

# DIPLOMATIC NOTES AND THE SOUTH CHINA SEA DISPUTES

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## I. Introduction

A note verbale is among the many forms of diplomatic correspondence available to governments.<sup>1</sup> In contemporary diplomatic communication, a note verbale is also referred to as a diplomatic note since English has come to be considered the lingua franca of diplomacy.<sup>2</sup> It is a formal note written in the third person, less formal than first-person notes, and more formal than aide-memoires.<sup>3</sup> It is a note that may be addressed to a foreign minister or ministry, or to a permanent representative or mission. The typical uses of a note verbale include the exchange of information between the United Nations (UN) and governments or permanent missions, and requests for and acknowledgements of information and documents.<sup>4</sup> The note's nature is that of a memorandum and is unsigned.<sup>5</sup>

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<sup>1</sup> The idea originally implicit in the term, note verbale, is that it embodies the substance or formal record of an oral communication or a conversation, although such a note is not designed for publication. ERNEST SATOW, *SATOW'S GUIDE TO DIPLOMATIC PRACTICE* 42 (Lord Gore-Booth & Desmond Pakenham eds., 5th ed. 1979).

<sup>2</sup> JOHAN VERBEKE, *DIPLOMACY IN PRACTICE: A CRITICAL APPROACH* 31 (2023).

<sup>3</sup> CHRISTER JOHNSON & MARTIN HALL, *ESSENCE OF DIPLOMACY* 46 (2005); RALPH G. FELTHAM, *DIPLOMATIC HANDBOOK* 31 (7th ed. 1998); Johst Wilmanns, *Note Verbale*, in 9 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 286-87 (Rudolf Bernhardt ed., 1986).

<sup>4</sup> U.N., *UNITED NATIONS CORRESPONDENCE MANUAL: A GUIDE TO THE DRAFTING, PROCESSING AND DISPATCH OF OFFICIAL UNITED NATIONS COMMUNICATIONS* 19 (2000), <https://archive.unu.edu/hq/library/resource/UN-correspondence-manual.pdf>.

<sup>5</sup> JENNIFER SPEAKE & MARK LAFLAUR, *THE OXFORD ESSENTIAL DICTIONARY OF FOREIGN TERMS IN ENGLISH* (2002) <https://www.oxfordreference.com/display/10.1093/acref/9780199891573.001.0001/acref-9780199891573-e-4750>.

Formality, politeness, and profuse courtesy are prominent features of diplomatic notes, which, along with their pre-formulated nature, are intended to reduce tensions and limit the perils of interpretive divergences.<sup>6</sup>

In diplomatic practice within the UN system, a note verbale is often addressed to the UN Secretary-General for circulation to members of the UN. A State may issue a note verbale in the form of a protest note in order to challenge and prevent a policy or practice from developing, to affirm and protect its national interests, to contest or condemn the acts or claims of another State, and to gain international allies and seek political and diplomatic support from other States and the wider community of nations.<sup>7</sup> In cases of disputes, the resort to diplomatic protest via notes verbales is considered standard diplomatic practice.<sup>8</sup>

In the case of the South China Sea disputes,<sup>9</sup> notes verbales have been employed as a mode of correspondence between and amongst claimant States in the South China Sea and have been deliberately utilized by claimant States to the South China Sea, as well as external or third States, to express certain positions and as rejoinders to other statements and claims made by other States. The use of notes verbales has been an opportune exercise in public diplomacy, further

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<sup>6</sup> MARCUS GALDIA, LECTURES ON LEGAL LINGUISTICS 231 (2017).

<sup>7</sup> R. P. BARSTON, MODERN DIPLOMACY 289-90 (2014).

<sup>8</sup> VERBEKE, *supra* note 2, at 200.

<sup>9</sup> The author has written extensively on various aspects of the South China Sea disputes. *Please see* Lowell Bautista, *The South China Sea Arbitration and Historic Rights in the Law of the Sea*, 17 PHIL. Y.B. OF INT'L L. 1, 1-40 (2018); Lowell Bautista, *The South China Sea Arbitral Award amidst Shifting Philippine Foreign Policy*, 6 KOR. J. INT'L & COMP. L. 1, 1-20 (2018); Lowell Bautista, *The South China Sea Arbitral Award: Evolving Post-Arbitration Strategies, Implications and Challenges*, 10 ASIAN POL. & POL'Y 178, 178-89 (2018); Lowell Bautista, *There are No Davids and Goliaths in International Law: Some Lessons from Territorial and Maritime Disputes Settled through International Adjudication*, in THE SOUTH CHINA SEA READER 119, 119-47 (2016); Lowell Bautista & Aries Arugay, *Philippines v. China the South China Sea Arbitral Award: Implications for Policy and Practice*, 9 ASIAN POL. & POL'Y 122, 122-52 (2017); Lowell Bautista, *Philippine Arbitration Against China Over the South China Sea*, 1 ASIA-PAC. J. OCEAN L. & POL'Y 116, 116-21 (2016); Lowell Bautista, *The Philippines and the Arbitral Tribunal's Award: A Sombre Victory and Uncertain Times Ahead*, 38 CONTEMP. SOUTHEAST ASIA 349, 349-55 (2016); Lowell Bautista, *The Arbitration Case Between Philippines and China Over Their Dispute in the South China Sea*, 19 J. SOUTHEAST ASIAN STUD. 3, 3-24 (2014); Lowell Bautista, *The Philippine Claim to Bajo de Masinloc in the Context of the South China Sea Dispute*, 6 J. EAST ASIA & INT'L L. 497, 497-529 (2013); Lowell Bautista, *Thinking Outside the Box: The South China Sea Issue and the United Nations Convention on the Law of the Sea (Options, Limitations and Prospects)*, 81 PHIL. L. J. 699, 699-731 (2007).

catapulting the South China Sea disputes on the international agenda, and even influencing the contours of global public opinion. The notes verbales have been used as tools to promote, clarify, and expound foreign policy positions and disseminate information. Consequently, this has resulted in some degree of greater clarity and elucidation of the conflicting and ambiguous territorial and maritime claims in the South China Sea.

The use of notes verbales in the South China Sea disputes is a positive development in the promotion of the rule of law in international relations.<sup>10</sup> It can be reasonably contended that the notes verbales bear diminutive consequences on the situations and conditions on the ground. However, these diplomatic initiatives which recognize, support, and celebrate the South China Sea arbitral award ruling<sup>11</sup> and endorse a rules-based international legal order are significant in demonstrating that China's claim to "historic rights" beyond the limits of its entitlements under the United Nations Convention on the Law of the Sea ("UNCLOS")<sup>12</sup> within the area encompassed by the nine-dash line, is both not recognized and not acceptable to many States. In some respects, China's assertiveness in the use of notes verbales in the articulation and defense of its claims in the South China Sea engendered the unintended effect of forging international consensus to oppose China's claims that are inconsistent with UNCLOS. The notes verbales also revived unresolved intra-regional disagreements among States like Vietnam, Malaysia, and the Philippines.<sup>13</sup> Nonetheless, the use

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<sup>10</sup> This has been labeled loosely as "lawfare", which broadly pertains to the role, relevance, and use of international law, including its legal systems, processes, and institutions, as a strategy or weapon against opponents. The use of "lawfare" in the context of the South China Sea disputes has been discussed in literature. *See for example* Douglas Guilfoyle, *The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea*, 95 INT'L AFF. 999, 999-1017 (2019); Renato C. De Castro, *The 12 July 2016 Permanent Court of Arbitration's (PCA) Award: The Philippines' Lawfare versus China's Realpolitik in the South China Sea Dispute*, 8 INT'L J. OF CHINA STUD. 347, 347-72 (2017); Anne Hsiu-An Hsiao, *China and the South China Sea "Lawfare"*, ISSUES & STUD., June 2016, at 1, 1-42; Richard J. Heydarian, *Mare Liberum: Aquino, Duterte, and The Philippines' Evolving Lawfare Strategy in the South China Sea*, 10 ASIAN POL. & POL'Y 283, 283-99 (2018).

<sup>11</sup> South China Sea Arbitration (Phil. v. China), Award, 2016 (July 12) [hereinafter *The South China Sea Arbitration Award of July 12, 2016*].

<sup>12</sup> U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. [hereinafter "UNCLOS" or "the Convention"].

<sup>13</sup> For example, the still unresolved Philippine claim to North Borneo or Sabah vis-à-vis Malaysia. This topic is not covered in this paper, but there is academic literature which discusses this

of diplomatic notes, nay diplomacy, is critical in order to build trust, avert potential conflict, and provide opportunities for States to explore means to resolve their disputes peacefully through negotiation and in a manner consistent with international law.

Notwithstanding the categorical ruling of the South China Sea arbitral tribunal declaring that China's nine-dash line claim is incompatible with UNCLOS,<sup>14</sup> China has continued to pursue its claims and its activities in the disputed territories. China has consistently disregarded and criticized the arbitral ruling as a "piece of waste paper".<sup>15</sup> It has also intensified on its use of notes verbales, expressing what many observe as revised articulations of its claims.<sup>16</sup> Many States have opposed and protested the "historic rights" claimed by China over the South China Sea, confirming the ruling of the arbitral tribunal that China's claims have no basis under UNCLOS. Malaysia, Vietnam, the Philippines, and Indonesia have all issued notes verbales against China.<sup>17</sup> Following the award, States outside of the region such as the United States, Australia, New Zealand, Japan, the United Kingdom, France, and Germany have submitted notes verbales in protest of Chinese claims. China dismissed and responded to every single note

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extensively. *See for example* NICHOLAS TARLING, *SULU AND SABAH: A STUDY OF BRITISH POLICY TOWARDS THE PHILIPPINES AND NORTH BORNEO FROM THE LATE EIGHTEENTH CENTURY* (1978); M. O. ARIFF, *THE PHILIPPINES' CLAIM TO SABAH: ITS HISTORICAL, LEGAL, AND POLITICAL IMPLICATIONS* (1970); Erwin S. Fernandez, *Philippine-Malaysia Dispute over Sabah: A Bibliographic Survey*, 7 *ASIA-PAC. SOC. SCIENCE REV.* 53, 53-64 (2007); U.P. LAW CENTER - INSTITUTE OF INTERNATIONAL LEGAL STUDIES, *THE PHILIPPINE CLAIM TO A PORTION OF NORTH BORNEO: MATERIALS AND DOCUMENTS* (2003); REPUBLIC OF THE PHILIPPINES, *PHILIPPINE CLAIM TO NORTH BORNEO, VOLUME I* (1964); REPUBLIC OF THE PHILIPPINES, *PHILIPPINE CLAIM TO NORTH BORNEO, VOLUME II* (1967), among others.

<sup>14</sup> The South China Sea Arbitration Award of July 12, 2016, *supra* note 11, ¶¶ 261, 278, 1203 (B)(2). *See also id.* ¶¶ 232, 246, 252, 262, 263.

<sup>15</sup> *China on PH's 2016 Arbitral Win: "Illegal, null, and void,"* CNN PHILIPPINES (July 31, 2021), <https://www.cnnphilippines.com/news/2021/7/13/China-on-PH-2016-arbitral-win-West-Philippine-Sea.html>.

<sup>16</sup> U.S. DEP'T OF STATE, *LIMITS IN THE SEAS NO. 150 - PEOPLE'S REPUBLIC OF CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA 2* (2022), <https://www.state.gov/wp-content/uploads/2022/01/LIS150-SCS.pdf>.

<sup>17</sup> Ian Storey, *The South China Sea Dispute in 2020-2021*, ISEAS-YUSOF ISHAK INSTITUTE (Sep. 3, 2020) [https://www.iseas.edu.sg/wp-content/uploads/2020/08/ISEAS\\_Perspective\\_2020\\_97.pdf](https://www.iseas.edu.sg/wp-content/uploads/2020/08/ISEAS_Perspective_2020_97.pdf).

verbale. These notes verbales will be discussed in this paper.<sup>18</sup> The notes verbales are listed in Annexes 1 and 2 at the end of this paper.

