legitimate claims to land features. The U.S. supports the 2002 ASEAN-China declaration on the conduct of parties in the South China Sea. We encourage the parties to reach agreement on a full code of conduct. The U.S. is prepared to facilitate initiatives and confidence building measures consistent with the declaration. Because it is in the interest of all claimants and the broader international community for unimpeded commerce to proceed under lawful conditions. Respect for the interests of the international community and responsible efforts to address these unresolved claims and help create the conditions for resolution of the disputes and a lowering of regional tensions.

*See also* John Kerry, U.S. Secretary of State, Remarks on U.S.-China Relations at John Hopkins School of Advanced International Studies, Washington, DC (Nov. 4, 2014), <https://2009-2017.state.gov/secretary/remarks/2014/11/233705.htm> [hereinafter Kerry Statement]

The United States is not a claimant and we do not take a position on the various territorial claims of others. But we take a strong position on how those claims are pursued and how those disputes are going to be resolved. So, we are deeply concerned about mounting tension in the South China Sea and we consistently urge all the parties to pursue claims in accordance with international law, to exercise self-restraint, to peacefully resolve disputes and to make rapid, meaningful progress to complete a code of conduct that will help reduce the potential for conflict in the years to come. And the United States will work, without getting involved in the merits of the claim, on helping that process to be effectuated, because doing so brings greater stability, brings more opportunity for cooperation in other areas.

*See also* John Kerry, U.S. Secretary of State, Remarks with Chinese Foreign Minister Wang Yi, Washington, DC, Feb. 23, 2016, <https://2009-2017.state.gov/secretary/remarks/2016/02/253164.htm>

We also talked today about the importance of reducing tensions and maintaining the space necessary for diplomatic solutions to the competing claims in the South China Sea. As I said in our meeting, we believe that it is important for a diplomatic solution, for a solution to occur which follows the rule of law that brings the countries to the table for a negotiated resolution not for unilateral actions. We want to halt the expansion and the militarization of occupied features. We think everybody benefits by true demilitarization, non-militarization. We also urge people to clarify the territorial and maritime claims in accordance with international law and to commit to peacefully resolve and manage disputes, including through the use of such international mechanisms as authentic bilateral or multilateral negotiations or arbitration. I also reiterated the commitment of the United States of America to freedom of navigation and over-flight, something which China says it does not stand in the way of; it agrees that there should be peaceful freedom of navigation. I stressed that any enforcement by any party of maritime claims by deploying their own aircraft over disputed areas are not compatible with the freedoms of navigation and of skies of access to flight operations.

basic tenets of U.S. policy in the South China Sea region. These consistently included efforts to protect several U.S. national interests: (1) maintaining regional stability, (2) upholding respect for international law, (3) preserving maritime freedom and (4) promoting peaceful resolution of disputes.

A review of official statements by President Trump and senior Trump administration officials shows relative consistency with these elements of longstanding U.S. policy for the South China Sea. For example, during President Trump's first year in office, he concluded a series of joint statements with his counterparts from several East Asian States, including Malaysia,<sup>106</sup>

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106. Joint Statement for Enhancing the Comprehensive Partnership between the United States of America and Malaysia (Sept. 13, 2017), <https://www.whitehouse.gov/briefings-statements/joint-statement-enhancing-comprehensive-partnership-united-states-america-malaysia/>

Prime Minister Najib and President Trump discussed matters relating to the South China Sea and emphasized the importance of ensuring, maintaining and safeguarding peace and stability, maritime security, freedom of navigation and over-flight and other lawful uses of the seas. The two leaders underscored the importance of upholding and adhering to the rules-based maritime order. They called upon all disputing parties to implement their international legal obligations in good faith and to avoid the threat or use of force, intimidation, or coercion. They further called on all disputing parties to exercise self-restraint in the conduct of activities and refrain from action that erodes trust and confidence and escalates tension, including the militarization of outposts. The two leaders reaffirmed that all maritime claims must be based on and resolved in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea.

the Philippines,<sup>107</sup> Vietnam,<sup>108</sup> Japan<sup>109</sup> and Singapore.<sup>110</sup> Each of these statements contained these fundamental elements of U.S. policy for the South

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107. Joint Statement between the United States of America and the Republic of the Philippines (Nov. 13, 2017), <https://www.whitehouse.gov/briefings-statements/joint-statement-united-states-america-republic-philippines/>

Both sides reiterated their commitment to uphold their principles including the freedom of navigation and overflight and the exercise of self-restraint. They stressed the importance of peacefully resolving disputes in the South China Sea, in accordance with international law, as reflected in the Law of the Sea Convention. They further underscored the need to continue pursuing confidence-building measures to increase mutual trust and confidence and to refrain from actions that would escalate tensions, including militarization.

108. Joint Statement between the United States of America and the Socialist Republic of Vietnam (Nov. 12, 2017), <https://www.whitehouse.gov/briefings-statements/joint-statement-united-states-america-republic-philippines/>

The two leaders underscored the strategic importance to the international community of free and open access to the South China Sea, the importance of unimpeded lawful commerce, the need to respect freedom of navigation and over-flight and other lawful uses of the sea. The two sides reiterated the stance on the South China Sea in the previous United States-Vietnam and United States-ASEAN joint statements, including their call on parties to refrain from escalatory actions, the militarization of disputed features and unlawful restrictions on freedom of the seas. They reaffirmed their shared commitment to the peaceful settlement of disputes in accordance with international law, including full respect for legal and diplomatic processes. They called for the full and effective implementation of the Declaration on the Conduct of Parties in the South China Sea (DOC) and an early conclusion to an effective, legally binding Code of Conduct for the South China Sea (COC). They further called for all South China Sea claimants to clarify and comport their maritime claims in accordance with the international law of the sea as reflected in the 1982 United Nations Convention on the Law of the Sea and to implement their international legal obligations in good faith in managing or resolving these disputes.

109. Joint Statement from President Donald J. Trump and Prime Minister Shinzo Abe (Feb. 10, 2017), <https://www.whitehouse.gov/briefings-statements/joint-statement-president-donald-j-trump-prime-minister-shinzo-abe/>

The two leaders underscored the importance of maintaining a maritime order based on international law, including freedom of navigation and overflight and other lawful uses of the sea. The United States and Japan oppose any attempt to assert maritime claims through the use of intimidation, coercion or force. The United States and Japan also call on countries concerned to avoid actions that would escalate tensions in the South China Sea, including the militarization of outposts and to act in accordance with international law.

110. Joint Statement by the United States of America and the Republic of Singapore, Oct. 24, 2017, <https://www.whitehouse.gov/briefings-statements/joint-statement-united-states-america-republic-singapore/>

China Sea. Similarly, at the 2017 APEC Summit, during Trump's first visit to the Asia-Pacific region, he emphasized that his regional vision for the Indo-Pacific included "uphold[ing] principles that have benefitted all of us, like respect for the rule of law, individual rights and freedom of navigation and overflight, including open shipping lanes."<sup>111</sup>

Beyond that, President Trump appears to have gone one step further than prior presidents in terms of offering direct assistance to manage and resolve the South China Sea disputes. For example, under the Clinton administration, the State Department spokesperson stated, "The United States is willing to assist in any way that claimants deem helpful," without publicly clarifying any specific ways for the United States to assist.<sup>112</sup> Elaborating on ways the United States could assist, the U.S. secretary of state in the first term of Obama's presidency declared that the United States is "prepared to facilitate initiatives and confidence building measures," while her successor in the second Obama term said that the United States "will work" on "helping" the process of finalizing a code of conduct in the South China Sea.<sup>113</sup> But President Trump appears to be the first president to have offered to play a direct role in assisting the South China Sea claimant-States to resolve their disputes. During his 2017 trip to the Asia-Pacific region, when meeting with the president of Vietnam, he publicly stated:

South China Sea, as you know, we're looking at; we're looking at it together. If I could help mediate or arbitrate, please let me know. And you've had a dispute for quite a while with China. If I can help in any way, I'm a very good mediator and a very good arbitrator. I have done plenty of it from both sides. So if I can help you, let me know.<sup>114</sup>

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Both leaders noted concerns about developments in the South China Sea (SCS). They reaffirmed the importance of safeguarding peace and stability and they reiterated their commitment to upholding freedoms of navigation and overflight and other lawful uses of the sea. Consonant with the Sunnyslands Declaration, both leaders underscored the importance of the peaceful resolution of disputes, including full respect for legal and diplomatic processes, in accordance with universally recognized principles of international law and the 1982 United Nations Convention on the Law of the Sea. They also reiterated their support for the expeditious conclusion of an effective and binding Code of Conduct in the SCS.

111. APEC CEO Summit Remarks, *supra* note 56.

112. Shelly Press Briefing, *supra* note 104.

113. *See* Kerry Statement, *supra* note 105.

114. Remarks by President Donald J. Trump at Joint Press Conference, Hanoi, Vietnam (Nov. 11, 2017), <https://www.presidency.ucsb.edu/documents/remarks-prior-meeting-with-president-tran-dai-quang-vietnam-hanoi-vietnam>.

A search of all subsequent public statements by President Trump has located no additional references to this idea that he would directly arbitrate or mediate these disputes.<sup>115</sup> While never coming to fruition, this offer of direct support or assistance at the presidential level appears to be a new development.

In terms of how President Trump's unprecedented offer to mediate the South China Sea disputes relates to the continuing viability of the tribunal's ruling, it can be argued both ways. On the one hand, a critic could argue that such an offer by a U.S. president to mediate the disputes between South China Sea claimants, particularly those between the Philippines and China, ignored or disregarded the existence and validity of the arbitral tribunal's ruling. On the other hand, however, a realist could argue that the contemporary practice of States in resolving their territorial and maritime disputes with other States is often non-linear in progression. In other words, a review of the case history of many real-world disputes shows that the claimant States often bounce among international courts and tribunals, arbitration, mediation, and direct negotiations for a single or set of disputes, before they eventually resolve them. Regardless, the personal nature of Trump's offer to mediate the disputes demonstrated that these disputes did achieve at least some level of presidential attention during the Trump administration.

#### IV. THE EXPRESS U.S. PERSPECTIVE ON THE TRIBUNAL'S RULING

By first examining the implied U.S. perspective on the tribunal's ruling during the Trump administration, one might assume that an express U.S. perspective on the South China Sea arbitration did not exist during those four years. To the contrary, there were several government public statements and official documents, including by Trump administration officials other than President Trump himself, which did expressly reference the ruling. But reviewing the Trump administration's philosophical approach to foreign policy, as well as its specific policies on China and the South China Sea, help to provide the context of the administration's explicit invocations of the tribunal's ruling. Moreover, examining the Trump administration's foreign policy more generally reveals that there might have been some credibility challenges or logical disconnects between what the U.S. government was implicitly say-

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115. A search of President Trump's speeches, statements, and documents, conducted online of The American Presidency Project, <https://www.presidency.ucsb.edu/>, produced negative results (last search conducted on Jan. 6, 2021).

ing or doing and what it was expressly saying and doing. To derive the express U.S. perspective on the tribunal's ruling, the official words and State actions of the government will be considered, particularly those occurring after the arbitral tribunal issued its final award in July 2016 until the end of President Trump's four years in office.