This paper will discuss the use and exchange of notes verbales, otherwise referred to as diplomatic notes, in the South China Sea disputes. It will be in five parts. The first part will provide a brief introduction into the general nature of diplomatic notes and situate the discussion against the backdrop of the South China Sea disputes. The second and fourth parts will discuss the exchange of diplomatic notes *before* and *after* the final award of the South China Sea arbitral tribunal, respectively. The third part will provide a summary of the South China Sea arbitration. The fifth part, and by way of conclusion will offer some reflections on how the use of diplomatic notes in the South China Sea has provided greater clarity in the articulation of conflicting territorial and maritime claims in the South China Sea, demonstrated that States seek and pursue a peaceful, rules-based approach in the management and resolution of their disputes with other States, and illustrated the prudent engagement of States with international law as a mechanism to contest China's territorial and maritime claims in the South China Sea.

## II. Pre-2016 Arbitration Award

The first series of note verbale exchanges concerning the South China Sea commenced in 2009. On April 13, 2009, China filed a note verbale addressed to the Secretary-General of the United Nations in protest of Republic Act No. 9522.<sup>19</sup> Passed on March 10, 2009, the Act amended certain provisions of Republic Act No. 3046, as amended by Republic Act No. 5446, defining the archipelagic baselines of

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<sup>18</sup> It needs to be emphasized that the notes verbales examined and discussed in this paper are not intended to be exhaustive. There are numerous other notes verbales which are not mentioned or covered in this paper. The multi-volume memorial, written submissions, responses, and annexes that the Philippines submitted in the arbitration against China in the South China Sea refer, cite, mention, and attach numerous other notes verbales, diplomatic correspondences, letters, and other documents relevant and related to the South China Sea disputes. For these, please refer to the website of the Permanent Court of Arbitration at <https://pca-cpa.org/en/cases/7/>.

<sup>19</sup> Letter from the Permanent Mission of the People's Republic of China, CML/12/2009 (Apr. 13, 2009), [https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn69\\_2009\\_chn.pdf](https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn69_2009_chn.pdf).

the Philippines.<sup>20</sup> The baselines of the Philippine archipelago in Republic Act No. 9522 are defined by 101 baselines, and provided that baselines over the Kalayaan Island Group as constituted under Presidential Decree No. 1596 and Bajo de Masinloc (also known as Scarborough Shoal) over which the Philippines exercises sovereignty and jurisdiction, shall be determined as a “regime of islands” consistent with Article 121 of UNCLOS.<sup>21</sup> In the note verbale, China asserted that Republic Act No. 9522 “illegally claims” Bajo de Masinloc (which China refers to as Huangyan Island) and some islands and reefs of the Kalayaan Island Group (which China refers to as Nansha Islands).<sup>22</sup> The Chinese government reiterated that it has “indisputable sovereignty over Huangyan Island and Nansha Islands and their surrounding maritime areas” for being “part of the territory of China since ancient time.”<sup>23</sup>

On May 6, 2009, Malaysia and Vietnam made a joint submission to the United Nations Commission on the Limits of the Continental Shelf (UN CLCS) in respect of the southern part of the South China Sea.<sup>24</sup> The joint submission is a submission for only a portion of the two coastal States’ continental shelf, and both States reserved the right to make further submissions, either jointly or unilaterally, in respect of other areas.<sup>25</sup> The joint submission also informed the Commission that there are “unresolved disputes” in the area subject of the joint submission; nevertheless, Vietnam and Malaysia assured the Commission that the joint submission “will not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts.”<sup>26</sup>

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<sup>20</sup> Rep. Act No. 9522: An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines, and for Other Purposes (2009), <https://www.officialgazette.gov.ph/2009/03/10/republic-act-no-9522/>.

<sup>21</sup> *Id.* § 1, 2.

<sup>22</sup> Letter from the Permanent Mission of the People’s Republic of China, CML/12/2009, *supra* note 19.

<sup>23</sup> *Id.*

<sup>24</sup> Joint Continental Shelf Submission of Malaysia & Socialist Republic of Vietnam (May 6, 2009), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/mys\\_vnm2009executivesummary.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009executivesummary.pdf).

<sup>25</sup> *Id.* at 1.

<sup>26</sup> *Id.* at 2. This declaration is in accordance with Rule 46 of the Commission’s Rules of Procedure, and Paragraphs 1 and 2 of Annex I to the Commission’s Rules of Procedure.

On May 7, 2009, Vietnam made a partial submission to the UN CLCS in respect of its extended continental shelf in the North Area.<sup>27</sup> The partial submission of Vietnam recognized that the area of continental shelf is subject of “overlapping interests expressed by relevant coastal States”; nevertheless, it is of the view that the area of continental shelf that is the subject of its submission is “not a subject of overlap and dispute.”<sup>28</sup> The declaration of Vietnam is in accordance with Paragraph 2(a) and (b) of Annex I and Rule 46 of the UN CLCS Rules of Procedures, that in cases where there is a dispute between States with opposite or adjacent coasts or those with unresolved land or maritime disputes, the coastal State making the submission shall inform and assure the Commission that the submission will not prejudice matters relating to the delimitation of their boundaries and that the actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between States.<sup>29</sup> Vietnam’s extended continental shelf submission encompassed the Hoang Sa and Truong Sa archipelagos in the South China Sea, which Vietnam refers to as the East Sea.<sup>30</sup>

On May 7, 2009, China sent a note verbale to the UN Secretary-General opposing the Vietnam note verbale dated May 7, 2009.<sup>31</sup> China released another note verbale on May 7, 2009, in response to the May 6, 2009 joint submission of Malaysia and Vietnam to the UN CLCS.<sup>32</sup> A map depicting China’s nine-dash line claim was attached to these notes verbales.<sup>33</sup> These notes verbales were circulated

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<sup>27</sup> Socialist Republic of Vietnam’s Continental Shelf Submission (Apr. 2009), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/vnm2009n\\_executivesummary.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm2009n_executivesummary.pdf).

<sup>28</sup> *Id.* at 3.

<sup>29</sup> See Rules of Procedure of the Commission on the Limits of the Continental Shelf (Apr. 2008), [https://www.un.org/depts/los/clcs\\_new/commission\\_rules.htm](https://www.un.org/depts/los/clcs_new/commission_rules.htm).

<sup>30</sup> *Id.* at 5-8.

<sup>31</sup> Letter from the Permanent Mission of the People’s Republic of China, CML/18/2009 (May 7, 2009), [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2009re\\_vnm.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf).

<sup>32</sup> Letter from the Permanent Mission of the People’s Republic of China, CML/17/2009 (May 7, 2009), [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf).

<sup>33</sup> For materials that explain the history, nature, and status of China’s nine-dash line, *please see* Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AM. J. OF INT’L L. 98, 98-123 (2013); Keyuan Zou, *The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands*, 14 INT’L J. OF MARINE AND COASTAL L. 27-55 (1999); Li Jinming & Li Dexia,

to all members of the Commission, all States Parties to UNCLOS, and all members of the United Nations. This was the first time that a map of China's nine-dash line claim was attached to an official communication that is circulated to all members of the United Nations. In the note verbale, China claimed "indisputable sovereignty over the islands in the South China Sea and adjacent waters and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof." China alleged that Malaysia and Vietnam's claim to the continental shelf beyond 200 nautical miles as embodied in their joint submission to the UN CLCS had "seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea." China claimed that the Chinese Government has consistently held this position, and such position is "widely known by the international community."<sup>34</sup> China requested the UN CLCS not to consider the joint submission of Malaysia and Vietnam, citing Article 5(a) of Annex I of the Rules of Rules of Procedure of the UN CLCS.<sup>35</sup>

The following day, on May 8, 2009, Vietnam issued a note verbale in response to China's notes verbales of April 13, 2009 and May 7, 2009.<sup>36</sup> In the same note verbale, Vietnam reiterated its "indisputable sovereignty" over the Hoang Sa (Paracels) and Truong Sa (Spratlys) archipelagos. Vietnam asserted that its submission as well as its joint submission with Malaysia to the UN CLCS constitute legitimate undertaking in the implementation of UNCLOS and conform with the Rules of Procedure of the UN CLCS.<sup>37</sup> Vietnam directly challenges China's claims in the South China Sea (which it referred to as "Eastern Sea") as embodied in China's nine-dash line map as having "no legal, historical or factual basis, therefore is null and void."<sup>38</sup>

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*The Dotted Line on the Chinese Map of the South China Sea: A Note*, 34 OCEAN DEV'T & INT'L L. 287-295 (2003); Florian Dupuy & Pierre-Marie Dupuy, *A Legal Analysis of China's Historic Rights Claim in the South China Sea*, 107 AM. J. OF INT'L L. 124-141 (2013).

<sup>34</sup> Letters from the Permanent Mission of the People's Republic of China, CML/18/2009 & CML/17/2009, *supra* notes 31-32.

<sup>35</sup> *Id.*

<sup>36</sup> Letter from the Permanent Mission of the Socialist Republic of, No.86/HC-2009 (May 8, 2009), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/vnm\\_re\\_chn\\_2009re\\_vnm.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm_re_chn_2009re_vnm.pdf).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*



Malaysia, in response to the Chinese note verbale of May 7, 2009, released its own note verbale on May 20, 2009.<sup>39</sup> Malaysia reiterated that its joint submission with Vietnam to the UN CLCS is a legitimate undertaking in implementation of UNCLOS and in conformity with the pertinent provisions of the Convention and the Rules of Procedure of the UN CLCS.<sup>40</sup> Malaysia clarified that the joint submission is without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts, as well as the position of the claimant States in the South China Sea in respect of their land or maritime disputes, which are subject to relevant provisions of UNCLOS and the Rules of Procedure of the UN CLCS.<sup>41</sup>

On August 4, 2009, the Philippines released two notes verbales. The first one was in response to Vietnam's May 6, 2009 submission to the UN CLCS,<sup>42</sup> while the second note verbale was a response to the joint submission of Malaysia and Vietnam to the UN CLCS on May 6, 2009.<sup>43</sup> In the first note verbale of August 4, 2009, the Philippines objected to Vietnam's continental shelf claims beyond 200 nautical miles in the South China Sea on the ground that the claims of Vietnam overlap with those of the Philippines.<sup>44</sup> In the second note verbale of August 4, 2009, the Philippines protested against the joint submission for an extended continental shelf by Malaysia and Vietnam on the basis that the claims "are disputed not only because they overlap with that of the Philippines, but also because of the controversy arising from the territorial claims on some of the

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<sup>39</sup> Letter from the Permanent Mission of Malaysia, HA 24/09 (May 20, 2009), [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/mys\\_re\\_chn\\_2009re\\_mys\\_vnm\\_e.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/mys_re_chn_2009re_mys_vnm_e.pdf).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* Specifically, Malaysia's Note Verbale referred to art. 76 (10) of UNCLOS, art. 9 of Annex II of UNCLOS, and ¶¶ 1, 2 & 5 of Annex I of the Rules of Procedure of the UN CLCS, respectively.

<sup>42</sup> Letter from the Permanent Mission of the Republic of the Philippines, No. 000818 (Aug. 4, 2009), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/clcs\\_37\\_2009\\_los\\_phl.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/clcs_37_2009_los_phl.pdf).

<sup>43</sup> Letter from the Permanent Mission of the Republic of the Philippines, No. 000819 (Aug. 4, 2009) [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/clcs\\_33\\_2009\\_los\\_phl.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/clcs_33_2009_los_phl.pdf).

<sup>44</sup> Letter from the Permanent Mission of the Republic of the Philippines, No. 000818, *supra* note 42.

islands in the area including North Borneo.”<sup>45</sup> In both notes verbales, the Philippines, relying upon relevant provisions of UNCLOS and Rules of Procedure of the UN CLCS, requested the UN CLCS to refrain from considering the unilateral submission of Vietnam and the joint submission of Malaysia and Vietnam, unless and until after the parties have discussed and resolved their disputes.<sup>46</sup>

On August 18, 2009, Vietnam responded to the two Philippine notes verbales dated August 4, 2009.<sup>47</sup> The note verbale reaffirmed its “consistent position that Vietnam has indisputable sovereignty over the Hoang Sa (Paracels) and Truong Sa (Spratlys) archipelagoes.”<sup>48</sup> In language similar to previous notes verbales, Vietnam reiterated that its submission and joint submission with Malaysia constitute legitimate undertakings in implementation and in conformity with the provisions of UNCLOS and the Rules of Procedures and Scientific and Technical Guidelines of the UN CLCS.<sup>49</sup> Vietnam added that “all disputes relating to the Eastern Sea (South China Sea) must be settled through peaceful negotiations, in accordance with international law,” particularly UNCLOS and the Declaration on the Conduct of Parties in the South China Sea.<sup>50</sup>

On August 21, 2009, Malaysia responded to Philippine note verbale No. 000819 dated August 4, 2009.<sup>51</sup> In its note verbale, Malaysia clarified that it had informed the Philippines prior to the submission of its joint UN CLCS submission for an extended continental shelf with Vietnam, and had proposed for the Philippines to consider joining the joint submission.<sup>52</sup> Malaysia argued that the Philippines’ claim to North Borneo “has no basis under international law,” and

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<sup>45</sup> Letter from the Permanent Mission of the Republic of the Philippines, No. 000819, *supra* note 43.

<sup>46</sup> Letters from the Permanent Mission of the Republic of the Philippines, No. 000818 & No. 000819, *supra* notes 42-43.

<sup>47</sup> Letter from the Permanent Mission of the Socialist Republic of Vietnam, No. 240/HC-2009 (Aug. 18, 2009), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/vnm\\_re\\_phl\\_2009re\\_vnm.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm_re_phl_2009re_vnm.pdf).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Letter from the Permanent Mission of Malaysia, HA 41/09 (Aug. 21, 2009), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/mys\\_re\\_phl\\_2009re\\_mys\\_vnm\\_e.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_re_phl_2009re_mys_vnm_e.pdf).

<sup>52</sup> *Id.*

asserted that “Malaysia has never recognized the Philippines’ claim to the Malaysian state of Sabah, formerly known as North Borneo.”<sup>53</sup>

On July 8, 2010, Indonesia sent a note verbale to the UN Secretary-General in reference to the Chinese note verbale of May 7, 2009, particularly assailing the attached map depicting the nine-dash line, stating that “[t]hus far, there is no clear explanation as to the legal basis, the method of drawing, and the status of those separated dotted-lines.”<sup>54</sup> The note verbale reiterated its longstanding position that “Indonesia is not a claimant State to the sovereignty disputes in the South China Sea” and the impartial yet active role it has played in initiating confidence building measures among the claimant States since 1990 which has resulted in the adoption of the Declaration on the Conduct of Parties in the South China Sea in 2002. Indonesia also referred to relevant previous official statements made by Chinese officials to highlight the position of China, in relation to the maritime zone of small islands and rocks, that remote or small features in the South China Sea are not entitled to an exclusive economic zone (EEZ) or continental shelf.<sup>55</sup> In

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<sup>53</sup> *Id.* at 2. The relevant portion of the note verbale states: “In this respect, the Permanent Mission of Malaysia wishes to draw the attention of the Secretary-General to the Judgment of the International Court of Justice dated 23 October 2001 in the Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan and the Application by the Philippines for permission to Intervene. On the issue of the Philippine claim to North Borneo, Judge Ad-hoc Franck, in a Separate Opinion stated that “in light of the clear exercise by the people of North Borneo of their right to self-determination, it cannot matter whether this Court, in any interpretation it might give to any historic instrument or efficacy, sustains or not the Philippines claim to historic title. Modern international law does not recognize the survival of a right of sovereignty based solely on historic title: not in any event, after an exercise of self-determination conducted in accordance with the requisites of international law, the bona fides of which has received international recognition by the political organs of the United Nations. Against this, historic claims and feudal pre-colonial titles are mere relics of another international legal era, one that ended with the setting of the sun on the age of colonial imperium.”

<sup>54</sup> Letter from the Permanent Mission of the Republic of Indonesia, No. 480/POL-703/VII/10 (July 8, 2010), [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/idn\\_2010re\\_mys\\_vnm\\_e.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf).

<sup>55</sup> *Id.* at 1. Indonesia specifically referred to the following statements:

“a. The statement of the Head of Delegation of the People’s Republic of China, H.E. Ambassador Chen Jinghua, at the 15th Session of the International Seabed Authority (ISBA) in Kingston, Jamaica on June 2009, in particular by mentioning that ‘[c]laim on [EEZ] and continental shelf with the rock. . . as the basepoint concerns important principles of the Convention and the overall interests of the international community.’ He further went on by referring to the statement of Ambassador Arvid Prado of Malta that “if a 200-mile limit of jurisdiction could

Indonesia's view, a contrary view "[a]llowing the use of uninhabited rocks, reefs and atolls isolated from the mainland and in the middle of the high sea as a basepoint to generate maritime space concerns the fundamental principles of the Convention and encroaches the legitimate interest of the global community." The note verbale concludes that "the so called 'nine-dotted-lines map' as contained in ... circular note Number: CMU17/2009 dated 7th May 2009, clearly lacks international legal basis and is tantamount to upset the UNCLOS 1982."<sup>56</sup>

After a year, on April 5, 2011, the Philippines through a note verbale addressed to the UN Secretary-General expressed its views on China's claims embodied in its two notes verbales (CML/17/2009 and CML/18/2009) of May 7, 2009.<sup>57</sup> The Philippines outlined the following three points, which, respectively address the views of the Philippines on the islands and other geologic features; the waters adjacent to the islands and other geologic features; and other relevant waters, seabed, and subsoil in the South China Sea:

First, the Kalayaan Island Group (KIG) constitutes an integral part of the Philippines. The Republic of the Philippines has sovereignty and jurisdiction over the geological features in the KIG.

Second, the Philippines, under the Roman notion of *dominium maris* and the international law principle of "*la terre domine la mer*" which states that the land dominates the sea, necessarily exercises sovereignty and jurisdiction over the waters around or adjacent to each relevant geological feature in the KIG as provided

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be founded on the possession of uninhabited, remote or very small islands, the effectiveness of international administration of ocean space beyond national jurisdiction would be gravely impaired.

- b. The statement of the Chinese delegation at the 19th meeting of the State Parties on the Law of the Sea (SPLOS) held on 22-26 June 2009 in New York, reiterating that 'according to Article 121 of the UNCLOS, rocks which cannot sustain human habitation or economic life of their own shall have no [EEZ] or continental shelf.'

<sup>56</sup> *Id.* at 2.

<sup>57</sup> Letter from the Permanent Mission of the Republic of the Philippines, No. 000228 (Apr. 5, 2011), [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/phl\\_re\\_chn\\_2011.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/phl_re_chn_2011.pdf). The Philippine note verbale specifically refers to the May 7, 2009 Letters of China (CML/17/2009 & CML/18/2009) addressed to the U.N. Secretary-General.

for under the United Nations Convention on the Law of the Sea (UNCLOS).

At any rate, the extent of the waters that are “adjacent” to the relevant geological features are definite and determinable under UNCLOS, specifically under Article 121 (Regime of Islands) of the said Convention.

Third, since the adjacent waters of the relevant geological features are definite and subject to legal and technical measurement, the claim as well by the People's Republic of China on the “*relevant waters as well as the seabed and subsoil thereof*” (as reflected in the so-called 9-dash line map attached to Notes Verbales CMU17/2009 dated 7 May 2009 and CMU18/2009 dated 7 May 2009) outside of the aforementioned relevant geological features in the KIG and their “adjacent waters” would have no basis under international law, specifically UNCLOS. With respect to these areas, sovereignty and jurisdiction or sovereign rights, as the case may be, necessarily appertain or belong to the appropriate coastal or archipelagic state - the Philippines - to which these bodies of waters as well as seabed and subsoil are appurtenant, either in the nature of Territorial Sea, or 200M [EEZ], or Continental Shelf (CS) in accordance with Articles 3, 4, 55, 57, and 76 of UNCLOS.<sup>58</sup>

On April 14, 2011, China sent its response to the Philippine note verbale of April 5, 2011.<sup>59</sup> The note verbale mentioned that the contents of Philippine Note Verbale No. 00028 dated April 5, 2011, were “totally unacceptable to the Chinese government.” In keeping with its previous assertions, the note verbale reiterated that:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters and enjoys sovereign rights and

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<sup>58</sup> *Id.* at 2-3.

<sup>59</sup> Letter from the Permanent Mission of the People's Republic of China, CML/8/2011 (Apr. 14, 2011), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2011\\_re\\_phl\\_e.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2011_re_phl_e.pdf).

jurisdiction over the relevant waters as well as the seabed and subsoil thereof. China's sovereignty and related rights and jurisdiction in the South China Sea are supported-by abundant historical and legal evidence.

The so-called Kalayaan Island Group (KIG) claimed by the Republic of Philippines is in fact part of China's Nansha Islands. In a series of international treaties which define the limits of the territory of the Republic of Philippines and the domestic legislation of the Republic of Philippines prior to the 1970s, the Republic of Philippines had never made any claims to Nansha Islands or any of its components. In the 1970s, the Republic of Philippines started to invade and occupy some islands and reefs of China's Nansha Islands and made relevant territorial claims, to which China objects strongly. The Republic of Philippines' occupation of some islands and reefs of China's Nansha Islands as well as other related acts constitutes infringement upon China's territorial sovereignty. Under the legal doctrine of "*ex injuria jus non oritur*," the Republic of Philippines can in no way invoke such illegal occupation to support its territorial claims. Furthermore, under the legal principle of "*la terre domine la mer*," coastal states' [EEZ] and Continental Shelf claims shall not infringe upon the territorial sovereignty of other states.

Since 1930s, the Chinese Government has given publicity several times the geographical scope of China's Nansha Islands and the names of its components. China's Nansha Islands is therefore clearly defined. . . .<sup>60</sup>

On May 3, 2011, Vietnam through a single note verbale responded to both the Philippine Note No. 000228 dated April 5, 2011 and the Chinese Note No. CML/8/2011 dated April 14, 2011, in the following manner: "Hoang Sa (Paracel) and Truong Sa (Spratly) Archipelagoes, are integral parts of Vietnamese territory. Viet

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<sup>60</sup> *Id.* at 1-2.

Nam has sufficient historical evidence and legal foundation to assert her sovereignty over these two archipelagoes.”<sup>61</sup>

The first series of diplomatic exchanges on the South China Sea was transitorily punctuated by a standoff between the Philippines and China in April 2012 at Bajo de Masinloc (Scarborough Shoal).<sup>62</sup> It is against this backdrop of increasing tensions and escalation of assertiveness from China, that prompted the Philippines to resort to arbitration under Part XV of UNCLOS to protect its rights under the Convention. The Philippines adopted a rules-based approach to address the Scarborough Shoal standoff and its maritime and territorial claims in the South China Sea.

### III. The 2016 Arbitration Award

On January 23, 2013, the Philippines initiated arbitral proceedings against China under Annex VII of UNCLOS.<sup>63</sup> The Philippines recognized that the Tribunal does not have jurisdiction to decide on the issue of sovereignty over the disputed features nor did it request for a delimitation of the maritime boundaries in the South China Sea.<sup>64</sup> The arbitration acknowledged that the Tribunal is not vested with jurisdiction over certain categories of disputes which are excluded from the compulsory dispute settlement procedures in UNCLOS in view of China’s

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<sup>61</sup> Letter from the Permanent Mission of the Socialist Republic of Vietnam, No. 77/HC-2011 (May 3, 2011), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/vnm\\_2011\\_re\\_phlc hn.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm_2011_re_phlc hn.pdf).

<sup>62</sup> For an examination of the Philippine claim to Bajo de Masinloc, *please see* Lowell Bautista, *The Philippine claim to Bajo de Masinloc in the context of the South China Sea dispute*, 6 J. OF EAST ASIA AND INT’L L. 497, 497-529 (2013). The Scarborough Shoal standoff of April 2012 is discussed on pp. 518 to 520. On the Chinese claim to Scarborough Shoal, *please see* Bing Bing Jia, *A Preliminary Study of the Title to Huangyan Island, (Scarborough Reef/Shoal)*, 45 OCEAN DEV’T & INT’L L. 360, 360-373 (2014). *See also* Renato De Castro, *The Philippines Confronts China in the South China Sea: Power Politics vs. Liberalism-Legalism*, 39 ASIAN PERSPECTIVE 71, 71-100 (2015); Michael Green, Kathleen Hicks, Zack Cooper, John Schaus & Jake Douglas, *Counter-Coercion Series: Scarborough Shoal Standoff*, ASIA MARITIME TRANSPARENCY INITIATIVE (May 22, 2017), <https://amti.csis.org/counter-co-scarborough-standoff/>.