*A. U.S. Statements about the Tribunal's Ruling*

As mentioned previously, President Trump did not personally comment on the arbitration ruling itself. But senior Trump administration officials did make public remarks about the ruling. The Trump administration also issued a number of high-level documents that referenced the ruling. Below is a review of the remarks and documents in which the United States continued to invoke the ruling and its significance.

Senior diplomats in the Trump administration invoked the tribunal's ruling. Both of Trump's secretaries of state issued joint statements with close U.S. allies that favorably endorsed the ruling. In August 2017, then-Secretary of State Rex Tillerson issued a joint statement with Australia's Foreign Minister Julie Bishop and Japan's Foreign Minister Taro Kono, which stated:

The ministers called on China and the Philippines to abide by the Arbitral Tribunal's 2016 Award in the Philippines-China arbitration, as it is final and legally binding on both parties. The ministers noted the significance of the UNCLOS dispute settlement regime and the Tribunal's decision in discussions among parties in their efforts to peacefully resolve their maritime disputes in the SCS.<sup>116</sup>

Two years later, in August 2019, Secretary of State Mike Pompeo similarly issued a joint statement with Australia's Foreign Minister Marise Payne and Japan's Foreign Minister Kono: "The Ministers underscored the importance of the July 2016 Philippines-China Arbitral Tribunal's award and noted that the Tribunal's award is final and legally binding for the two parties."<sup>117</sup>

In October 2019, Assistant Secretary of State David Stillwell testified before a committee of the Senate. The scheduled purpose of the hearing was

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116. Australia-Japan-United States Trilateral Strategic Dialogue Ministerial Joint Statement (Aug. 6, 2017), <https://www.state.gov/australia-japan-united-states-trilateral-strategic-dialogue-ministerial-joint-statement/>.

117. Trilateral [Australia-Japan-United States] Strategic Dialogue Joint Ministerial Statement (Aug. 1, 2019), <https://www.state.gov/trilateral-strategic-dialogue-joint-ministerial-statement-august-1-2019/>.

to discuss U.S. policy in the Indo-Pacific region and the implementation of the Asia Reassurance Initiative Act of 2018. But during Assistant Secretary Stilwell's opening statement, he said the following about some of China's maritime claims:

PRC maritime claims in the South China Sea, exemplified by the preposterous nine-dashed line, are both unlawful and unreasonable. These claims, which are without legal, historic, or geographic merit, impose real costs on other countries. Through repeated provocative actions to assert the nine-dashed line, Beijing is inhibiting ASEAN members from accessing over \$2.5 trillion in recoverable energy reserves, while contributing to instability and the risk of conflict.<sup>118</sup>

While Stilwell did not expressly reference the tribunal's ruling in this portion of his sworn testimony, his characterization of China's nine-dashed line as "unlawful" and "without legal merit" was in full conformity with the substance of the ruling.

In June 2020, the U.S. Ambassador to the United Nations submitted a three-page letter to the U.N. Secretary-General, which invoked the tribunal's ruling. It was written in response to China's December 2019 *note verbale* to the Commission on the Limits of the Continental Shelf. In particular, it objected to China's unlawful claim to "historic rights," any claim by China to draw straight baselines around South China Sea island groups and resulting internal waters, and any claimed maritime entitlements by China derived from submerged features in the South China Sea.<sup>119</sup> After identifying these specific objections, the letter stated, "These positions are consistent with the decision of the Tribunal in The South China Sea Arbitration."<sup>120</sup> In the letter's conclusion, the United States "urges China to conform its maritime claims to international law as reflected in the Convention; *to comply with the*

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118. *ARIA (Asia Reassurance Initiative Act) in Action, Part 3: Implementation and the Indo-Pacific Strategy, Hearing Before the Subcomm. on East Asia, the Pacific and International Cybersecurity Policy of the S. Comm. on Foreign Relations*, 116th Cong 114 (2019) (statement of David R. Stilwell, Assistant Secretary Bureau of East Asian and Pacific Affairs, U.S. Department of State), [https://www.foreign.senate.gov/imo/media/doc/10 16 19 -- ARIA in Action - Implementation and the Indo-Pacific Strategy.pdf](https://www.foreign.senate.gov/imo/media/doc/10%2016%2019%20--%20ARIA%20in%20Action%20-%20Implementation%20and%20the%20Indo-Pacific%20Strategy.pdf) [hereinafter Stilwell Statement].

119. Letter from Ambassador Kelly Craft, U.S. Representative to the United Nations, to António Guterres, Secretary-General of the United Nations (June 1, 2020), <https://usun.usmission.gov/protecting-chinas-unlawful-maritime-claims-at-the-un/>.

120. *Id.*

*Tribunal's July 12, 2016 decision*; and to cease its provocative activities in the South China Sea.”<sup>121</sup>

Of note, Ambassador Craft's letter enclosed a copy of the diplomatic note the United States had delivered to China in December 2016 under the Obama administration.<sup>122</sup> Immediately after Ambassador Craft issued her letter, Secretary of State Pompeo tweeted the letter, stating, “Today, the U.S. protests the PRC's unlawful South China Sea maritime claims at the @UN. We reject these claims as unlawful and dangerous. Member States must unite to uphold international law and freedom of the seas.”<sup>123</sup> To summarize, one month before the fourth anniversary of the arbitral tribunal's ruling, the senior-most diplomat in the Trump administration publicly reaffirmed the three-year-old diplomatic position taken by the prior presidential administration, which protested China's illegal maritime claims and favorably endorsed the tribunal's ruling.

Most recently, and perhaps most significantly, Secretary Pompeo issued a statement on the fourth anniversary of the arbitral tribunal's ruling. After invoking President Trump's vision of a “free and open Indo-Pacific,” it reiterated the longstanding U.S. national interests in the South China Sea.<sup>124</sup> It went on to criticize China's nine-dash line and expressly invoked the tribunal's ruling:

In a unanimous decision on July 12, 2016, an Arbitral Tribunal constituted under the 1982 Law of the Sea Convention—to which the PRC is a state party—rejected the PRC's maritime claims as having no basis in international law. The Tribunal sided squarely with the Philippines, which brought the arbitration case, on almost all claims.<sup>125</sup>

Like previous statements by senior officials, it restated the binding nature of the tribunal's ruling: “As the United States has previously stated and as specifically provided in the Convention, the Arbitral Tribunal's decision is final

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121. *Id.* (emphasis added).

122. *See supra* note 51 and accompanying text.

123. U.S. Secretary of State Michael Pompeo (@SecPompeo), TWITTER (June 2, 2020, 12:52 PM), <https://twitter.com/SecPompeo/status/1267861621965303809>.

124. Michael R. Pompeo, U.S. Secretary of State, Press Statement, U.S. Position on Maritime Claims in the South China Sea (July 13, 2020), <https://www.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/>.

125. *Id.*

and legally binding on both parties.”<sup>126</sup> Up to this point, the July 2020 statement broke no new ground in terms of U.S. policy on the South China Sea generally or the tribunal’s ruling specifically. But then the statement declared, “Today we are aligning the U.S. position on the PRC’s maritime claims in the SCS with the Tribunal’s decision.”<sup>127</sup>

Following this declaration, the statement elaborated on three specific ways it was aligning U.S. policy with the tribunal’s ruling. First, the United States would not recognize any claim by China to an EEZ for any high-tide elevation located within the Philippines EEZ. The United States would also not recognize any territorial or maritime claim by China to Mischief Reef or Second Thomas Shoal, given that both features are submerged and located within the Philippines’ EEZ. Second, the United States would not recognize any maritime claim by China for any of the Spratly Islands beyond a 12 nautical mile territorial sea. Third, the United States would not recognize any territorial or maritime claim by China to James Shoal, given that this feature is submerged and located within Malaysia’s EEZ. Thus, while this July 2020 statement was titled “Maritime Claims in the South China Sea,” it was focused primarily on actions by China that have negatively impacted the South China Sea situation.

On the same day Secretary Pompeo issued this statement, Assistant Secretary Stilwell delivered remarks at the CSIS annual South China Sea Conference. In his speech, he described the tribunal’s ruling as “a historic statement on international law in the South China Sea,” highlighting that the tribunal’s ruling was “unanimous.”<sup>128</sup> He also pointed out, “The tribunal sided squarely with the Philippines on the bulk of its legal claims.”<sup>129</sup> But he criticized China for trying to “delegitimize and ignore the verdict, despite its obligations to abide by it as a party to [UNCLOS].”<sup>130</sup> After these remarks about the tribunal’s ruling and other introductory comments about China’s negative actions in the South China Sea, Secretary Stilwell then presented Secretary Pompeo’s statement on U.S. policy in the South China Sea, which

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126. *Id.*

127. *Id.*

128. David R. Stilwell, Assistant Secretary Bureau of East Asian and Pacific Affairs, U.S. Department of State, Remarks for the Center for Strategic and International Studies (Virtual): The South China Sea, Southeast Asia’s Patrimony and Everybody’s Own Backyard (July 14, 2020), <https://www.state.gov/the-south-china-sea-southeast-asias-patrimony-and-everybodys-own-backyard/>.

129. *Id.*

130. *Id.*

he acknowledged was issued “on the occasion of the anniversary of the 2016 tribunal ruling.”<sup>131</sup> In addition to these statements by Secretary Pompeo and Assistant Secretary Stilwell, the spokesperson for the Department of State has also repeatedly invoked the tribunal’s ruling, both in press releases and in press briefings.<sup>132</sup>

Senior defense officials within the Trump administration also publicly invoked the tribunal’s ruling. While serving during the first two years of Trump’s presidency, Secretary of Defense James Mattis commented favorably about the arbitral ruling in speeches at the Shangri-La Dialogue held in Singapore annually and attended by senior defense officials from throughout the Asia-Pacific region and elsewhere. In his 2017 speech, Secretary Mattis reminded the audience, “The 2016 ruling by the Permanent Court of Arbitration on the case brought by the Philippines on the South China Sea is binding. We call on all claimants to use this as a starting point to peacefully manage their disputes in the South China Sea.”<sup>133</sup> His prepared remarks for the 2018 event did not refer to the arbitration or the ruling. But when answering a question by a dialogue participant from the Philippines, Secretary Mattis bluntly stated, “[W]e have been on the record about international tribunals that say there is no such thing as a nine-dash line, or is no legal basis for this—we stand by international law. We stand by international tribunals.”<sup>134</sup>

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131. *Id.*

132. For example, the U.S. State Department’s spokesperson made detailed remarks honoring the three-year anniversary of the ruling. These remarks highlighted the significance of the ruling as “a victory for the rule of law,” and reiterated several key elements of the ruling. Morgan Ortagus, Spokesperson, U.S. Department of State, Department Press Briefing (July 11, 2019), <https://www.state.gov/briefings/department-press-briefing-july-11-2019/>. In April 2020, the same spokesperson released a press statement about a reported Chinese sinking of a Vietnamese fishing vessel in the South China Sea. Within that press statement, she noted: “China’s Nine-Dashed Line was deemed an unlawful maritime claim by an arbitral tribunal convened under the 1982 Law of the Sea Convention in July 2016, a position shared by the U.S. Government.” Morgan Ortagus, Spokesperson, U.S. Department of State, Press Statement: PRC’s Reported Sinking of a Vietnamese Fishing Vessel in the South China Sea (Apr. 6, 2020), <https://www.state.gov/prcs-reported-sinking-of-a-vietnamese-fishing-vessel-in-the-south-china-sea/>.