<sup>63</sup> Letter from the Republic of the Philippines to the People’s Republic of China, No. 13-0211 (Jan. 22, 2013), <https://dfa.gov.ph/images/UNCLOS/Notification and Statement of Claim on West Philippine Sea.pdf>.

<sup>64</sup> *Id.* ¶ 7.

Declaration of August 25, 2006 under Article 298 of UNCLOS.<sup>65</sup> The arbitration addressed a dispute concerning an interpretation or application of UNCLOS, which does not involve territorial sovereignty, boundary delimitation or historic title, or any of the optional exceptions from jurisdiction in Article 298 in Section 3 of Part XV of UNCLOS, and thus, subject to the compulsory procedures entailing binding decisions under Section 2 of Part XV of UNCLOS.<sup>66</sup>

In the arbitration, the Philippines asserted, among others, that China's maritime claims in the South China Sea based on its so-called nine-dash line are contrary to UNCLOS and invalid; that China has unlawfully occupied and engaged in unlawful construction activities in Mischief Reef, McKennan Reef, Gaven Reef, and Subi Reef, which are submerged features that are not considered "islands" under UNCLOS and therefore not subject to China's sovereignty since these submerged features are not located in China's continental shelf; that China has unlawfully prevented the Philippines from exploiting the living resources in the waters adjacent to Scarborough Shoal and Johnson Reef; and that China has unlawfully claimed and prevented the exercise by the Philippines of its rights to exploit the resources in its EEZ and continental shelf and has unlawfully interfered with the navigational rights of the Philippines under UNCLOS.<sup>67</sup>

The Philippines, in essence, put forth three fundamental questions in the arbitration. First, whether the rights and obligations of China and the Philippines regarding the waters, seabed, and maritime features of the South China Sea are governed by UNCLOS, and whether China's claims based on its "nine-dash line" are inconsistent with the Convention and therefore invalid. Second, whether

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<sup>65</sup> *Id.* at 16, ¶ 40. The claims of the Philippines do not fall within China's Declaration of August 25, 2006 since the claims do not involve the interpretation or application of Articles 15, 74, and 83 relating to boundary delimitation, or historic bays or titles in the contemplation of the relevant provisions of UNCLOS; or concern military activities or law enforcement activities; or pertain to matters over which the Security Council is exercising functions in accordance with the UN Charter. See China's Declaration (Aug. 25, 2006), [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&clang=\\_en#EndDec](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec).

<sup>66</sup> See UNCLOS arts. 279, 281, 283(1), 286, 287(1), 287(3), 287(5), 298. See also Lowell Bautista, *Dispute Settlement in the Law of the Sea Convention and Territorial and Maritime Disputes in Southeast Asia: Issues, Opportunities, and Challenges*, 6 *ASIAN POL. & POL'Y* 375, 378-82 (2014).

<sup>67</sup> *Republic of the Philippines' Notification and Statement of Claim* 13-14 (Jan. 22, 2013), <https://s3.documentcloud.org/documents/2165477/phl-prc-notification-and-statement-of-claim-on.pdf>.



certain maritime features claimed by both China and the Philippines are islands, low tide elevations, or submerged banks, and whether they can generate entitlement to maritime zones greater than 12 nautical miles under Article 121 of UNCLOS. And finally, whether the Philippines should be allowed to exercise and enjoy the rights within and beyond its EEZ and continental shelf that are established under UNCLOS.<sup>68</sup>

On February 19, 2013, China announced via a note verbale addressed to the Department of Foreign Affairs of the Philippines that it rejects and returns Philippine Note Verbale No. 13-0211 which commenced the arbitral proceedings against China over the South China Sea.<sup>69</sup> In the note verbale, China reiterated its “indisputable sovereignty over the Nanhai Islands and their adjacent waters” and alleged that the “direct cause of these disputes has been the illegal occupation by the Philippines of some islands and reefs of China’s Nansha Islands.”<sup>70</sup> China maintained that “both sides have agreed to settle the disputes through bilateral negotiations” and the initiation of arbitration proceedings by the Philippines “runs counter to the agreement and contravenes the principles and spirit of the Declaration on the Conduct of Parties in the South China Sea (DOC).”<sup>71</sup> China also alleged that the Philippine Notification and Statement of Claim contains “grave errors both in fact and in law, and includes many false accusations against China.”<sup>72</sup>

A year later, on December 7, 2014, China released a position paper on the matter of jurisdiction in the South China Sea arbitral proceedings initiated by the Philippines.<sup>73</sup> The position paper made it clear that the Chinese Government “will neither accept nor participate in the arbitration thus initiated by the Philippines.”<sup>74</sup> China did not participate in the arbitration at any stage. However, the arbitral procedure under UNCLOS ensured that the refusal of China to

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<sup>68</sup> *Id.* ¶ 6.

<sup>69</sup> Letter from the Permanent Mission of the People’s Republic of China to the Republic of the Philippines, No. (13) PG-039 (Feb. 19, 2013), <https://www.documentcloud.org/documents/2165478-phl-prc-china-note-verbale.html>.

<sup>70</sup> *Id.* at 1.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *China’s Position Paper on South China Sea*, CHINA DAILY (Dec. 7, 2014), [http://www.china-daily.com.cn/china/2014-12/07/content\\_19037946.htm](http://www.china-daily.com.cn/china/2014-12/07/content_19037946.htm).

<sup>74</sup> *Id.*

participate in the proceedings did not impair or frustrate the proceedings or the validity of the arbitral award.<sup>75</sup> There was no duty on the part of China to appear before the Tribunal. However, it did have the duty to comply with the decision of the Tribunal, provided the Tribunal had jurisdiction. Its nonappearance did not affect the validity of the judgment. It is final and there is no provision for appeal.<sup>76</sup>

The South China Sea Annex VII arbitral tribunal resolved the issue of jurisdiction before proceeding on the merits of the Philippine claim. On October 29, 2015, the arbitral tribunal issued an award on jurisdiction and admissibility, largely ruling in favor of the Philippines.<sup>77</sup> The unanimous award found that the Tribunal was properly constituted in accordance with Annex VII of UNCLOS and that China's nonappearance does not deprive the Tribunal of jurisdiction.<sup>78</sup> It also ruled that the act of the Philippines in initiating the arbitration was not an abuse of process, and that there were no indispensable parties whose absence deprived the Tribunal of jurisdiction.<sup>79</sup> It also clarified that the dispute does not concern sovereignty over the features within the South China Sea or delimitation of maritime boundaries.<sup>80</sup> The Tribunal further ruled that the 2002 China-ASEAN Declaration on the Conduct of the Parties in the South China Sea, being a political agreement which was not intended to be legally binding, along with other agreements and joint statements by China and the Philippines, do not preclude recourse to the compulsory dispute settlement procedures under UNCLOS.<sup>81</sup> The Tribunal ruled that it had jurisdiction to consider 7 out of the 14 submissions of the Philippines, except those that involve consideration of issues that do not possess an exclusively preliminary character, which the Tribunal reserved to the merits phase.<sup>82</sup>

China, consistent with its position of non-acceptance and non-participation in the proceedings, did not accept the decisions in the Tribunal's

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<sup>75</sup> UNCLOS annex VII, art. 9.

<sup>76</sup> UNCLOS annex VII, art. 11; part XV, §2; art. 296. *See also* The South China Sea Arbitration Award of July 12, 2016, *supra* note 11, ¶ 1172.

<sup>77</sup> South China Sea Arbitration (Phil. v. China), Award on Jurisdiction & Admissibility, 2015 (Oct. 29), <https://pcacases.com/web/sendAttach/2579> [hereinafter Award on Jurisdiction].

<sup>78</sup> *Id.* ¶¶ 413(a)(b), 112–23.

<sup>79</sup> *Id.* ¶ 413.

<sup>80</sup> *Id.* ¶¶ 398–411.

<sup>81</sup> *Id.* ¶ 413(e).

<sup>82</sup> *Id.* ¶¶ 398–412.

Award on Jurisdiction and has stated that the Award “is null and void, and has no binding effect on China.”<sup>83</sup> China also continued to publicly assail the jurisdiction of the Tribunal, relying on the same reasons outlined in China’s Position Paper of December 7, 2014.<sup>84</sup> The Tribunal, to ensure procedural fairness to both parties, had taken a number of measures to safeguard the procedural rights of China, as well as those of the Philippines.<sup>85</sup>

On July 12, 2016, the arbitral tribunal constituted under Annex VII of UNCLOS its final award in the dispute between the Philippines and China over maritime claims in the South China Sea.<sup>86</sup> The South China Sea arbitration was clearly a legal victory for the Philippines. Notwithstanding China’s position to flout the award, it remains final, binding, and not subject to appeal.<sup>87</sup> The final award of the arbitral tribunal categorically declared that China’s nine-dash line claim is incompatible with UNCLOS,<sup>88</sup> and that China’s historic rights over living and

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<sup>83</sup> *Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA WEBSITE (Oct. 30, 2015), [https://www.fmprc.gov.cn/eng/wjdt\\_665385/2649\\_665393/201510/t20151030\\_679419.html](https://www.fmprc.gov.cn/eng/wjdt_665385/2649_665393/201510/t20151030_679419.html).

<sup>84</sup> *Briefing by Xu Hong, Director-General of the Department of Treaty and Law on the South China Sea Arbitration Initiated by the Philippines*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA WEBSITE (May 12, 2016), [https://www.fmprc.gov.cn/nanhai/eng/wjbxw\\_1/201605/t20160519\\_8523323.htm](https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/201605/t20160519_8523323.htm).

<sup>85</sup> Award on Jurisdiction, *supra* note 77, ¶¶ 112-23; The South China Sea Arbitration Award of July 12, 2016, *supra* note 11, ¶¶ 116-44.

<sup>86</sup> The South China Sea Arbitration Award of July 12, 2016, *supra* note 11.

<sup>87</sup> UNCLOS art. 296(1); annex VII, art. 11. *See also* Award on Jurisdiction, *supra* note 77, ¶ 114, citing *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgement on Merits, 1986 I.C.J. 14, 24, ¶ 28 (June 27); *Arctic Sunrise Arbitration (Kingdom of the Neth. v. Russ. Federation)*, Provisional Measures, Order of Nov. 22, 2013, ITLOS Rep. 230, 242, ¶ 51; *Arctic Sunrise Arbitration (Kingdom of the Neth. v. Russ. Federation)*, Award on Jurisdiction of Nov. 26, 2014, ¶ 60; *Arctic Sunrise Arbitration (Kingdom of the Neth. v. Russ. Federation)*, Award on the Merits of Aug. 14, 2015, ¶ 10.

<sup>88</sup> The South China Sea Arbitration Award of July 12, 2016, *supra* note 11, ¶¶ 261, 278, 1203(B)(2), 232, 252, 246, 262, 263. In the final award, the tribunal declared that China does not possess historic rights over the resources within the “nine-dash line” in areas within the Philippine EEZ or continental shelf (¶¶ 246, 247); and that any historic rights that China may have over these resources is incompatible with UNCLOS and have been extinguished by China’s accession to UNCLOS and its entry into force (¶¶ 257, 261, 262). The issue of sovereignty was carefully and explicitly avoided by the Tribunal, being mindful of the limits of its jurisdiction (¶¶ 283, 392).

nonliving resources in the SCS find no basis in international law and are incompatible with UNCLOS.<sup>89</sup> The arbitral tribunal, inter alia, also included in its dispositive, a declaration regarding the status of features in the South China Sea;<sup>90</sup> the status of China's construction of artificial islands, installations, and structures in the South China Sea;<sup>91</sup> and the operation of Chinese law enforcement vessels in Scarborough Shoal.<sup>92</sup>

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The tribunal clarified that any claim by China to historic rights to the living and nonliving resources within the “nine-dash line” beyond the limits of China's maritime zones as provided for under UNCLOS, has been superseded by the entry into force of the Convention (¶ 263). In the Tribunal's view, China's ratification of UNCLOS did not extinguish its historic rights in the waters of the South China Sea but rather constituted a relinquishment of high seas freedoms it previously utilized over these sea areas which have been subsumed under the regime of the EEZ under the Convention, for which it gained a greater degree of control over maritime zones adjacent to its coasts and islands (¶ 271).

<sup>89</sup> *Id.* ¶¶ 239, 243, 278. See also Lowell Bautista, *The South China Sea Arbitration and Historic Rights in the Law of the Sea*, 17 PHIL. Y.B. OF INT'L L. 1, 1-40 (2018).

<sup>90</sup> *Id.* The Tribunal, after a detailed examination, concluded that the following features in their natural condition are high-tide features: Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef, and Gaven Reef (North); and the following features are low-tide elevations: Hughes Reef, Gaven Reef (South), Subi Reef, Mischief Reef, and Second Thomas Shoal. As such, they generate no entitlement to maritime zones of their own (¶¶ 382, 383, 646). The Tribunal declared, applying its measured considerations in the application of Article 121(3) of UNCLOS, that the following features are considered “rocks” for purposes of Article 121(3) of UNCLOS: Scarborough Shoal, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), and McKennan Reef (¶¶ 554-70, 643-45). Furthermore, the Tribunal concluded that Itu Aba, Thitu, West York, Spratly Island, South-West Cay, and North-East Cay are not capable of sustaining human habitation or economic life of their own within the meaning of Article 121(3) of UNCLOS, and therefore such features are not entitled to have an EEZ or continental shelf (¶¶ 622, 625-26). In respect of Mischief Reef and Second Thomas Shoal, the Tribunal decided that they form part of the EEZ and continental shelf of the Philippines, both being located within 200 nautical miles of the coast of the Philippine island of Palawan, in an area which does not overlap with any entitlements generated by any maritime feature claimed by China (¶ 647).

<sup>91</sup> *Id.* ¶¶ 852-90, 1038, 1043, 1177-79, 1181, 983, 992, 993. The Tribunal also declared that China's reclamation activities have interfered with the rights of the Philippines under UNCLOS, aggravated the dispute and undermined the integrity of the proceedings, irreparably damaged the fragile marine environment of the South China Sea, and are clearly in violation of China's obligations under UNCLOS. See also UNCLOS arts. 60, 80, 192, 194(1), 194(5), 197, 123, 206.

<sup>92</sup> *Id.* ¶ 1109. The Tribunal concluded that the conduct of Chinese law enforcement vessels in the vicinity of Scarborough Shoal created serious risk of collision and danger to Philippine vessels

#### IV. Post-2016 Arbitration Award

Under international law, China is a party to the South China Sea arbitration despite its non-participation in the proceedings and is bound by the award rendered by the Tribunal.<sup>93</sup> However, even after the final award of the South China Sea arbitral tribunal was rendered, China has continued to maintain its position not to honor the ruling of the arbitral tribunal through official government documents. On July 12, 2016, the Chinese Ministry of Foreign Affairs released a Statement on the final award of the arbitral tribunal which stated “China solemnly declares that the award is null and void and has no binding force. China neither accepts nor recognizes it.”<sup>94</sup> On July 13, 2016, the Chinese Government released a Statement asserting its territorial sovereignty and maritime rights and interests in the South China Sea relying upon “activities of the Chinese people in the South China Sea [which] date back to over 2,000 years ago.”<sup>95</sup> On July 13, 2016, China released a white paper which stated:

The Arbitral Tribunal in the South China Sea arbitration established at the Philippines’ unilateral request has, ab initio, no jurisdiction, and awards rendered by it are null and void and have no binding force. China’s territorial sovereignty and maritime rights and interests in the South China Sea shall under no circumstances be affected by those awards. China does not accept

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and personnel and ruled China to have violated relevant provisions of Convention on the International Regulations for Preventing Collisions at Sea (COLREGS) and UNCLOS.

<sup>93</sup> *Id.* ¶ 143.

<sup>94</sup> *Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA WEBSITE (July 12, 2016), [https://www.fmprc.gov.cn/eng/wjdt\\_665385/2649\\_665393/201607/t20160712\\_679470.html](https://www.fmprc.gov.cn/eng/wjdt_665385/2649_665393/201607/t20160712_679470.html).

<sup>95</sup> *Statement of the Government of the People’s Republic of China on China’s Territorial Sovereignty and Maritime Rights and Interests in the South China Sea*, EMBASSY OF THE PEOPLE’S REPUBLIC OF CHINA IN PORTUGAL WEBSITE (July 13, 2016), [http://pt.china-embassy.gov.cn/pot/sgdt/201607/t20160713\\_10409629.htm](http://pt.china-embassy.gov.cn/pot/sgdt/201607/t20160713_10409629.htm).

or recognize those awards. China opposes and will never accept any claim or action based on those awards.<sup>96</sup>

On July 12, 2016, the United States Department of State released a Press Statement on the final award of the arbitral tribunal, stating that “the Tribunal’s decision is final and legally binding on both China and the Philippines. The United States expresses its hope and expectation that both parties will comply with their obligations.”<sup>97</sup> The US Press Statement lauded the Tribunal’s decision as “an important contribution to the shared goal of a peaceful resolution to disputes in the South China Sea,” and reiterated that the United States “strongly supports the rule of law,” and it supports “efforts to resolve territorial and maritime disputes in the South China Sea peacefully, including through arbitration.”

The United States also responded to the documents circulated by China following the final award of the arbitral tribunal. The United States responded with a demarche and a diplomatic note on December 28, 2016, highlighting contradictions between China’s claims and international law, particularly, the law of the sea.<sup>98</sup> The diplomatic note referred to previously published assessments by the United States of China’s claims in the South China Sea.<sup>99</sup> The United States objects to China’s “historic rights” claim as “unlawful, insofar as it would be inconsistent with international law as reflected in the Law of the Sea Convention.”<sup>100</sup>

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<sup>96</sup> *China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea* (otherwise referred to as the “China White Paper on the South China Sea”) ¶ 120, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA WEBSITE (July 13, 2016), [https://www.fmprc.gov.cn/eng/wjdt\\_665385/2649\\_665393/201607/t20160713\\_679474.html](https://www.fmprc.gov.cn/eng/wjdt_665385/2649_665393/201607/t20160713_679474.html).

<sup>97</sup> John Kirby, *Decision in the Philippines-China Arbitration (Press Statement)*, U.S. DEP’T OF STATE WEBSITE (July 12, 2016), <https://2009-2017.state.gov/r/pa/prs/ps/2016/07/259587.htm>.

<sup>98</sup> The note was subsequently published in the DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 520–22 (CarrieLyn D. Guymon ed., 2016), <https://www.state.gov/wp-content/uploads/2019/05/2016-Digest-United-States.pdf>.

<sup>99</sup> U.S. DEP’T OF STATE, LIMITS IN THE SEAS NO. 143 - CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA (2014), [https://www.globalsecurity.org/military/library/report/2014/limits-in-the-seas\\_china-south-china-sea\\_20141205.pdf](https://www.globalsecurity.org/military/library/report/2014/limits-in-the-seas_china-south-china-sea_20141205.pdf). See also U.S. DEP’T OF STATE, LIMITS IN THE SEAS NO. 117 - STRAIGHT BASELINE CLAIM: CHINA (1996), <https://2009-2017.state.gov/documents/organization/57692.pdf>.

<sup>100</sup> DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, *supra* note 98, at 522.

The post-award exchange of diplomatic notes recommenced in November 2017 with the partial submission of Malaysia to the UN CLCS on the outer limits of its continental shelf in the South China Sea.<sup>101</sup> Malaysia's note verbale declared that "the area of continental shelf beyond 200 M that is the subject of this Partial Submission. . . is not located in an area which has any land or maritime dispute between Malaysia and any other coastal State."<sup>102</sup> On December 12, 2019, Malaysia sent a note verbale addressed to the UN Secretary-General transmitting the submission of its claim for an extended continental shelf in the South China Sea to the UN CLCS.<sup>103</sup> The Malaysian note verbale dated December 12, 2019 where Malaysia made a partial submission to the UN CLCS in respect of the South China Sea started a salvo of diplomatic notes.<sup>104</sup>

The UN CLCS received communications from twelve (12) States with regard to the Malaysian submission.<sup>105</sup> China was the first to issue a note verbale on December 12, 2019, asserting that the submission by Malaysia "has seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea."<sup>106</sup> The following year, 2020, was notable for the active exchange of diplomatic correspondence amongst the claimant States of the South China Sea, as well as States external to the region.

On March 6, 2020, the Philippines released two diplomatic notes. The first one, No. 000191-2020, was directed at the Chinese and Malaysian notes verbales both released on December 12, 2019, where the Philippines asserted sovereignty

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<sup>101</sup> Malaysia's Partial Submission to the UN CLCS, MYS\_ES\_DOC-01\_281117 (Nov. 2017), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys85\\_2019/20171128\\_MYS\\_ES\\_DOC\\_001\\_secured.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys85_2019/20171128_MYS_ES_DOC_001_secured.pdf).

<sup>102</sup> *Id.* at 2, ¶4.1.

<sup>103</sup> Letter from the Permanent Mission of Malaysia, HA 59/19 (Dec. 12, 2019), [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/mys85\\_2019/2019\\_12\\_12\\_MYS\\_NV\\_UN\\_001.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/mys85_2019/2019_12_12_MYS_NV_UN_001.pdf).

<sup>104</sup> Malaysia's Partial Submission to the UN CLCS, *supra* note 101.

<sup>105</sup> *Communications Received by the UN CLCS with regard to the Partial Submission of Malaysia in the South China Sea on December 12, 2019*, [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/submission\\_mys\\_12\\_12\\_2019.html](https://www.un.org/depts/los/clcs_new/submissions_files/submission_mys_12_12_2019.html) (July 26, 2022).

<sup>106</sup> Letter from the Permanent Mission of the People's Republic of China, CML/14/2019 (Dec. 12, 2019), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys85\\_2019/CML\\_14\\_2019\\_E.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys85_2019/CML_14_2019_E.pdf).

and jurisdiction over the Kalayaan Island Group and Bajo de Masinloc.<sup>107</sup> Relying upon the ruling of the arbitral award, it stated that “[t]he Tribunal conclusively settled the issue of historic rights and maritime entitlements in the South China Sea. The Tribunal ruled that claims to historic rights, or other sovereign rights or jurisdiction that exceed the geographic and substantive limits of maritime entitlements under UNCLOS, are without lawful effect.”<sup>108</sup> The second Philippine diplomatic note, No. 000192-2020, released on March 6, 2020, was directed at the Malaysian submission dated December 12, 2019.<sup>109</sup> The note verbale asserted that the Malaysian submission “covers features within the Kalayaan Island Group over which the Republic of the Philippines has sovereignty,” and that “the area also overlaps with the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea of the Republic of the Philippines is measured, and over which the Government of the Republic of the Philippines intends to make a submission at a future time.” In the same note verbale, the Philippines reaffirmed its claim over portions of Sabah against Malaysia, asserting that “the Malaysian submission is projected from portions of North Borneo over which the Republic of the Philippines has never relinquished its sovereignty.”<sup>110</sup>

On August 27, 2020, the Malaysian Government stated in a note verbale in response to the Philippine note verbale that Malaysia “categorically rejects the excessive maritime claims arising from the Kalayaan Island Group as asserted by the Republic of the Philippines as they have not conformed to Part IV of UNCLOS 1982 and have no basis under international law.”<sup>111</sup> Malaysia also stated that it has “never recognized the Republic of the Philippines’ claim to the Malaysian state of Sabah, formerly known as North Borneo” and drew attention to the ICJ judgment in the Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan and the

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<sup>107</sup> Letter from the Permanent Mission of the Republic of the Philippines, No. 000191 (Mar. 6, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_03\\_06\\_PHL\\_NV\\_UN\\_001.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_03_06_PHL_NV_UN_001.pdf).