133. Mattis, Remarks at the Shangri-La Dialogue, *supra* note 99.

134. Mattis, Remarks at the Plenary Session of the 2018 Shangri-La Dialogue, *supra* note 99.

In 2019, Mark Esper succeeded Mattis as Secretary of Defense. Due to the COVID-19 pandemic, the organizers of the Shangri-La Dialogue decided not to convene the annual summit, so Secretary Esper did not have an opportunity to speak about the tribunal's ruling at this multilateral forum. But he did discuss the ruling at an ASEAN-U.S. Defense Ministerial Meeting, hosted by Thailand in November 2019. He reportedly told his ASEAN counterparts:

China's activities there are a threat not only to other claimants and to many Southeast Asian nations, but to all trading nations who value freedom of the seas and the peaceful settlement of disputes . . . . (China's) maritime claims in the South China Sea, exemplified by the illegitimate nine-dash line, are both unlawful and unreasonable and counter to the July 2016 ruling of the UNCLOS Permanent Court of Arbitration at The Hague.<sup>135</sup>

Thus, regardless of senior leadership changes, the Trump administration continued to reference the tribunal's ruling and criticize China for disregarding it.

Senior military officials during the Trump administration also invoked the tribunal's ruling. This includes annual testimony by the top commander in the Asia-Pacific region before the Senate Armed Services Committee. In 2017, during his first opportunity to testify about the tribunal ruling after its issuance, Admiral Harry Harris stated the following:

The past year included some major developments in the status of these disputes. The landmark ruling by the Arbitral Tribunal under the Law of the Sea Convention (the Tribunal) in July 2016 addressed the status of features and maritime claims specified in the Philippines' arbitration case. While the tribunal did not rule on the sovereignty of specific features, the tribunal did declare a number of China's maritime claims and actions unlawful. However, China ignored the ruling and maintains and even articulated new excessive maritime claims throughout the South China Sea. All the activities underway before the ruling, including the militarization of the

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135. *US Defense Sec. Esper Slams China in Meeting with ASEAN Counterparts*, ABS-CBN NEWS (Nov. 17, 2019), <https://news.abs-cbn.com/overseas/11/17/19/us-defense-sec-esper-slams-china-in-meeting-with-asean-counterparts>.

artificial landforms created by China and the provocative actions of military and law enforcement forces, continue unabated.<sup>136</sup>

In 2018, Admiral Harris was succeeded in command by Admiral Philip Davidson. During his February 2019 testimony on the U.S. military's force posture in the Indo-Pacific region, Admiral Davidson also spoke about the tribunal's ruling. He stated the following:

Beijing maintains maritime claims in the South China Sea that are contrary to international law and pose a substantial long-term threat to the rules-based international order. Beijing ignored the 2016 ruling of an Arbitral Tribunal established under Annex VII of the Law of the Sea Convention, which concluded that China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the "nine-dash line" are contrary to UNCLOS and without legal effect.<sup>137</sup>

Taken together, the testimony of these two senior military commanders collectively identified some of what the United States perceives as the key elements of the tribunal's ruling, including the invalidation of China's claims to a nine-dashed line and historic rights in the South China Sea. Furthermore, they highlighted how China has "ignored the ruling" and assessed that such disregard for the tribunal's ruling demonstrated how China poses a threat to the "rules-based international order."

In addition to these public speeches and congressional testimony by senior defense and military officials, the Department of Defense in the Trump administration also invoked the tribunal ruling in its published reports. Each year, the Secretary of Defense is required by law to produce and submit to Congress a report on military and security developments involving China.<sup>138</sup>

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136. *Hearing to Receive Testimony on United States Pacific Command and United States Force Korea Before the S. Comm. on Armed Services*, 115th Cong. (2017) (statement of Admiral Harry B. Harris Jr., U.S. Navy, Commander, U.S. Pacific Command), [https://www.armed-services.senate.gov/imo/media/doc/Harris\\_04-27-17.pdf](https://www.armed-services.senate.gov/imo/media/doc/Harris_04-27-17.pdf).

137. *Hearing to Receive Testimony on the United States Indo-Pacific Command and United States Forces Korea in Review of the Defense Authorization Request for Fiscal Year 2020 and the Future Years Defense Program Before the S. Comm. on Armed Services*, 116th Cong. (2019) (statement of Admiral Philip S. Davidson, U.S. Navy, Commander, U.S. Indo-Pacific Command), [https://www.armed-services.senate.gov/imo/media/doc/Davidson\\_02-12-19.pdf](https://www.armed-services.senate.gov/imo/media/doc/Davidson_02-12-19.pdf).

138. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 1202, 113 Stat. 512, 781 (1999).

Following the tribunal's final ruling in 2016, the annual reports for 2017,<sup>139</sup> 2018,<sup>140</sup> and 2019<sup>141</sup> discussed the ruling. Of note, the 2017 report devoted

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139. OFFICE OF THE SECRETARY OF DEFENSE, ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 2017, at i (2017), [https://dod.defense.gov/Portals/1/Documents/pubs/2017\\_China\\_Military\\_Power\\_Report.PDF](https://dod.defense.gov/Portals/1/Documents/pubs/2017_China_Military_Power_Report.PDF) [hereinafter 2017 ANNUAL REPORT TO CONGRESS]

In the South China Sea, China continued construction at its military outposts in the Spratly Islands. Important milestones in 2016 included landing civilian aircraft on its airfields on Fiery Cross, Subi and Mischief Reefs, as well as landing a military transport aircraft on Fiery Cross Reef. In July 2016, an arbitral tribunal constituted under the compulsory dispute settlement procedures in the United Nations Convention on the Law of the Sea (LOSC), issued a ruling in favor of the Philippines with respect to issues involving the interpretation and application of the LOSC. Among other things, the tribunal ruled that China's "nine-dash line" cannot represent a lawful maritime claim to the extent that any of the claims it reflects would exceed the limits of China's maritime entitlements under the Convention. The tribunal did not rule on sovereignty claims to land features, an issue that is outside the scope of the Convention. China rejected the ruling.

140. OFFICE OF THE SECRETARY OF DEFENSE, ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 2018, at 12–13 (2018), <https://media.defense.gov/2018/Aug/16/2001955282/-1/-1/1/2018-CHINA-MILITARY-POWER-REPORT.PDF> [hereinafter 2018 ANNUAL REPORT TO CONGRESS]

In 2017, China continued increased outreach to the Philippines, Vietnam and Brunei to maintain momentum toward its goal of effectively controlling disputed areas in the South China Sea. These overtures follow the July 2016 arbitration ruling in the case brought by the Philippines against China under the 1982 Law of the Sea Convention (LOSC). This ruling included findings that China violated the Philippines' sovereign rights within the Philippines' EEZ; that China has no basis on which to claim historic rights within the nine-dash line to the extent that any claim exceeds maritime entitlements China could claim under the LOSC; and that Mischief Reef, Subi Reef, Second Thomas Shoal and Reed Bank do not generate maritime entitlements. The tribunal did not rule on sovereignty claims to land features. In response to the ruling, China continued to claim historic rights in the South China Sea and made a separate assertion of a right to "internal" waters within entire island groups (rather than from individual features as set out in the LOSC). This likely references China's unlawful straight baseline claims around the Paracel Islands and potential drawing of similarly unlawful straight baselines around three other South China Sea island groups claimed by China. Since the arbitration ruling, China has managed tensions with regional claimants and largely continued its operations and activities in the region as it had prior to the ruling.

141. OFFICE OF THE SECRETARY OF DEFENSE, ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 2019, at 7–8 (2019), <https://media.defense.gov/2019/May/02/2002127082/-1/-1/>

two pages of relatively detailed analysis to the ruling. This included a summary of the issues raised by the Philippines, a description of seven elements of the ruling characterized as “significant,” an emphasis that “the ruling is binding on China and the Philippines,” and a recounting of the post-ruling interactions between the parties.<sup>142</sup> The 2017 report also observed, “China has adjusted talking points to exclude references to the claimed ‘nine-dash line,’ probably to avoid taking a position that directly opposes the ruling and risks additional regional backlash.”<sup>143</sup> The 2018 report also discussed the tribunal’s ruling, but to a more limited extent. Of note, this report expressed concern about some of China’s post-ruling statements suggesting that it might draw “unlawful straight baselines around three other South China Sea island groups.”<sup>144</sup> The discussion in the 2019 report was even shorter, composed of only three sentences. But the final words of the third sentence of that brief passage is clear: “[T]he ruling is binding on China.”<sup>145</sup>

While the U.S. government did not refer to the tribunal’s ruling on a daily basis, senior officials and high-level documents consistently invoked the ruling over the past four years. These recurring invocations included several common elements. First, they highlighted that the ruling deliberately did not address the competing sovereignty claims but focused on addressing maritime legal issues under the UNCLOS regime, including the legal status of specific geographic features in the South China Sea. Second, they pointed out that the ruling invalidated several of China’s maritime claims in the South China Sea, including China’s nine-dashed line claim, its claim to historic rights, and its claims to maritime entitlements for submerged features and artificial islands. Third, they described how the ruling determined that China, which does not satisfy the UNCLOS definition of archipelagic State, may not draw straight baselines around offshore island groups or claim internal waters therein. Fourth, they emphasized that the ruling is final and legally

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1/1/2019\_CHINA\_MILITARY\_POWER\_REPORT.pdf [hereinafter 2019 ANNUAL REPORT TO CONGRESS]

In July 2016, a tribunal established pursuant to the Law of the Sea Convention ruled that China’s claims to ‘historic rights’ over the South China Sea encompassed by the ‘nine-dash line’ could not exceed its maritime rights under the Law of the Sea Convention. China did not participate in the arbitration and Chinese officials publicly voiced opposition to the ruling. By the terms of the Convention, the ruling is binding on China.

142. 2017 ANNUAL REPORT TO CONGRESS, *supra* note 139, at 8, 9.

143. *Id.* at 9.

144. 2018 ANNUAL REPORT TO CONGRESS, *supra* note 140, at 13.

145. 2019 ANNUAL REPORT TO CONGRESS, *supra* note 141, at 8.

binding on China and the Philippines. Fifth, they criticized China for ignoring the ruling and extrapolated how that disregard demonstrated China's challenge to the rules-based international order. Sixth, they called upon both parties to comply with the ruling and its specific elements. Taken together, these invocations by senior officials and high-level documents demonstrated that the United States had certainly not forgotten the tribunal's ruling and that it considered many of the ruling's elements to reflect established international law.

*B. U.S. Actions that Support the Ruling*

In addition to the official U.S. statements and documents, the government also engaged in specific actions, which should be considered when assessing the U.S. perspective on the tribunal ruling's value and viability. Under President Trump, the U.S. military enhanced its presence in the South China Sea in several noteworthy ways to implement U.S. policy on the South China Sea. Some of these ways appeared to be effectuating elements of the tribunal's ruling.