<sup>108</sup> *Id.* at 2.

<sup>109</sup> Letter from the Permanent Mission of the Republic of the Philippines, No. 000192 (Mar. 6, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_03\\_06\\_PHL\\_NV\\_UN\\_002.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_03_06_PHL_NV_UN_002.pdf).

<sup>110</sup> *Id.* at 1.

<sup>111</sup> Letter from the Permanent Mission of Malaysia, HA 30/20 (Aug. 27, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_08\\_27\\_MYS\\_NV\\_UN\\_003.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_08_27_MYS_NV_UN_003.pdf).



Application by the Philippines for Permission to Intervene, and for this reason, the Philippine claim to North Borneo “clearly has no basis under international law.”<sup>112</sup>

The Philippines responded to the Malaysian note on October 9, 2020.<sup>113</sup> In response to Malaysia’s assertion that the Philippines has excessive maritime claims arising from the Kalayaan Island Group, it argued that “the Philippines asserts no maritime entitlements beyond those defined under [UNCLOS]. . . as interpreted by the Award rendered on July 12, 2016 in the South China Sea Arbitration.”<sup>114</sup> The Philippines further reiterated that “the Malaysian submission is projected from a portion of North Borneo over which the Republic of the Philippines has never relinquished its sovereignty.”<sup>115</sup>

On March 23, 2020, China’s response to the Philippine notes verbales dated March 6, 2020 characterized the Philippine claim over the Kalayaan Island Group as “illegal occupation” which in China’s view is “completely baseless under international law.”<sup>116</sup> It also assailed the arbitral tribunal, describing “its conduct and its awards are unjust and unlawful.”<sup>117</sup> On March 30, 2020, Vietnam filed its protest against China’s notes verbales (CML/14/2019 dated December 12, 2019 and CML/11/2020 dated March 23, 2020), affirmed UNCLOS as the “sole basis” for the

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<sup>112</sup> *Id.* at 1-2. The Indonesian note verbale cited the Separate Opinion of Judge Ad-hoc Thomas Franck, also quoted in *supra* note 53, in the Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay), Judgment, 2001 I.C.J. 208 (Oct. 23) and the Application by the Philippines for Permission to Intervene.

<sup>113</sup> Letter from the Permanent Mission of the Republic of the Philippines, No. 0929-2020 (Oct. 9, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_10\\_09\\_PHL\\_NV\\_UN\\_003.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_10_09_PHL_NV_UN_003.pdf).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* In respect of the Philippine claim to North Borneo, which is not the subject of this paper, the Philippine note verbale mentioned that “the Philippines recalls the agreement of the parties to the Manila Accord dated July 31, 1963 and reiterates its commitment under the Accord to assert its North Borneo claim in accordance with international law and the principle of the pacific settlement of disputes.” The same note verbale further emphasized that “The separate opinion cited by Malaysia in the judgment dated October 23, 2001, rendered in relation to the Philippine application for permission to intervene in the Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), did not constitute a formal ruling on the issue of Philippine sovereignty over a portion of North Borneo.”

<sup>116</sup> Letter from the Permanent Mission of the People’s Republic of China, CML/11/2020 (Mar. 23, 2020), [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/China\\_Philippines\\_ENG.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/China_Philippines_ENG.pdf).

<sup>117</sup> *Id.* at 2.

maritime entitlements of features in the East Sea (South China Sea), and opposed “maritime claims. . . that exceed the limits provided in UNCLOS, including historic rights; these claims are without lawful effect.”<sup>118</sup> On April 10, 2020, Vietnam filed two diplomatic notes: the first one was in protest of the Malaysian note verbale dated December 12, 2019,<sup>119</sup> and the second one was in protest of the Philippine notes verbales dated March 6, 2020 (No. 000101-2020 and No. 000192-2020).<sup>120</sup> Both notes verbales reiterated that Vietnam has “ample historical evidence and legal basis to affirm its sovereignty over the Hoang Sa (Paracel) Islands and the Truong Sa (Spratly) Islands in accordance with international law. Viet Nam also has sovereignty, sovereign rights, and jurisdiction over its maritime zones established in accordance with the 1982 United Nations Convention on the Law of the Sea.”<sup>121</sup>

On April 17, 2020, China responded to Vietnam stating that the latter “violated estoppel and made illegal territorial claims to China’s Xisha Qundao and Nansha Qundao” and “sent troops to invade and illegally occupy some islands and

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<sup>118</sup> Letter from the Permanent Mission of the Socialist Republic of Vietnam, No.22/HC-2020 (Mar. 30, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/VN20200330\\_ENG.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf). The note verbale of Vietnam stated that: “Viet Nam affirms that as between Viet Nam and China, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) provides the sole legal basis for and defines in a comprehensive and exhaustive manner the scope of their respective maritime entitlements in the East Sea. Accordingly, the maritime entitlement of each high-tide feature in the Hoang Sa Islands and the Truong Sa Islands shall be determined in accordance with Article 121(3) of UNCLOS; the baselines of the groups of islands in the East Sea, including the Hoang Sa Islands and the Truong Sa Islands, cannot be drawn by joining the outermost points of their respective outermost features; low-tide elevations or submerged features are not capable of appropriation and do not, in and of themselves, generate entitlements to any maritime zones. Viet Nam opposes any maritime claims in the East Sea that exceed the limits provided in UNCLOS, including claims to historic rights; these claims are without lawful effect.”

<sup>119</sup> Letters from Permanent Mission of the Socialist Republic of Vietnam, No.24/HC-2020 (Apr. 10, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/vm/2020\\_04\\_10\\_VNM\\_NV\\_UN\\_002\\_ENG.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/vm/2020_04_10_VNM_NV_UN_002_ENG.pdf).

<sup>120</sup> Letters from Permanent Mission of the Socialist Republic of Vietnam, No.25/HC-2020 (Apr. 10, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/vm/2020\\_04\\_10\\_VNM\\_NV\\_UN\\_003\\_ENG.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/vm/2020_04_10_VNM_NV_UN_003_ENG.pdf).

<sup>121</sup> Letters from Permanent Mission of the Socialist Republic of Vietnam, No.24/HC-2020 & No.25/HC-2020, *supra* notes 119-20.

reefs of China's Nansha Qundao by force.”<sup>122</sup> China asserted that its sovereignty is “widely recognized by the international community” and even Vietnam “had also explicitly recognized it.”<sup>123</sup> In support of this statement, China cited a diplomatic note sent on September 14, 1958 by Vietnam’s then Prime Minister Pham Van Dong that Vietnam “recognizes and supports the declaration of the Government of the People's Republic of China on its decision concerning China's territorial sea made on September 4, 1958.”<sup>124</sup> China also argued that “[p]rior to the early 1970s, Viet Nam had officially recognized that Xisha Qundao and Nansha Qundao have always been inherent parts of China's territory since ancient times. This position was reflected in its government statements and notes, as well as its official maps, textbooks, and newspapers.”<sup>125</sup>

On May 26, 2020, Indonesia protested China’s notes verbales (No. CML/14/2019 dated December 12, 2019, No. CML/11/2020 dated 23 March 2020, and No. CML/42/2020 dated April 17, 2020). The note verbale, noteworthy for its explicit reference to the South China Sea arbitral award, stated Indonesia’s position in respect of the South China Sea as follows:

1. Indonesia reiterates once again that Indonesia is not a party to the territorial dispute in the South China Sea;
2. Furthermore, Indonesia notes that its view concerning the maritime entitlements of the maritime features as reflected in the 2010 circular note has been confirmed by the Award of 12 July 2016 by the Tribunal instituted under Annex VII to the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982) between the Republic of the Philippines against the People’s Republic of China (The South China Sea Arbitration) in which no maritime features in the Spratly Islands is entitled to an [EEZ] or a Continental Shelf of its own;

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<sup>122</sup> Letter from the Permanent Mission of the People's Republic of China, CML/42/2020 (Apr. 17, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_04\\_17\\_CHN\\_NV\\_UN\\_003\\_EN.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_04_17_CHN_NV_UN_003_EN.pdf).

<sup>123</sup> *Id.* at 1.

<sup>124</sup> *Id.* at 2.

<sup>125</sup> *Id.*

3. Indonesia reiterates that the Nine-Dash Line map implying historic rights claim clearly lacks international legal basis and is tantamount to upset UNCLOS 1982. This view has also been confirmed by the Award of 12 July 2016 by the Tribunal that any historic rights that the People's Republic of China may have had to the living and non-living resources were superseded by the limits of the maritime zones provided for by UNCLOS 1982.<sup>126</sup>

On June 2, 2020, China expressed its “firm opposition” to the Indonesian note verbale, where it argued that there is “no territorial dispute between China and Indonesia in the South China Sea. However, China and Indonesia have overlapping claims on maritime rights and interests in some parts of the South China Sea.”<sup>127</sup>

On June 1, 2020, the United States through a letter addressed to the UN Secretary-General reiterated its prior objections to China's maritime claims, particularly its objection to China's claim to “historic rights” in the South China Sea for being excessive and inconsistent with international law as reflected in UNCLOS.<sup>128</sup> The US note verbale referred to the ruling by the South China Sea arbitral tribunal, “which is final and binding on China and the Philippines. . . that China's claim to historic rights is incompatible with the Convention to the extent it exceeds the limits of China's possible maritime zones as specifically provided for in the Convention.”<sup>129</sup> The US note verbale unambiguously mentioned at the outset that “the present communication concerns only the views expressed by China regarding its maritime claims in the South China Sea,” and particularly noted the

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<sup>126</sup> Letter from the Permanent Mission of the Republic of Indonesia, No. 126/POL-703/V/20 (May 26, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_05\\_26\\_IDN\\_NV\\_UN\\_001\\_English.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_05_26_IDN_NV_UN_001_English.pdf). The note verbale reiterated Indonesia's position as reflected in the earlier Letter from the Permanent Mission of the Republic of Indonesia, No. 148/POL-703/VI/20 (June 12, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_06\\_12\\_IDN\\_NV\\_UN\\_002\\_ENG.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_06_12_IDN_NV_UN_002_ENG.pdf).

<sup>127</sup> Letter from the Permanent Mission of the People's Republic of China, CML/46/2020 (June 2, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_06\\_02\\_CHN\\_NV\\_UN\\_eng.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_06_02_CHN_NV_UN_eng.pdf).

<sup>128</sup> Letter from the Permanent Mission of the United States of America, A/74/874 S/2020/483 (June 1, 2020), <https://digitallibrary.un.org/record/3864892?ln=en#record-files-collapse-header>.

<sup>129</sup> *Id.* at 2.

previous notes verbales of the Philippines, Vietnam, and Indonesia, which have all independently expressed their legal objections to the maritime claims of China as embodied in China's note verbale No. CML/14/2019 dated 12 December 2019.<sup>130</sup> The US note verbale urged China "to comply with the Tribunal's July 12, 2016 decision and to cease its provocative activities in the South China Sea."<sup>131</sup>

On June 9, 2020, through a letter addressed to the UN Secretary-General, China asserted that it "firmly opposes the completely wrong accusations made by the United States" in the US letter of June 1, 2020.<sup>132</sup> The annex to the Chinese letter, reiterated similar assertions of "China's territorial sovereignty and its maritime rights and interests in the South China Sea. . . established in the long course of historical practice" which are "consistent with international law, including the Charter of the United Nations and the United Nations Convention on the Law of the Sea (UNCLOS)."<sup>133</sup> China directed the following words toward the United States:

The United States is not a State party to UNCLOS, nor a referee supervising the implementation of UNCLOS. The United States shall not deny China's territorial sovereignty and maritime rights and interests in the South China Sea through misinterpreting UNCLOS. China urges the United States to fulfil its commitment not to take a position on sovereignty issues on the South China Sea. China also urges the United States not to cause troubles in the South China Sea, not to conduct military provocation and not to sow discord between China and ASEAN countries, but to fully respect China's territorial sovereignty and maritime rights and interests in the South China Sea, and to respect the joint efforts

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<sup>130</sup> *Id.* The US note verbale referred to the following diplomatic notes: Letter from the Permanent Mission of the Republic of the Philippines No. 000191-2020, *supra* note 107; Letter from the Permanent Mission of the Socialist Republic of Vietnam No. 22/HC-2020, *supra* note 118; and Letter from the Permanent Mission of the Republic of Indonesia No. 126/POL-703/V/20, *supra* note 126.

<sup>131</sup> *Id.* at 2.

<sup>132</sup> Ambassador Zhang Jun, Letter dated June 9, 2020 from the Permanent Representative of the People's Republic of China, U.N. Doc. A/74/886 (June 10, 2020), [https://digitallibrary.un.org/record/3866011/files/A\\_74\\_886-EN.pdf](https://digitallibrary.un.org/record/3866011/files/A_74_886-EN.pdf).

<sup>133</sup> *Id.* at 2.

made by China and ASEAN countries to maintain peace and stability in the South China Sea.<sup>134</sup>

On June 12, 2020, Indonesia responded to the Chinese circular note No. CML/46/2020 dated June 2, 2020 concerning the response of China toward Indonesia's note verbale of May 26, 2020, with the following two points:

1. No feature in the Spratly Islands is entitled to an [EEZ] or Continental Shelf of its own, hence no feature therefrom will generate overlapping maritime entitlement with Indonesia's [EEZ] or Continental Shelf.
2. No historic rights exist in Indonesia's [EEZ] and Continental Shelf vis-à-vis the People's Republic of China. Should there be any historic rights existing prior to the entry into force of UNCLOS 1982, those rights were superseded by the provisions of UNCLOS 1982.<sup>135</sup>

The Indonesian note verbale underscored that the two arguments are governed by UNCLOS and subsequently confirmed by the arbitral tribunal award of July 12, 2016; and therefore, "Indonesia sees no legal reasoning under international law, particularly UNCLOS 1982, to conduct negotiation on maritime boundaries delimitation with the People's Republic of China or on any other matters pertaining to maritime rights or interests' claims made in contravention to international law."<sup>136</sup>

On June 18, 2020, China's response to the Indonesian note verbale of June 12, 2020 merely repeated its claims from previous notes and expressed "firm opposition" to Indonesia's note, without any articulation of the basis of its supposed "territorial sovereignty and maritime rights and interests in the South China Sea. . . established in the long course of historical practice" which are

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<sup>134</sup> *Id.*

<sup>135</sup> Letter from the Permanent Mission of the Republic of Indonesia, No. 148/POL-703/VI/20, *supra* note 126.

<sup>136</sup> *Id.*

purportedly “clear and consistent with international law” including the UN Charter and UNCLOS.<sup>137</sup>

On July 23, 2020, Australia strongly and categorically denounced China’s historic rights and territorial claims in the South China Sea:

The Australian Government rejects any claims by China that are inconsistent with the 1982 United Nations Convention on the Law of the Sea (UNCLOS), in particular, maritime claims that do not adhere to its rules on baselines, maritime zones and classification of features.

Australia rejects China’s claim to ‘historic rights’ or ‘maritime rights and interests’ as established in the Tong course of historical practice’ in the South China Sea. The Tribunal in the 2016 South China Sea Arbitral Award found these claims to be inconsistent with UNCLOS and, to the extent of that inconsistency, invalid.

There is no legal basis for China to draw straight baselines connecting the outermost points of maritime features or ‘island groups’ in the South China Sea, including around the ‘Four Sha’ or ‘continental’ or ‘outlying’ archipelagos. Australia rejects any claims to internal waters, territorial sea, [EEZ], and continental shelf based on such straight baselines. . . .

Australia also rejects China’s claims to maritime zones generated by submerged features, or low tide elevations in a manner inconsistent with UNCLOS. Land building activities or other forms of artificial transformation cannot change the classification of a feature under UNCLOS. There is no legal basis for a maritime feature to generate maritime entitlements beyond those generated under UNCLOS by that feature in its natural state. . . .

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<sup>137</sup> Letter from the Permanent Mission of the People’s Republic of China, CML/48/2020 (June 18, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_06\\_18\\_CHN\\_NV\\_UN\\_006\\_English.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_06_18_CHN_NV_UN_006_English.pdf).

The Australian Government does not accept China's assertion in its note of 17 April 2020 that its sovereignty claims over the Paracel Islands and the Spratly Islands are 'widely recognized by the international community'. . . . The Australian Government also wishes to express its strong concern in relation to China's claims of 'continuously and effectively' exercising sovereignty over low-tide elevations given that they do not form part of the land territory of a State.

The Australian Government also disputes China's claim that it is not bound by the Arbitral Award. The rationale put forward by China as an explanation of why the Arbitral Award is not binding on China is not supported by international law. Pursuant to Article 296 and Article 11 of Annex VII of UNCLOS the Tribunal's decision is final and binding on both parties to the dispute. . . .<sup>138</sup>

The Australian note verbale emphasized that the South China Sea arbitral award is binding upon China, and that the arbitral award found that China's claims are inconsistent with UNCLOS.<sup>139</sup> On July 29, 2020, China responded to the

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<sup>138</sup> Letter from the Permanent Mission of the Commonwealth of Australia, N°20/026 1-2 (July 23, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_07\\_23\\_AUS\\_NV\\_UN\\_001\\_OLA-2020-00373.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_07_23_AUS_NV_UN_001_OLA-2020-00373.pdf). The Australian note verbale directly referenced and was written in response to previous Chinese notes verbales No. CML/14/2019 dated Dec. 12, 2019, No. CML/11/2020 dated Mar. 23, 2020, No. CML/42/2020 dated Apr. 17, 2020, No. CML/46/2020 dated June 2, 2020, and No. CML/48/2020 dated June 18, 2020, as well as the Annex to the letter dated June 9, 2020 from the Permanent Representative of China to the United Nations addressed to the Secretary-General, concerning Malaysia's submission HA 59/19 dated Dec. 12, 2019 to the Commission on the Limits of the Continental Shelf.

<sup>139</sup> *Id.* at 1-2. Australia correctly argues that China is not allowed to draw straight baselines in the South China Sea, including the "Four Sha" or "continental" or "outlying archipelagos" because ". . . States may draw straight baselines only in certain circumstances. Principally, Article 7(1) of UNCLOS provides that straight baselines may be employed '[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity.' Furthermore, Article 47(1) of UNCLOS limits the use of archipelagic straight baselines to archipelagic States, as defined in Article 46. In the absence of meeting these requirements, States must draw normal baselines in accordance with Article 5, including in relation to islands." Australia also denounced China's reclamation or artificial island building activities on submerged features and low tide elevations the South China Sea and correctly argues that such



Australian note verbale with the standard exhortations claiming its supposed sovereignty over the South China Sea and disparagingly stated that “[t]he Arbitral Tribunal violates the principle of state consent, exercises jurisdiction ultra vires, errs in applying the law in its awards and violates international law. Its awards are illegal, and null and void.”<sup>140</sup> The Chinese note verbale also accused Australia of violating international law by not accepting Chinese claims, stating that:

Australia's wrongful acts of ignoring the basic facts on the South China Sea issue and denying China's land territorial sovereignty and maritime rights and interests in the South China Sea have violated international law and basic principles of international relations, including the Charter of the United Nations. China does not accept the contents of the aforementioned Note Verbale of Australia.<sup>141</sup>

On July 29, 2020, Malaysia rejected in its entirety the December 12, 2019 Chinese note verbale and categorically stated that:

Malaysia rejects 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 relevant part of the 'nine dash line' as they are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and

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features will not acquire the status of an “island” under UNCLOS, stating that “. . . the Australian Government does not accept that artificially transformed features can ever acquire the status of an island under Article 121(1) of UNCLOS. Moreover, Article 60(8) of UNCLOS provides that artificial islands ‘do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the [EEZ], or the continental shelf.’”

<sup>140</sup> Letter from the Permanent Mission of the People's Republic of China, CML/54/2020 (July 29, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/20200729\\_C HN\\_NV\\_UN\\_e.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/20200729_C HN_NV_UN_e.pdf).

<sup>141</sup> *Id.* at 2.

substantive limits of China's maritime entitlements under the Convention.<sup>142</sup>

The note verbale further stated that “Malaysia considers that the People’s Republic of China’s claim to the maritime features in the South China Sea has no basis under international law.”<sup>143</sup> On August 7, 2020, China responded to the Malaysian note verbale of July 29, 2020, with its emblematic reiterations of supposed Chinese sovereignty and maritime rights in the South China Sea purportedly consistent with international law and UNCLOS and China’s “firm rejection” of the contents of the Malaysian note verbale.<sup>144</sup>

On September 16, 2020, three European States — France,<sup>145</sup> Germany,<sup>146</sup> and the United Kingdom,<sup>147</sup> — submitted their respective joint notes verbales against China’s claims. The joint note verbale was a response to views previously expressed by China in several notes verbales.<sup>148</sup> The joint note verbale reaffirmed that France, Germany, and the United Kingdom “take no position” to competing

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<sup>142</sup> Letter from the Permanent Mission of Malaysia, HA 26/20 (July 29, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_07\\_29\\_MYS\\_NV\\_UN\\_002\\_OLA-2020-00373.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_07_29_MYS_NV_UN_002_OLA-2020-00373.pdf).

<sup>143</sup> *Id.*

<sup>144</sup> Letter from the Permanent Mission of the People’s Republic of China, “CML/56/2020,” (Aug. 7, 2020), [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/20200807\\_CHN\\_NV\\_UN\\_Eng.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/20200807_CHN_NV_UN_Eng.pdf).

<sup>145</sup> Letter from the Permanent Mission of the French Republic, BF N° 2020-0343647 (Sept. 16, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_09\\_16\\_FRA\\_NV\\_UN\\_001\\_EN.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_16_FRA_NV_UN_001_EN.pdf).

<sup>146</sup> Letter from the Permanent Mission of the Federal Republic of Germany, No. 324/2020 (Sept. 16, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_09\\_16\\_DEU\\_NV\\_UN\\_001.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_16_DEU_NV_UN_001.pdf).

<sup>147</sup> Letter from the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland, UK NV No. 162/20 (Sept. 16, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_09\\_16\\_GBR\\_NV\\_UN\\_001.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_16_GBR_NV_UN_001.pdf).

<sup>148</sup> The joint verbale specifically referred to the People’s Republic of China’s maritime claims in the South China Sea in its notes verbales No. CML/14/2019 dated Dec. 12, 2019, No. CML/11/2020 dated Mar. 23, 2020, No. CML/42/2020 dated Apr. 17, 2020, No. CML/46/2020 dated June 2, 2020, No. CML/48/2020 dated June 18, 2020, No. CML/54/2020 dated July 29, 2020, and No. CML/56/2020 dated Aug. 7, 2020, as well as the annex to the letter dated June 9, 2020 from the Permanent Representative of China to the United Nations addressed to the Secretary-General, concerning the submission by Malaysia HA 59/19 dated Dec. 12, 2019 to the Commission on the Limits of the Continental Shelf.

claims of territorial sovereignty in the South China Sea. The joint note verbale underscored “the universal and unified character of UNCLOS,” and without mention of China’s straight baselines in the South China Sea, stated that UNCLOS is the legal framework that governs the conditions for the application of straight and archipelagic baselines, which is only applicable to archipelagic States under Parts II and IV of UNCLOS.<sup>149</sup> France, Germany, and the United Kingdom also emphasized that the specific and exhaustive conditions set forth UNCLOS in the application of the regime of islands to naturally formed land features, and without mention of China’s land-building and reclamation activities in the South China Sea, stated that “[l]and building activities or other forms of artificial transformation cannot change the classification of a feature under UNCLOS.”<sup>150</sup> The joint note verbale unqualifiedly denounced China’s so-called “historic rights” claim in the South China Sea as confirmed by the final award of the arbitral tribunal, highlighting “. . . that claims with regard to the exercise of “historic rights” over the South China Sea waters do not comply with international law and UNCLOS provisions” and recalling “. . . that the arbitral award in the *Philippines v. China* case dating to 12 July 2016 clearly confirms this point.”<sup>151</sup>

On September 18, 2020, China responded to the joint notes verbales of France, Germany, and the United Kingdom.<sup>152</sup> The Chinese note verbale condemned the use of UNCLOS “as a political tool to attack other countries,” and argued that “UNCLOS does not cover everything about the maritime order,” and

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<sup>149</sup> *Id.* The joint note verbale did not particularly refer to China’s straight baselines in the South China Sea. However, see materials which confirm that China’s use of straight baselines in the South China Sea does not conform with UNCLOS: J. Ashley Roach, *Offshore Archipelagos Enclosed by Straight Baselines: An Excessive Claim?*, 49 OCEAN DEV’T & INT’L L. 176, 176-202 (2018); Hyunsoo Kim, *China’s Basepoints and Baselines Under the United Nations Convention on the Law of the Sea: A Critical Analysis*, 6 J. OF EAST ASIA AND INT’L L. 135, 135 – 54 (2013). See also LIMITS IN THE SEAS NO. 143 - CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA, *supra* note 99; LIMITS IN THE SEAS NO. 117 - STRAIGHT BASELINE CLAIM: CHINA, *supra* note 99; LIMITS IN THE SEAS NO. 150 - PEOPLE’S REPUBLIC OF CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA, *supra* note 16.