First, the Trump administration streamlined the executive branch's approval process for maritime operations conducted by U.S. military forces, including those conducted in the South China Sea. Four decades ago, the U.S. government established its Freedom of Navigation Program:

Since 1979, U.S. Presidents have directed the U.S. Government to carry out a Freedom of Navigation (FON) Program to preserve this national interest. The U.S. FON Program includes: (1) consultations and representations by U.S. diplomats (i.e., U.S. Department of State) and (2) operational assertions by U.S. military forces (i.e., U.S. Department of Defense (DoD) FON Program).<sup>146</sup>

Within the Department of Defense, the FON program includes both "planned FON assertions" and "other FON-related activities."<sup>147</sup> Planned FON assertions, also known as freedom of navigation operations (FO-

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146. U.S. Department of Defense, *Freedom of Navigation (FON) Program* (Feb. 28, 2017), <https://policy.defense.gov/Portals/11/DoD%20FON%20Program%20Summary%202016.pdf?ver=2017-03-03-141350-380>.

147. *Id.*

NOPs), are defined as “operations that have the primary purpose of challenging excessive maritime claims.”<sup>148</sup> Other FON-related activities are defined as “operations that have some other primary purpose, but have a secondary effect of challenging excessive maritime claims.”<sup>149</sup> The operations are described as “deliberately planned, legally reviewed, properly approved and conducted with professionalism”;<sup>150</sup> however, this public document does not specify who within the military chain of command has the authority to approve operations.

President Obama’s administration was reportedly reluctant to approve FONOPs in the South China Sea, or at least certain categories of those operations. For example, during a September 2015 hearing of the Senate Armed Services Committee, Senator Sullivan questioned Admiral Harris, who was serving as Commander, U.S. Pacific Command, about whether U.S. military forces should conduct operations within 12 nautical miles of South China Sea features that China had “built-up.”<sup>151</sup> In response, Admiral Harris stated, “I believe that we should be allowed to exercise freedom of navigation and maritime and flight in the South China Sea against those islands that are not islands.”<sup>152</sup> Senator Sullivan then asked, “Have you or [then-Secretary of Defense Ash] Carter asked the White House for permission to do that?”<sup>153</sup> Harris responded, “Senator, I have given policy options—military options to the Secretary and I would leave it to the Secretary or [Assistant Secretary of Defense David Shear] to address.”<sup>154</sup> Senator Sullivan then redirected his questioning to Shear, who was serving as the Assistant Secretary of Defense for Asia-Pacific Security Affairs and was testifying beside Admiral Harris at the hearing. Sullivan asked, “What has the White House said when you have asked permission to go within the 12-mile zone of a feature like that?” In response, Shear stated, “Senator, [U.S. Pacific Command], along with the Department of Defense, are options-generating institutions and the Secretary is particularly interested in options with regard to the South China Sea

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148. *Id.*

149. *Id.*

150. *Id.*

151. *Hearing to Receive Testimony on Maritime Security Strategy in the Asia-Pacific Region Before the S. Comm. On Armed Services*, 108th Cong. 53 (2015), <https://www.armed-services.senate.gov/imo/media/doc/15-72%20-%209-17-15a.pdf> [hereinafter *Hearing on Maritime Security Strategy in the Asia-Pacific Region*].

152. *Id.* at 54.

153. *Id.*

154. *Id.* at 55.

in general.”<sup>155</sup> Sullivan rephrased his question: “But I just asked a simple question. What did the White House say if you asked for permission to go within inside the 12-mile limit? What did the White House say?”<sup>156</sup> Shear responded, “Sir, I am not able to discuss current policy deliberations, but I can assure you that that is one of the options that the administration is considering.”<sup>157</sup> This verbal exchange between Congress and senior leaders within the Department of Defense implied that the approval authority for these FONOPs was retained at the White House level during the Obama administration. Additionally, Assistant Secretary Shear’s response strongly suggested that the White House was reluctant to approve such operations in the South China Sea.

Two years later, President Trump had taken office. At the confirmation hearing for General Joseph Dunford, U.S. Marine Corps, for reappointment as the Chairman of the Joint Chiefs of Staff, the same Senator Sullivan asked, “Can you elaborate a bit on the [Department of Defense’s] FONOPs policy and if this differs from the previous administration?”<sup>158</sup> In response, General Dunford described the difference as follows:

Secretary [of Defense James] Mattis, when he came in, in early February [2017], we went to him with a couple of individual Freedom of Navigation Operations that you spoke about. And he said, ‘Hey, look, I—how about giving me a full strategy that lays this thing out now for a long period of time and talks about the strategic effect we’re trying to achieve?’ You spoke about partners, you talk about being routine and regular. And so, those are the things that Secretary Mattis directed. After that, Admiral Harris developed a long-term plan for Freedom of Navigation Operations and that’s what we’re implementing right now, is a strategic approach to Freedom of Navigation Operations that does, in fact, support our overall strategy in the Pacific, as well as the specific mission, which is to ensure that we fly, sail and operate wherever international law allows. And we continue to validate those claims where we see international airspace, for that matter, or the maritime domain.<sup>159</sup>

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155. *Id.*

156. *Id.*

157. *Id.*

158. *Hearing to Consider the Nomination of General Joseph F. Dunford Jr., USMC, for Reappointment to the Grade of General and Reappointment to be Chairman of the Joint Chiefs of Staff Before the S. Comm. on Armed Services*, 115th Cong. 91 (2017), [https://www.armed-services.senate.gov/imo/media/doc/17-80\\_09-26-17.pdf](https://www.armed-services.senate.gov/imo/media/doc/17-80_09-26-17.pdf).

159. *Id.* at 92.

Senator Sullivan then asked a follow-up question, “So, those are going well, regular, routine, with our allies, if possible, not micromanaged from the [National Security Council at the White House]?”<sup>160</sup> General Dunford confirmed, “That’s right. And, Senator, in candor, we still and always will, take into account what else is happening in the strategic environment.”<sup>161</sup> By streamlining the approval process for FONOPs, the Trump administration validated the importance of regularly conducting these operations in the South China Sea to uphold the rule of law.

Second, the U.S. military now conducts FONOPs in the South China Sea more frequently than it did in the past. One of the challenges in identifying trends in the rate of FONOPs is the limited public information about those operations. For decades, the Department of Defense has published annual reports containing information about freedom of navigation operations. But for 2016 and prior years, the annual reports included only two elements of information: (1) the claimant State whose claim had been challenged by the FONOP and (2) the category of the excessive maritime claim that had been challenged.<sup>162</sup> Due to a requirement in the 2017 National Defense Authorization Act, however, annual FON reports for 2017 through 2021 now include a third element of information: “[t]he nature of each claim, including the geographic location or area covered by such claim (including the body of water and island grouping, when applicable).”<sup>163</sup> But this additional information still does not provide the full clarity necessary to perform external analysis about whether the frequency of FONOPs are increasing or decreasing, particularly in the South China Sea.

However, other public data sources strongly suggest the frequency of its FONOPs in the South China Sea increased under President Trump. Dr. Collin Koh, a Singaporean scholar who studies maritime security in East Asia, has developed, maintains, and distributes an unofficial chart that lists each FONOP conducted in the South China Sea. Dr. Koh’s compilation is based

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160. *Id.*

161. *Id.* at 93.

162. See U.S. Department of Defense, DoD *Freedom of Navigation (FON) Reports*, <https://policy.defense.gov/OUSDP-Offices/FON/> (last visited Jan. 6, 2021) [hereinafter Annual FON Reports] (provides a record of operational assertions for fiscal years 1991–2019).

163. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1275(b)(2), 130 Stat. 2000, 2540 (2016).

upon reporting published by various news organizations and press releases issued by national governments. Published in late May 2020, Dr. Koh's most recent chart summarizing individual operations contained information that can be aggregated to show the unofficial total numbers of FONOPs for each of the past four and a half years: three during the Obama administration's last year in office (2016), four during the Trump administration's first year in office (2017), six in the second year (2018), eight in the third year (2019) and ten in the fourth year (2020).<sup>164</sup>

The trending numbers of FONOPs in the South China Sea might actually be even greater, according to a news article published in February 2020, reportedly based upon data provided by U.S. Pacific Fleet.<sup>165</sup> This increased level of operational activity evidences that the United States does, in fact, fly, sail, and operate wherever international law allows, including in the South China Sea.

Third, during the Trump administration, the U.S. military made deliberate efforts to work cooperatively with its allies and partners to preserve maritime freedom in the waters of East Asia, including the South China Sea. Like prior presidents, such as Ronald Reagan,<sup>166</sup> President Trump and his administration emphasized the importance of preserving "peace through strength" in protecting U.S. national security interests.<sup>167</sup> But Trump slightly refined this longstanding strategic principle through the lens of his "America First"

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164. Collin Koh (@CollinSLKoh), TWITTER (Dec. 24, 2020, 9:51 PM), <https://twitter.com/CollinSLKoh/status/1342211239796068354/photo/1>.

165. David B. Larter, *In Challenging China's Claims in the South China Sea, the US Navy Is Getting More Assertive*, DEFENSE NEWS (Feb. 5, 2020), <https://www.defensenews.com/naval/2020/02/05/in-challenging-chinas-claims-in-the-south-china-sea-the-us-navy-is-getting-more-assertive/>

The U.S. Navy conducted more freedom of navigation operations in 2019 than in any year since the U.S. began more aggressively challenging China's claims in the South China Sea in 2015. The Navy conducted nine FONOPs in the South China Sea last year, according to records provided by U.S. Pacific Fleet.

166. *See, e.g., Republican Party Platform of 1980*, THE AMERICAN PRESIDENCY PROJECT (July 15, 1980), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1980> ("Republicans support a policy of peace through strength; weakness provokes aggression.") Reagan was first elected as president in the 1980 election.

167. President Ronald Reagan, Speech at the Republican National Convention: Peace Through Strength (July 17, 1980), <https://www.reaganlibrary.gov/permanent-exhibits/peace-through-strength>.

policy,<sup>168</sup> particularly concerning the U.S. global network of treaty alliances. In Trump's *National Security Strategy*, he stated, "Allies and partners magnify our power. We expect them to shoulder a fair share of the burden of responsibility to protect against common threats."<sup>169</sup> He emphasized, "Together with our allies, partners and aspiring partners, the United States will pursue cooperation with reciprocity. Cooperation means sharing responsibilities and burdens."<sup>170</sup> In the context of preserving maritime freedom globally, the Trump administration arguably wanted to ensure that U.S. allies and partners were not "free riders"<sup>171</sup> in preserving freedom of navigation.

In fact, during the Trump administration, the United States emphasized collective efforts to preserve maritime freedom in the South China Sea. During one of the Senate hearings mentioned previously, Assistant Secretary of State Stilwell testified, "We work with Indo-Pacific allies and partners to conduct joint maritime training and operations to maintain free and open access and we have welcomed historic firsts in that regard."<sup>172</sup> One such "first" occurred in May 2019, when U.S. military forces conducted their first "joint sail" through the South China Sea with military ships and aircraft of India, Japan, and the Philippines.<sup>173</sup> In April 2020, three U.S. Navy ships conducted combined operations in the South China Sea with HMAS *Parramatta*, a Royal Australian Navy frigate.<sup>174</sup> The U.S. Navy admiral who participated in these combined U.S.-Australian operations stated, "To bring this much combat capability together here in the South China Sea truly signals to our allies and partners in the region that we are deeply committed to a free and open Indo-Pacific."<sup>175</sup> About those same combined operations, the commanding officer of one of the participating U.S. Navy ships stated,

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168. Of note, the last sentence immediately above President Trump's signature declares: "This National Security Strategy puts America First." 2017 NATIONAL SECURITY STRATEGY, *supra* note 87, at ii.

169. *Id.* at 4.

170. *Id.*

171. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

172. Stilwell Statement, *supra* note 118, at 117.

173. U.S. DEPARTMENT OF STATE, *A FREE AND OPEN INDO-PACIFIC: ADVANCING A SHARED VISION* 23 (2019), <https://www.state.gov/wp-content/uploads/2019/11/Free-and-Open-Indo-Pacific-4Nov2019.pdf>.

174. Nicholas Huynn, *U.S. Navy, Royal Australian Navy Team Up in the South China Sea*, CPF (Apr. 21, 2020), <https://www.cpf.navy.mil/news.aspx/130600>.

175. *Id.*

“They (Australia) have the same interest in ensuring freedom of navigation and observance of internationally accepted norms and customs pertaining to the law of the sea.”<sup>176</sup>

As for future intentions of collective efforts to preserve maritime freedom in the South China Sea, the United Kingdom is reportedly planning to deploy its newest aircraft carrier HMS *Queen Elizabeth* in 2021 for combined operations with the U.S. Navy.<sup>177</sup> The British newspaper that reported this planned deployment assessed,

The US is seeking to increase its military presence in the South China Sea in a bid to counteract Chinese attempts at hegemony and to assert the right to freedom of navigation in the sea. The Queen Elizabeth’s participation in the forthcoming naval mission will help reinforce the notion that the UK supports US foreign policy.<sup>178</sup>

In short, these combined, burden-sharing operations appear to have been intended to message that preserving maritime freedom is a “shared” interest in advancing a “free and open” Indo-Pacific region, including in the South China Sea.

Fourth and perhaps most significantly, the U.S. military during the Trump administration conducted a category of FONOPs in the South China Sea that appeared deliberately intended to further an element of the arbitral tribunal’s ruling. During the Obama administration and before the tribunal’s ruling, the U.S. military either was not conducting—or was rarely conducting—FONOPs in the South China Sea within twelve miles of geographic features that China had built up. During the September 2015 hearing of the Senate Armed Services Committee discussed previously, Senator John McCain, the committee chairman, sparred with Ambassador Shear on this precise issue. When questioned, Ambassador Shear acknowledged that U.S. forces had not conducted a FONOP within 12 nautical miles of the artificial

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176. Peter Mitchell, *US Praises Aust Warship in South China Sea*, CANBERRA TIMES (Apr. 27, 2020), <https://www.canberratimes.com.au/story/6735768/us-praises-aust-warship-in-south-china-sea/>.

177. John Varga, *South China Sea Shock: How UK Will Team Up with US and Dutch in Bold Mission in 2021*, EXPRESS (Oct. 30, 2019), <https://www.express.co.uk/news/world/1197401/south-china-sea-news-hms-queen-elizabeth-us-navy-vietnam-nine-dash-line-world-war-3>.

178. *Id.*

islands for three years.<sup>179</sup> After the tribunal's ruling, however, the Department of Defense reported that U.S. military forces conducted FONOPs in 2017 and 2018 to challenge a new category of excessive maritime claim by China: "actions/statements that indicate a claim to a [territorial sea] around features not so entitled."<sup>180</sup> Notably, this fourth distinction of FONOPs under the Trump administration operationalized two specific determinations in the arbitration ruling: (1) that low-tide elevations in the South China Sea, such as Mischief Reef, occupied by China "do not generate entitlements to a territorial sea" of their own<sup>181</sup>; and (2) "[a] low-tide elevation will remain a low-tide elevation under [UNCLOS], regardless of the scale of the island or installation built atop it."<sup>182</sup> Such operational actions also demonstrated the ruling's continued relevance to the United States.

### C. U.S. Silence and Inaction

The United States undertook the above-discussed actions in furtherance of its South China Sea policy and certain elements of the arbitral tribunal's ruling. But sometimes, it is not only what a government says and does that is important, but also what it does not say and what it does not do that can be equally relevant. In the context of the South China Sea arbitration ruling, it appears that the United States has made no official statements nor taken any noticeable actions in furtherance of one particular element of that ruling.

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179. *Hearing on Maritime Security Strategy in the Asia-Pacific Region*, *supra* note 151, at 22

Chairman McCain: Have we gone within the 12 miles of the reclaimed area? The answer I believe is no.

Ambassador Shear: We have not recently gone within 12 miles of a reclaimed area. However  
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Chairman McCain: When was the last time we did?

Ambassador Shear: I believe the last time we conducted a freedom of navigation operation in the South China Sea was April of this year.

Chairman McCain: Within the 12-mile limit. Come on, Mr. Secretary. I am very interested in the 12-mile limit because if you respect the 12-mile limit, then that is de facto sovereignty agreed to tacitly to the Chinese. Now, have we or have we not operated within the 12-mile limit in recent years?

Ambassador Shear: I believe the last time we conducted a freedom of navigation operation within 12 nautical miles of one of those features was 2012.

Chairman McCain: 2012, 3 years ago.

180. Annual FON Reports, *supra* note 162.

181. South China Sea Arbitration, *supra* note 1, ¶ 1203.

182. *Id.* ¶ 305.

More specifically, it has remained silent about the tribunal's legal analysis of what geographic features are entitled to an EEZ and its resulting determinations that none of the high-tide elevations highlighted in the Philippines arbitration pleadings are so entitled.

Under the legal regime reflected in UNCLOS, a coastal State may claim an EEZ, within which it has resource-related sovereign rights and jurisdiction.<sup>183</sup> The EEZ shall not extend more than 200 nautical miles from the State's coastline,<sup>184</sup> or less if other nearby State or States are also entitled to an EEZ.<sup>185</sup> The coastlines from which a State can derive its EEZ can include the State's mainland coast and certain land features. These features must be "naturally formed areas of land, surrounded above water at high tide";<sup>186</sup> in other words, "artificial islands" are not entitled to a territorial sea or an EEZ of their own.<sup>187</sup> Coastal States may claim an EEZ for islands that can "sustain human habitation or economic life of their own,"<sup>188</sup> but a feature that cannot sustain human habitation or economic life is a "rock," which is entitled to a territorial sea but not an EEZ.<sup>189</sup>

As discussed above,<sup>190</sup> the tribunal rendered sixty-five specific findings and declarations. Most of the issues and corresponding rulings have already been examined in this article. Many of these particular elements of the ruling have been expressly invoked by the U.S. government over the past four years. The curious question worth asking then is why none of the statements about the tribunal's ruling have made either an express or an implied reference to the tribunal's analysis and application of Article 121(3) to specific South China Sea features.

Part of the reason for this noticeable silence might be the potential legal ramifications of this element of the tribunal's ruling if it were applied universally, including to several U.S. islands remotely located in the Pacific Ocean. In addition to the highly-populated Hawaiian Islands, Guam, and American Samoa, the United States has sovereignty over eight smaller islands in the Pacific: Baker Island, Howland Island, Jarvis Island, Johnston Atoll,

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183. UNCLOS, *supra* note 4, art. 56.

184. *Id.* art. 57.

185. *Id.* art. 74(1).

186. *Id.* art. 121(1).

187. *Id.* art. 60(8).

188. *Id.* art. 121(3).

189. *Id.*

190. *See supra* Part II.A.

Kingman Reef, Midway Atoll, Palmyra Atoll and Wake Island.<sup>191</sup> Under the Guano Act of 1856,<sup>192</sup> the United States asserted sovereignty over most of these islands.<sup>193</sup> Since 1983, the United States has also claimed a 200 nautical mile EEZ around each<sup>194</sup> even though most are uninhabited.<sup>195</sup> In the words of UNCLOS, can these islands “sustain human habitation or economic life of their own”? When analyzed under some of the factors enunciated by the arbitral tribunal, the facts are not entirely clear.

Consider their historical usage. In the South China Sea arbitration, the arbitral tribunal assessed, “[T]he most reliable evidence of the capacity of a feature will usually be the historical use to which it has been put.”<sup>196</sup> In greater detail, the tribunal explained:

If the historical record of a feature indicates that nothing resembling a stable community has ever developed there, the most reasonable conclusion would be that the natural conditions are simply too difficult for such a community to form and that the feature is not capable of sustaining such habitation. . . . In the absence of . . . intervening forces [such as war, pollution, and environmental harm], the Tribunal can reasonably conclude that a feature that has never historically sustained a human community lacks the capacity to sustain human habitation.<sup>197</sup>

Of note, the tribunal clarified that “a purely official or military population, serviced from the outside, does not constitute evidence that a feature is capable of sustaining human habitation.”<sup>198</sup>

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191. See *U.S. Pacific Remote Island Area (PRIA)*, NOAA, <https://www.co-ris.noaa.gov/portals/pria.html#:~:text=The%20U.S.%20Pacific%20Remote%20Island,Hawai'i%20and%20American%20Samoa> (last visited Jan. 6, 2021).

192. An Act to Authorize Protection to be Given to Citizens of the United States who May Discover Deposits of Guano, 11 Stat. 164 (1856).

193. *U.S. Pacific Remote Island Area (PRIA)*, *supra* note 191.

194. Exclusive Economic Zone of the United States, Proclamation No.5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983); see also U.S. Department of State, Exclusive Economic Zone and Maritime Boundaries, Notice of Limits, Public Notice 2237, 60 Fed. Reg. 43,825 (Aug. 23, 1995).

195. *U.S. Pacific Remote Island Area (PRIA)*, *supra* note 191.

196. South China Sea Arbitration, *supra* note 1, ¶ 549.

197. *Id.*

198. *Id.* ¶ 550.

What is the evidence about “community” and “historical use” on these remote U.S. islands by humans other than “a purely official or military population”? Perhaps the best evidence is what the U.S. government says about them. For example, there has been an extremely limited presence of humans on Howland, Baker, and Jarvis Islands:

Although Polynesians were likely the first visitors to these islands, westerners “rediscovered” them in an uninhabited state in the early 1820s. Claimed by the United States in 1856 under the Guano Act, colonists helping to consolidate the U.S. claim to the islands [when they] constructed settlements and lived there from 1935 until they were rescued in 1942 after being attacked several times at the onset of World War II.<sup>199</sup>

U.S. government documents describe Palmyra Atoll as “host[ing] a 6,000-man Naval Air Station in World War II, complete with dock and airfield,” and Wake Island as “[u]sed by early Marshall Island navigators and later by a cable station and Pan American Airways, the atoll has been primarily used by the U.S. military since before World War II.”<sup>200</sup> In summary, the United States had only a limited presence on “[t]hese small dots of land in the midst of the ocean”.<sup>201</sup>

During World War II, the U.S. constructed and occupied military bases at Johnston and Palmyra Atolls, Wake Island, Midway Atoll and Baker Island. Jarvis and Howland Islands were also briefly occupied or utilized during the war. With the closure of the military base at Johnston Atoll in 2004, only Wake Island remains an active U.S. military base.<sup>202</sup>

The last U.S. military personnel stationed on Midway Atoll departed in 1997.<sup>203</sup> The U.S. government describes these islands’ current capabilities as follows: “Only Midway and Palmyra Atolls have serviceable runways; Baker

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199. U.S. Fish & Wildlife Service, *Pacific Remote Islands Marine National Monument*, [https://www.fws.gov/uploadedFiles/Region\\_1/NWRS/Zone\\_1/Pacific\\_Reefs\\_Complex/Johnston\\_Atoll/Documents/PRIMNM%20brief\(2\).pdf](https://www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_1/Pacific_Reefs_Complex/Johnston_Atoll/Documents/PRIMNM%20brief(2).pdf) (last visited Jan. 6, 2021)

200. *Id.*

201. *Id.*

202. U.S. *Pacific Remote Island Area (PRIA)*, *supra* note 191.

203. U.S. Fish & Wildlife Service, *Midway Atoll National Wildlife Refuge and Battle of Midway National Memorial, Chronology of Events*, [https://www.fws.gov/refuge/Midway\\_Atoll/preserving\\_the\\_past/Chronology\\_of\\_Events.html](https://www.fws.gov/refuge/Midway_Atoll/preserving_the_past/Chronology_of_Events.html) (last visited Jan. 6, 2021).

Island, Howland Island and Johnston Atoll no longer have functional airstrips.”<sup>204</sup> Midway Atoll is described as “one of the most remote coral atolls on earth.”<sup>205</sup> The U.S. Fish & Wildlife Service’s solicitation for “biological volunteers” to work for six-month periods at the National Wildlife Refuge on Johnston Atoll states, “[T]he remote location and isolation of Johnston Atoll and other Pacific island refuges make it virtually impossible for the general public to visit.”<sup>206</sup>

Consider these islands’ size, especially compared to the eleven geographic high-tide features analyzed by the arbitral tribunal. The tribunal calculated the size of each of these features.<sup>207</sup> It described Itu Aba as “the largest high-tide feature in the Spratly Islands” and calculated its size to be approximately 1.4 kilometers in length and 400 meters at its widest point, and have a total surface area of 0.43 square kilometers.<sup>208</sup>

What about the size of the U.S. remote islands in the Pacific? The CIA’s *World Factbook* lists the “emergent land” area for each of these islands as follows: Baker Island (2.1 square kilometers), Howland Island (2.6 square kilometers), Jarvis Island (5 square kilometers), Johnston Atoll (2.6 square kilometers), Kingman Reef (0.01 square kilometers), Midway Islands (6.2 square kilometers) and Palmyra Atoll (3.9 square kilometers).<sup>209</sup> Thus, except for Kingman Reef, all of these islands are geographically larger than the largest South China Sea feature analyzed by the tribunal. Yet the tribunal in the South China Sea arbitration concluded that “size cannot be a dispositive of a feature’s status as a fully entitled island or rock and is not, on its own, a relevant factor” under Article 121(3).<sup>210</sup>

204. U.S. *Pacific Remote Island Area (PRIA)*, *supra* note 191.

205. U.S. Fish & Wildlife Service, *Midway Atoll National Wildlife Refuge and Battle of Midway National Memorial, More About Midway*, [https://www.fws.gov/refuge/Midway\\_Atoll/more\\_about\\_midway.html](https://www.fws.gov/refuge/Midway_Atoll/more_about_midway.html) (last visited Jan. 6, 2021).

206. U.S. Fish & Wildlife Service, *Johnston Atoll*, [https://www.fws.gov/refuge/Johnston\\_Atoll/what\\_we\\_do/get\\_involved.html](https://www.fws.gov/refuge/Johnston_Atoll/what_we_do/get_involved.html) (last visited Jan. 6, 2021).

207. South China Sea Arbitration, *supra* note 1, ¶ 401.

208. *Id.*

209. *United States Pacific Island Wildlife Refuges*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/docs/history.html> (last visited Jan. 6, 2021).

210. South China Sea Arbitration, *supra* note 1, ¶ 538

The Tribunal considers that the *travaux* make clear that—although size may correlate to the availability of water, food, living space and resources for an economic life—size cannot be dispositive of a feature’s status as a fully entitled island or rock and is not, on its own, a

Consider the remote nature of these islands. The tribunal implied that remoteness of a geographic feature did not *ipso facto* render the feature to be a rock, particularly if there was a “stable community” of “human habitation.”<sup>211</sup> But in concluding that Scarborough Shoal was not a fully entitled island, the tribunal found that its high-tide elevations “could not sustain human habitation in their naturally formed state; they have no fresh water, vegetation, or living space and are *remote from any feature possessing such features*.”<sup>212</sup>

What is the proximity of the U.S. islands to other inhabited islands? Baker Island is 3,390 kilometers southwest of Honolulu, about halfway between Hawaii and Australia; Howland Island is 3,360 kilometers southwest of Honolulu, about halfway between Hawaii and Australia; Jarvis Island is 2,415 kilometers south of Honolulu, about halfway between Hawaii and the Cook Islands; Johnston Atoll is 1,330 kilometers southwest of Honolulu, about one-third of the way from Hawaii to the Marshall Islands; Kingman Reef is 1,720 kilometers south of Honolulu, about halfway between Hawaii and American Samoa; Midway Islands is 2,335 kilometers northwest of Honolulu near the end of the Hawaiian Archipelago, about one-third of the way from Honolulu to Tokyo; and Palmyra Atoll is 1,780 kilometers south of Honolulu, about halfway between Hawaii and American Samoa.<sup>213</sup>

Consider the terrain of these islands. In the South China Sea arbitration, the arbitral tribunal opined, “evidence of physical conditions will ordinarily suffice only to classify features that clearly fall within one category or the other.”<sup>214</sup> What are the physical conditions of the U.S. islands? The *World*

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relevant factor. As noted by the International Court of Justice in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, “international law does not prescribe any minimum size which a feature must possess in order to be considered an island.”

211. *Id.* ¶ 542

The term “human habitation” should be understood to involve the inhabitation of the feature by a stable community of people for whom the feature constitutes a home and on which they can remain. Such a community need not necessarily be large and in remote atolls a few individuals or family groups could well suffice.

212. *Id.* ¶ 556 (emphasis added).

213. *United States Pacific Island Wildlife Refuges*, *supra* note 209.

214. South China Sea Arbitration, *supra* note 1, ¶ 548

[I]n light of the Tribunal’s conclusions on the interpretation of Article 121(3), evidence of the objective, physical conditions on a particular feature can only take the Tribunal so far in its task. In the Tribunal’s view, evidence of physical conditions will ordinarily suffice only to

*Factbook* also includes a collection of satellite, aerial, and ground-level photographic imagery of Baker Island,<sup>215</sup> Howland Island,<sup>216</sup> Jarvis Island,<sup>217</sup>

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classify features that clearly fall within one category or the other. If a feature is entirely barren of vegetation and lacks drinkable water and the foodstuffs necessary even for basic survival, it will be apparent that it also lacks the capacity to sustain human habitation. The opposite conclusion could likewise be reached where the physical characteristics of a large feature make it definitively habitable. The Tribunal considers, however, that evidence of physical conditions is insufficient for features that fall close to the line. It will be difficult, if not impossible, to determine from the physical characteristics of a feature alone where the capacity merely to keep people alive ends and the capacity to sustain settled habitation by a human community begins. This will particularly be the case as the relevant threshold may differ from one feature to another.

215. Satellite Image of Baker Island, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM\\_001\\_large.JPG?1528325549](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM_001_large.JPG?1528325549); Aerial Image of Baker Island, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Baker\\_isle\\_a320.gif?1582570825](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Baker_isle_a320.gif?1582570825); Ground-level Image of Baker Island, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Baker\\_day\\_beacon.jpg?1582644257](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Baker_day_beacon.jpg?1582644257) (all last visited Jan. 6, 2021).

216. Satellite Image of Howland Island, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM\\_006\\_large.jpg?1528325549](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM_006_large.jpg?1528325549); Ground-level Images of Howland Island, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Howland\\_sign-CNewton.jpg?1583945584](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Howland_sign-CNewton.jpg?1583945584); [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Howland\\_Island\\_coastline.jpg?1582738650](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Howland_Island_coastline.jpg?1582738650) (all last visited Jan. 6, 2021).

217. Satellite images of Jarvis Island, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM\\_007\\_large.jpg?1528325550](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM_007_large.jpg?1528325550); [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM\\_004\\_large.jpg?1528325550](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM_004_large.jpg?1528325550); Ground-level Image of Jarvis Island, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Jarvis\\_Island\\_Guano\\_Tramway.jpg?1583844180](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Jarvis_Island_Guano_Tramway.jpg?1583844180) (both last visited Jan. 6, 2021).

Johnston Atoll,<sup>218</sup> Kingman Reef,<sup>219</sup> Midway Atoll<sup>220</sup> and Palmyra Atoll.<sup>221</sup> Many of these features appear to be composed of physical conditions similar to the islands at issue in the South China Sea. About Kingman Reef, *The World Factbook* states: “The east-west and northwest-southeast trending small strips of dry land (gray color) are composed of coral rubble and giant clamshells. The highest point on the reef is less than 1.5 m (5 ft.) above sea level, which is awash most of the time, making Kingman Reef a maritime hazard.”<sup>222</sup> More generally, if one reviews these publicly-available photographic images for each of the islands, they could reasonably conclude that, with the possible exception of Midway Atoll, none of these remote islands appear to be “capable of human habitation or economic life.”

Given that a coastal State has exclusive sovereign rights and jurisdiction to natural resources (e.g., fisheries, oil, natural gas, and seabed minerals) lo-

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218. Satellite image of Johnston Atoll, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM\\_002\\_large.png?1528325551](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM_002_large.png?1528325551); Ground-level image of Johnston Atoll, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Johnston\\_Island\\_male\\_frigate\\_birds.jpg?1583418808](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Johnston_Island_male_frigate_birds.jpg?1583418808) (both last visited Jan. 6, 2021).

219. Satellite Images of Kingman Reef, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM\\_003\\_large.jpg?1528325552](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM_003_large.jpg?1528325552); [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Kingman\\_Reef\\_-\\_2014-02-18\\_-\\_Landsat\\_8\\_-\\_15m.png?1583751946](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Kingman_Reef_-_2014-02-18_-_Landsat_8_-_15m.png?1583751946); Aerial Image of Kingman Reef, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Kingman\\_Reef\\_NWR\\_Photo\\_credit\\_Susan\\_White-USFWS\\_%2812198955306%29.jpg?1583751575](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Kingman_Reef_NWR_Photo_credit_Susan_White-USFWS_%2812198955306%29.jpg?1583751575); Ground-level Image of Kingman Reef, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Kingman\\_reef\\_wreck.jpg?1583772213](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Kingman_reef_wreck.jpg?1583772213) (all last visited Jan. 6, 2021).

220. Satellite Image of Midway Atoll, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM\\_005\\_large.JPG?1528325553](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM_005_large.JPG?1528325553); Ground-level Image of Midway Atoll, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Midway\\_barracks3.jpg?1583950723](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Midway_barracks3.jpg?1583950723) (both last visited Jan. 6, 2021).

221. Satellite Images of Palmyra Atoll, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM\\_009\\_large.JPG?1528325554](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM_009_large.JPG?1528325554), [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM\\_008\\_large.png?1528325555](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/UM_008_large.png?1528325555); Aerial Image of Palmyra Atoll, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Palmyra\\_Atoll\\_NWR\\_aerial\\_FWS.jpg?1583770797](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Palmyra_Atoll_NWR_aerial_FWS.jpg?1583770797); Ground-level Image of Palmyra Atoll, CIA, [https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Palmyra\\_shoreline.jpg?1583764495](https://www.cia.gov/library/publications/the-world-factbook/attachments/images/large/Palmyra_shoreline.jpg?1583764495) (all last visited Jan. 6, 2021).

222. *United States Pacific Island Wildlife Refuges*, *supra* note 209.

cated within its EEZ, it can draw significant benefits from an EEZ surrounding one or more small remote islands. In practical terms, a basic mathematical calculation shows that such an island could yield an EEZ of approximately 430,000 square kilometers.<sup>223</sup> Almost all of the eight remote U.S. islands in the Pacific Ocean are beyond the EEZ of any other U.S. island. Through an aggregation of the EEZs claimed by the United States for these islands, one can quickly see how the United States claims the largest EEZ in the world.<sup>224</sup> But what is mathematical and what is lawful are not necessarily synonymous. The question is whether each of these islands is legally entitled to an EEZ. When considered together, the available evidence regarding the historical use, geographic size, remote nature, and physical conditions of these islands strongly suggest that the U.S. claim to an EEZ for some or all of them is questionable.

Return now to the context of the United States potentially advocating for the viability of this element of the tribunal's ruling. If the United States were to highlight the lengthy portion of the arbitral tribunal's ruling that interprets, analyzes, and applies Article 121(3) and concludes that none of the South China Sea features are entitled to an EEZ, then the United States could be accused of following a double-standard in not applying this rule to its remote islands in the Pacific Ocean.

## V. CONCLUSION

A perennial issue of public international law is its enforceability. Given that the international rules-based order is primarily an anarchical system,<sup>225</sup> there are limited ways in which the rules underlying the international order can be

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223. Notionally, the geographic area of a small island would be at least 429,463 square kilometers, based upon the following mathematical calculation of the difference between the total geographic area of a 200 nautical mile radius circle (or 370 kilometer radius circle) and the total geographic area of a 12 nautical mile radius circle (or 22.22 kilometer radius circle).

224. *The United States Is An Ocean Nation*, NOAA, [https://www.gc.noaa.gov/documents/2011/012711\\_gcil\\_maritime\\_eez\\_map.pdf](https://www.gc.noaa.gov/documents/2011/012711_gcil_maritime_eez_map.pdf) (last visited Jan. 6, 2021) (“The U.S. EEZ is the largest in the world, spanning over 13,000 miles of coastline and containing 3.4 million square nautical miles of ocean—larger than the combined land area of all fifty states.”).

225. HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (1977).

enforced against individual States. This is especially true for decisions rendered by international courts and tribunals, including those of the International Court of Justice, the International Tribunal for the Law of the Sea, and arbitral tribunals such as those constituted under UNCLOS. Unlike domestic justice systems, these international courts and tribunals lack the equivalent of an auxiliary police force to ensure that those appearing before them comply with their “binding” judicial rulings. Complicating matters further is that international courts and tribunals’ decisions are legally binding only upon the State parties to that case.<sup>226</sup>

Given these structural challenges of international justice generally and China’s repeated failure to abide by the tribunal’s ruling in the South China Sea arbitration, what is the rest of the international community left to do? First, any sovereign State can “call upon” or “name and shame” any other sovereign State to comply with its legal obligations under international law, including decisions by international courts and tribunals that are legally binding upon that State. However, nothing prevents that other State from ignoring those diplomatic exhortations, especially if its government cares more about its domestic legitimacy than its international reputation. Similarly, a group of States can collaborate and issue a joint exhortation, but the other State could ignore that chorus of diplomatic voices as well. A State can employ economic measures, including imposing economic sanctions or offering economic incentives to persuade another State to comply with its legal obligations. However, the other State might have sufficient independent economic power to withstand external sanctions or incentives, thereby rendering them ineffective. In the direst circumstances, a State or States use military force to bring another State into compliance with its obligations. However, in the post-World War II international system, such uses of force generally require either conditions triggering the right of individual or collective self-defense<sup>227</sup> or a specific authorization by the U.N. Security Council.<sup>228</sup> When

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226. *See, e.g.*, Rome Statute of the International Criminal Court art. 59, July 17, 1998, 2187 U.N.T.S. 90 (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”); *see also* UNCLOS, *supra* note 4, art. 296(2) (“Any such decision shall have no binding force except between the parties and in respect of that particular dispute.”). Of course, nothing prevents those international courts and tribunals from citing previous judicial decisions in subsequent cases as persuasive authority for rendering decisions that are consistent with those previous decisions, which is a common practice among these courts and tribunals.

227. U.N. Charter art. 51.

228. *Id.* art. 41.

the other State is one of the five permanent members of the Security Council, the veto power<sup>229</sup> all but ensures that the Council will not authorize the use of force. In short, a third-party State's employment of diplomatic, economic, and military power might be unavailable or ineffective to bring a particular State into compliance with its obligations under international law.

In the context of the tribunal's ruling in the South China Sea arbitration and the importance of ensuring this ruling is followed by the two party-States to the arbitration, a third-party State has a calculated decision to make. Exactly how important is this judicial ruling? If a third-party State determines the ruling is critical to its national interests, in that case, it should expend greater resources and political efforts to ensure that the State-parties comply with the ruling. On the other hand, if a third-party State assesses the tribunal's ruling to be merely helpful or of mixed value, that State will likely do nothing more than issue public statements supporting the ruling. Of course, different States have different interests and weigh their interests differently; thus, they may reach different determinations.

The United States has a significant incentive to ensure that the tribunal's ruling is followed. Politically, the United States was a leader in the construction and development of the post-World War II international order and system, a system designed first and foremost to ensure that a third world war never happened.<sup>230</sup> The arbitral tribunal's ruling embodies the first of the four stated purposes of the United Nations:

To maintain international peace and security and to that end: to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace and to bring about by peaceful means and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.<sup>231</sup>

Moreover, the United States was instrumental in the ten years of negotiations that resulted in UNCLOS. As an influential member of the U.S. delegation to the UNCLOS conference testified at a Senate hearing, "[T]he Law of the

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229. *Id.* art. 27(1).

230. *Id.* pmb. ("We the Peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.")

231. *Id.* art. 1(1).

Sea negotiations were a long-term bipartisan effort to further American interests that engaged high level attention in successive administrations and among distinguished Members of both Houses of Congress.<sup>232</sup> He further testified: “The Law of the Sea Convention is in large measure the product of American efforts. The United States succeeded in creating a firm, globally accepted basis for long-term order and predictability at sea whose provisions, in President Reagan’s words, ‘fairly balance the interests of all states.’”<sup>233</sup>

However, when UNCLOS negotiations concluded in 1982, President Reagan decided that the United States would not join the treaty, primarily due to its problematic provisions regarding deep seabed mining.<sup>234</sup> But these problems were corrected through a second implementation agreement,<sup>235</sup> which the United States was also instrumental in negotiating under the administrations of Presidents George H. W. Bush and Bill Clinton.<sup>236</sup> Consequently, President Clinton submitted the 1982 treaty and the 1994 agreement to the Senate for its constitutional advice and consent. Thereafter, three successive presidential administrations of both political parties advocated for U.S. accession to the treaty. But the Senate has never taken a final vote on accession due to significant opposition among Republican members of the Senate. Ironically, some of these same Senate opponents of accession have

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232. *The United Nation’s Convention on the Law of the Sea: Hearing Before the S. Comm. on Foreign Relations*, 98th Cong. 92–93 (2007) (statement of Professor Bernard H. Oxman, Professor of Law, University of Miami School of Law), [https://www.foreign.senate.gov/imo/media/doc/092707\\_100407\\_Transcript\\_The United Nations Convention on the Law of the Sea2.pdf](https://www.foreign.senate.gov/imo/media/doc/092707_100407_Transcript_The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea2.pdf) [hereinafter Oxman Statement].

233. *Id.* at 93.

234. Statement by the President, United States Oceans Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983)

Last July I announced that the United States will not sign the United Nations Law of the Sea Convention that was opened for signature on December 10. We have taken this step because several major problems in the Convention’s deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not attain the aspirations of developing countries.

235. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 3.

236. Oxman Statement, *supra* note 232, at 93.

introduced congressional legislation<sup>237</sup> and made public statements<sup>238</sup> over the past four and half years that favorably invoke the arbitral tribunal's ruling and criticize China's disregard of it.

From a policy perspective, the tribunal's ruling is consistent with longstanding tenets of U.S. regional foreign policy. Recall that the United States has declared it has the following national interests in the South China Sea: maintaining regional stability, upholding respect for international law, preserving maritime freedom and promoting peaceful resolution of disputes. As explained in this article, each of these interests is advanced by the tribunal's ruling.

Procedurally, the arbitration proceedings and the tribunal's ruling provide both claimant and non-claimant States a valuable opportunity to resolve a number of the difficult legal issues affecting the South China Sea situation. Five intellectual experts in the field of international law of the sea were called upon to devote three and half years to analyzing these difficult issues. As of the date of the ruling, four of these individuals had a combined total of fifty-four years of prior judicial experience serving as members of the UNCLOS-created International Tribunal for the Law of the Sea, while the fifth was a recognized international scholar. Together, these imminent legal minds considered thousands of pages of evidence. They issued two comprehensive judicial rulings: a 159-page award analyzing and addressing procedural matters and a 501-page award analyzing and addressing substantive legal issues affecting various aspects of the South China Sea situation. The tribunal deliberately avoided issues outside of its jurisdiction, such as the sovereignty disputes, instead focusing on issues that required interpreting and applying UNCLOS provisions. Given that other international institution, such as the U.N. Security Council, U.N. General Assembly, International Court of Justice, and International Tribunal for the Law of the Sea, are unlikely to be called upon to analyze and address any of these legal issues involving the South China Sea, the arbitral tribunal's work product is likely to be one of

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237. *See, e.g.*, Resolution Calling for All Parties to Respect the Arbitral Tribunal Ruling with Regard to the South China Sea and to Express United States Policy on Freedom of Navigation and Overflight in the East and South China Seas, S. Res. 526, 114th Cong. (2016), <https://www.congress.gov/114/bills/sres526/BILLS-114sres526is.pdf>; *see also* South China Sea and East China Sea Sanctions Act of 2019, S. 1634, 116th Cong. (2019), <https://www.congress.gov/116/bills/s1634/BILLS-116s1634is.pdf>.

238. *See, e.g.*, U.S. Senator Bob Corker, Chairman, Senate Foreign Relations Committee, Statement on Ruling in South China Sea Maritime Dispute (July 12, 2016), <https://www.foreign.senate.gov/press/chair/release/corker-statement-on-ruling-in-south-china-sea-maritime-dispute>.

the only independent efforts to provide a legal way forward on so many of the South China Sea regions vexing issues.

If so much is at stake for the United States politically, substantively and procedurally for ensuring that the tribunal's ruling is fully valued and viable, then what can and should the United States do to preserve that value and ensure that viability? First and foremost, it should never presume that deliberate silence about the tribunal's ruling will create "strategic space" for the parties to make decisions and develop a way ahead. To the contrary, China has proven in its international relations that it interprets silence by other States as consent or, in the parlance of international law, acquiescence. Therefore, the U.S. government should invoke the tribunal's ruling repeatedly and consistently at all appropriate opportunities—both in meetings between senior U.S. officials and their counterparts from other States (e.g., China, U.S. allies and partners, and others), and in public remarks to international audiences and the news media. As the constitutional and political powers of the executive branch of the government transferred yet again in 2021 from President Trump to President Joseph Biden, the new chief executive and senior officials in the Biden administration should continue to speak directly about the tribunal ruling and its international significance, insist that the two parties comply with their obligations under the ruling, and encourage non-party States to voluntarily adhere to the elements of the ruling. Words are important, but words alone are insufficient. More can and should be done.

Diplomatically, the United States should also consider what options are available to preserve the ruling's value and ensure its viability. Are there conditions or contingencies that the United States can attempt to place upon its relationship with China? Are there elements of the U.S.-China relationship that are more important to China than the United States that the United States could withhold if China does not comply with its obligations under the tribunal's ruling? Given that there is already an increasing discussion about whether the United States should or will decouple its economy from China and several equities that the United States seeks to protect in such decoupling, it is difficult to envision that upholding the tribunal's ruling could be elevated above other direct economic interests of the United States in the Biden administration or any successor administrations. But U.S. diplomats should consider this option.

Operationally, the United States under President Trump made positive steps to effectuate elements of the tribunal's ruling. For example, the U.S.

military conducted FONOPs deliberately designed to challenge a new category of excessive maritime claim by China and were carried out in a manner consistent with the portions of the tribunal's ruling addressing the lack of maritime entitlements for artificial islands and human-modified islands. In fact, during the week marking the four-year anniversary of the ruling, the secretary of state issued a statement "aligning" U.S. policy with the tribunal's ruling, and FONOPs were conducted within 12 nautical miles of Cuarteron Reef and Fiery Cross Reef, two high-tide elevations occupied by China in the Spratlys.<sup>239</sup> Looking ahead, President Biden and his administration should continue to utilize the U.S. military to conduct such operations and should consider whether there are other elements of the tribunal's ruling that could be directly effectuated by FONOPs and other military presence activities.

Administratively, the United States should also examine how it acts as a coastal State. In particular, the United States should reconsider the full range of maritime entitlements it claims for its remote islands in the Pacific Ocean. Given the evidence identified in this article questioning whether several of these islands qualify for an EEZ,<sup>240</sup> the United States should reevaluate those claims. For economic purposes, President Reagan asserted a 200 nautical mile EEZ around these islands, thereby acquiring sovereign resource-related rights for the United States in and below these waters. For environmental purposes, President George W. Bush established a 50 nautical mile marine national monument around them,<sup>241</sup> and President Obama increased that designation to 200 nautical miles.<sup>242</sup> Both the original designation and the expanded designation were based upon the U.S. claim to jurisdiction in its EEZ. Regardless of whether the asserted U.S. interests around these islands are economic, environmental, or a combination of the two, the fact is that these actions by the United States encourage other States to take similar actions with regards to their small, remotely-located islands. Additionally, so long as those designations remain in effect, an effort to criticize a South China Sea claimant (particularly China) for claiming an EEZ around small

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239. Ankit Panda, *US Conducts Freedom of Navigation Operation Near China-Held Features in Spratlys*, THE DIPLOMAT (July 15, 2020), <https://thediplomat.com/2020/07/us-conducts-freedom-of-navigation-operation-near-china-held-features-in-spratlys/>.

240. *See supra* Part IV.C.

241. Establishment of the Pacific Remote Islands Marine National Monument, Proclamation No. 8336, 74 Fed. Reg. 1565 (Jan. 6, 2009).

242. Pacific Remote Islands Marine National Monument Expansion, Proclamation No. 9173, Fed. Reg. 58,645 (Sept. 25, 2014).

features in the South China Sea or encourage any of the claimants to reduce the size of their claimed maritime entitlements for small islands will likely be ignored, and the United States will be characterized as hypocritical.

Judicially, the United States needs to understand that it can be viewed skeptically by other States when it advocates for the Philippines and China to abide by the arbitral tribunal's decisions in the South China Sea arbitration. This was particularly true for the Trump administration. Recall the administration's decisions to terminate U.S. treaty obligations and block cases brought by other States against the United States in the International Court of Justice,<sup>243</sup> and its criticism of "baseless, politicized" claims and the ability of "purported" international courts to bind the United States.<sup>244</sup> Such harsh criticism is not too dissimilar from some of the rhetoric employed by senior officials of China's government when discussing the arbitral tribunal that heard and adjudicated the South China Sea arbitration.<sup>245</sup>

Looking ahead in the Biden administration, the United States should carefully consider the ramifications to international systems of justice, including the International Court of Justice and the International Tribunal for the Law of the Sea, before broadly dismissing the legitimacy of such judicial bodies. At a minimum, the United States should highlight historical evidence in its favor to preempt criticisms of being hypocritical, to include the fact that the United States has adjudicated more of its international disputes before the International Court of Justice than any other State.<sup>246</sup> In contrast, China has never adjudicated a dispute before either the International Court of Justice or International Tribunal for the Law of the Sea, even though it has continuously empaneled its judges on both for the past twenty-five years.<sup>247</sup> These facts suggest that China lacks a certain level of credibility—

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243. See *supra* Part III.A.

244. See *supra* text accompanying notes 71 and 72.

245. See, e.g., Zhenmin Press Conference, *supra* note 35 ("The arbitration case unilaterally initiated by the Philippines and the illegal arbitration by the ad hoc tribunal is a political farce carefully orchestrated under the legal pretext. The so-called award is illegal, null and void.").

246. See *Contentious Cases Organized by State*, ICJ, <https://www.icj-cij.org/en/cases-by-country> (last visited Jan. 6, 2021) (listing the United States as having twenty-five cases litigated in the history of the Court).

247. See *All Members*, ICJ, <https://www.icj-cij.org/en/all-members> (last visited Jan. 6, 2021); see also *Members of the Tribunal Since 1996*, ITLOS, <https://www.itlos.org/the-tribunal/members-of-the-tribunal-since-1996>.

that is, these means of international justice are good enough for other States but inexplicably not good enough for China.

Finally, and perhaps most importantly, the United States should become a party to UNCLOS. Four days before President Trump's inauguration, this author published an opinion-editorial entitled "How Trump Can Make America Navigate Again."<sup>248</sup> This commentary identified six concrete steps by which the Trump administration could effectively protect the U.S. interest in maritime freedom. Reviewing the four years of the Trump administration, one could assess that the United States took several of these recommended steps, including messaging that maritime freedom is a priority of national security strategy and calling upon America's allies to help protect maritime freedom around the world. But these six recommendations also included the following:

[President Trump] should prioritize America's accession to the Law of the Sea Convention, which codifies maritime freedom into international law. This action item is critically important for reasons of national security, energy security and economic opportunity. As commander of U.S. Central Command, then General Mattis told the Senate, "We owe our Soldiers, Airmen, Marines and Coast Guardsmen fixed treaty-based rights instead of relying on the threat of force or customary international law." Unfortunately, some Republican Senators have blocked an accession vote for years, primarily on ideological grounds. But the incoming president campaigned as an outsider who could break gridlock, depart from 'business as usual,' and put America back to work. He also spoke about seeking out 'untapped potential' to increase America's economic growth. Such potential could include the oil and mineral resources extractable from the seabed of world's oceans. Understandably, American companies are unwilling to assume the risk of exploring seabed areas, given that foreign companies could piggy-back at successful sites. Yet competitor nations who are parties to the convention, such as China, are lawfully taking advantage of exclusive seabed licenses. If the United States joins the convention, then it too could leverage the freedom to tap into the economic potential of those maritime areas, create American jobs extracting energy and other natural resources and converting them into high-technology goods and expand the American economy. As chairman and CEO of ExxonMobil, Tillerson told the Senate

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248. Jonathan G. Odom, *How Trump Can Make America Navigate Again*, NATIONAL INTEREST (Jan. 16, 2017), <https://nationalinterest.org/feature/how-trump-can-make-america-navigate-again-19065>.

that accession to the convention is “important to our company—and arguably to America’s energy security.”<sup>249</sup>

Four years later, the overarching U.S. national interests in national security, energy security and economic opportunity continue to exist; U.S. accession to UNCLOS would protect and promote those interests. Moreover, U.S. accession would also improve U.S. credibility on its commitment to protect and preserve the UNCLOS rules, which form a portion of the rules-based element of the international order. If the United States acceded to the treaty tomorrow, China would still likely ignore U.S. exhortations that it complies with its legal obligations under the tribunal’s ruling. But a center of gravity in this battle to preserve the existing rules-based international order is the hearts and minds of other States, including, but not limited to, U.S. allies and partners. Efforts to unite a chorus of voices in the international community in support of the tribunal’s ruling and its significance to the international order would be greatly enhanced if the United States was a full member of that community. Critics might argue that the United States is already a full member due to its economic and military power; however, such critics overlook the reality that the United States has no right to nominate and elect U.S. judges to the International Tribunal for the Law of the Sea and has no voice at the annual meetings of State parties to UNCLOS—two international forums that continue to shape and develop this important body of international law.

In conclusion, the United States continuously invoked the tribunal’s ruling in the South China Sea arbitration in the four years since the ruling was issued. This includes official words and actions under President Obama and his administration in the first six months after the ruling and the words and actions of the Trump administration in the subsequent four years. That administration candidly described how U.S. competition with China includes deliberate efforts by the United States to preserve the existing international rules-based order and uphold longstanding tenets of U.S. foreign policy in the South China Sea. Additionally, the Trump administration amplified U.S. challenges to China’s illegal maritime claims in the South China Sea through public speeches, diplomatic statements, and operational assertions.

Taken together, these words and actions frequently invoked elements of the tribunal’s ruling as reflecting international law binding upon the parties. But as outlined above, there is more the United States can and should do to

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249. *Id.*

preserve the tribunal ruling's value and ensure its viability. President Biden and his administration should make those statements and take those actions necessary to reinforce the importance of the ruling. Otherwise, there is a risk that the decision rendered by the international tribunal on July 12, 2016, becomes merely another event dot, with limited significance on the chronological timeline of what we know as the South China Sea situation.