<sup>150</sup> Letter from the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland, UK NV No. 162/20, *supra* note 147, at 2.

<sup>151</sup> *Id.*

<sup>152</sup> Letter from the Permanent Mission of the People’s Republic of China, CML/63/2020 (Sept. 18, 2020), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_09\\_18\\_CHN\\_NV\\_UN\\_009\\_e.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_18_CHN_NV_UN_009_e.pdf).

that China's territorial sea baselines in the South China Sea conforms with UNCLOS and general international law.<sup>153</sup>

On January 19, 2021, Japan stated its position rejecting China's territorial sea baselines in the South China Sea and affirming the final and binding nature of the South China Sea arbitral award.<sup>154</sup> Japan echoed similar positions espoused in previous notes verbales by the United States, France, Germany, and the United Kingdom, that "UNCLOS sets forth the conditions for the application of baselines in a specific and exhaustive manner" and "China has failed to invoke the relevant provisions of UNCLOS in asserting the lawfulness of the baselines in question." Consequently, Japan asserted that China cannot "justify the application of baselines that do not satisfy the conditions stipulated under UNCLOS."<sup>155</sup> Japan further stated that:

[F]reedom of navigation and overflight must be guaranteed in sea and airspace surrounding and above maritime features found to be low-tide elevations that do not have territorial sea and territorial airspace of their own, as stated in the award of the South China Sea Arbitration dated July 12, 2016, which is final and binding on the parties to the dispute.<sup>156</sup>

Japan pointed out the contradiction that whilst China mentioned freedom of navigation and overflight in the South China Sea in its note verbale CML63/2020 dated 18 September 2020, China "has asserted that has sovereignty in the sea and airspace surrounding and above those maritime features found to be low-tide elevations," and ". . . protested the overflight of Japanese aircraft in the airspace surrounding Mischief Reef and attempted to restrict the freedom of overflight in the South China Sea."<sup>157</sup>

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<sup>153</sup> *Id.* at 2.

<sup>154</sup> Letter from the Permanent Mission of Japan, SC/21/002 (Jan. 19, 2021), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/20210119JpnNvUn001OLA202000373.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/20210119JpnNvUn001OLA202000373.pdf).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

The response of China which “firmly opposes” the contents of Japan’s note verbale dated January 19, 2021 was released on January 28, 2021.<sup>158</sup> China’s response contained the usual platitudes maintaining its supposed “territorial sovereignty and maritime rights in the South China over the South China Sea. . . established in the long course of history and have been upheld by successive Chinese Governments and are consistent with international law, including the Charter of the United Nations and UNCLOS.” In usual manner, without providing a credible rejoinder premised upon facts and law to Japan’s indictment of China’s behavior curtailing freedom of navigation and overflight, China merely stated that it “. . . always respects the freedom of navigation and overflight enjoyed by all countries in the South China Sea in accordance with international law, but is firmly opposed to any country infringing on China’s sovereignty and undermining China’s security in the name of ‘freedom of navigation’.”<sup>159</sup> Consistent with previous statements, China repeated in the same note verbale that it considers the awards in the South China Sea arbitration as “illegal, and null and void, and for these reasons, “China neither accepts nor recognizes the awards.”<sup>160</sup>

On January 28, 2021, New Zealand deposited its note verbale to the UN Secretary-General in response to the Malaysian UN CLCS submission dated December 12, 2019 and to previous Chinese notes verbales.<sup>161</sup> New Zealand clarified that “it does not take a position on competing claims of territorial sovereignty in the South China Sea” nor does it comment on the substance of the Malaysian UN CLCS submission, but merely affirmed New Zealand’s position in respect of certain

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<sup>158</sup>Letter from the Permanent Mission of the People’s Republic of China, CML/1/2021 (Aug. 28, 2021), [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/20210128ChnNvUn009OLA20200373e.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/20210128ChnNvUn009OLA20200373e.pdf).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Letter from the Permanent Mission of New Zealand, No. 08/21/02 (Aug. 3, 2021), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/20210803NzNote.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/20210803NzNote.pdf). In particular, the New Zealand note verbale refers specifically to the “submission by Malaysia HA 59/19 dated December 12, 2019 to the Commission on the Limits of the Continental Shelf and the views expressed in the notes verbale[s] No. CML/14/2019 dated Dec. 12, 2019, No. CML/11/2020 dated Mar. 23, 2020, No. CML/42/2020 dated Apr. 17, 2020, No. CML/46/2020 dated June 2, 2020, No. CML/48/2020 dated June 18, 2020, No. CML/54/2020 dated July 29, 2020, No. CML/56/2020 dated Aug. 7, 2020, No. CML/63/2020 dated Sept. 18, 2020, No. CML/1/2021 dated Jan. 28, 2021, as well as the Annex to the letter dated June 9, 2020 addressed to the Secretary-General.”

aspects of UNCLOS.<sup>162</sup> The New Zealand note verbale – similar to the message in the diplomatic notes from non-claimant States such as the United States, France, Germany, the United Kingdom, and Japan – underscored the “universal and unified character of UNCLOS” as the “definitive legal framework” for all ocean-related activities.

The New Zealand note verbale did not specifically mention China or any of its practices, or any other State, for that matter. The note verbale merely drew upon relevant provisions of UNCLOS and their application to issues related to the South China Sea.<sup>163</sup> The note verbale confirmed that the arbitral award is “final and binding on both parties” and there is “no legal basis for states to claim ‘historic rights’ with respect to maritime areas in the South China Sea, as confirmed in the 2016 South China Sea Arbitral Award.” The note verbale mentioned that continental States cannot claim archipelagic State status; and therefore, there is “no legal basis on which to draw straight archipelagic baselines in the South China Sea, nor any legal basis to draw straight baselines around island groups in the South China Sea.” In respect of artificial land building activities, the note verbale stated that the classification of a naturally-formed feature “cannot be changed through land building activities or other means of artificial modification.” Regarding low-tide elevations and entirely submerged features, the note verbale affirmed that these features “do not give rise to any maritime entitlements” and “cannot be the subject of sovereignty claims or appropriation.”<sup>164</sup>

On August 16, 2020, China expressed that it “does not accept the positions of New Zealand in its note verbale.”<sup>165</sup> China’s response to New Zealand re-stated positions previously articulated by China in its numerous notes verbales. China invoked its supposed “territorial sovereignty and maritime rights and interests in the South China Sea. . . established in the long course of history. . . upheld consistently by successive Chinese Governments and are consistent with international law, including the Charter of the United Nations and UNCLOS.”

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.* The note verbale included direct references to ¶¶ 261 & 272 of the final award of the South China Sea arbitral tribunal and to relevant provisions of UNCLOS, namely articles 46(a), 47(1), 7, 121(3), 13(1), 121(1), 60(8), 296(1), as well as articles 9 & 11 of Annex VII.

<sup>164</sup> *Id.* at 2.

<sup>165</sup> Letter from the Permanent Mission of the People’s Republic of China, CML/32/2021 (Aug. 16, 2021), [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/20210816ChnNvUNen.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/20210816ChnNvUNen.pdf).

China maintained that it “applies UNCLOS with a rigorous and responsible attitude” whilst assailing the arbitral award as “illegal, and null and void” and arguing that the “regime of continental States’ outlying archipelagos is not regulated by UNCLOS” and that the denial of historic rights in the South China is a distortion of UNCLOS.<sup>166</sup>

On July 25, 2022, China deposited a note verbale to the UN Secretary-General reiterating its position in regard to the UN CLCS submission of Malaysia.<sup>167</sup> China asserted that the Malaysian UN CLCS submission has “seriously infringed upon China’s sovereignty, sovereign rights and jurisdiction in the South China Sea” and requested the Commission not to consider the submission since it involved a case where a land or maritime dispute exists.<sup>168</sup>

The diplomatic notes and other statements of China since May 2009 claim “indisputable sovereignty” and sovereign rights and jurisdiction over maritime areas that lie beyond the limits allowed under UNCLOS. China’s use of terminologies such as “jurisdictional seas” or even “historic rights” which bear no resemblance to their supposed equivalent terms in UNCLOS only creates further ambiguity, as well as terminological and legal confusion, which obfuscates the clear rules, provisions, and relevant articles of UNCLOS that indisputably apply to China.<sup>169</sup> China’s diplomatic notes and statements prominently fail to provide any clear and incontestable evidence or legal basis for its claims, other than constantly repeating that it has been “consistently held by the Chinese Government, and is widely known by the international community.” China has been unwavering and increasingly forceful, bold, and assertive in stating, re-stating, and enforcing its self-serving claim of “indisputable sovereignty over the islands in the South China

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<sup>166</sup> *Id.*

<sup>167</sup> Letter from the Permanent Mission of the People’s Republic of China, CML/96/2021 (July 25, 2022), [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/20220725EN.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/20220725EN.pdf).

<sup>168</sup> *Id.*

<sup>169</sup> China’s position in the South China Sea is inconsistent with UNCLOS and with China’s position in other areas. For example, in 2008, in response to Japan’s UN CLCS submission, China strongly and repeatedly protested Japan’s inclusion of Oki-no-Tori Shima, which China considers a “rock” under Article 121 (3) of UNCLOS. In its Feb. 6, 2009 note verbale protesting Japan’s UN CLCS submission, China urged that “[a]ll States Parties shall implement the Convention in its entirety and ensure the integrity of the Convention. . .” Letter from the Permanent Mission of the People’s Republic of China, No. CML/2/2009 1 (Feb. 6, 2009), [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/jpn08/chn\\_6feb09\\_e.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf).

Sea” without offering a valid legal justification or acceptable defense of its claim, choosing only to repeat it, despite strong, obvious, and incontrovertible evidence of other States challenging and refuting its expansive claims.

## V. Conclusion

The use of diplomatic notes in the South China Sea disputes demonstrates the shared respect for and commitment of States to seek and pursue a peaceful, rules-based approach in the management and resolution of their disputes with other States. The diplomatic notes, through clearly targeted messaging, have provided greater clarity in the articulation of claims and have affirmed the importance and commitment of States in upholding international law, particularly UNCLOS. The use of diplomatic notes also highlights and illustrates the prudent engagement with international law as a mechanism to contest China’s territorial and maritime claims in the South China Sea. The protests and responses to the Chinese maritime claims in the South China Sea show that States challenge and do not recognize or acquiesce to the expansive and unlawful claims of China in the South China Sea. Non-claimant States to the South China Sea have issued diplomatic notes that support the peaceful settlement of the disputes, affirm the universality of UNCLOS, challenge China’s claims, and extol the arbitration award.

The use of diplomacy in managing inter-State disputes is an essential aspect in maintaining the international legal order and ensuring the peaceful resolution of territorial and maritime jurisdictional disputes. Whilst inter-State disputes are ubiquitous in contemporary international relations, conflicts and wars are not and should not be. States have at their disposal a plethora of mechanisms, avenues, and means to pursue and secure their national interests. However, international norms should guide State practice and behavior in the conduct of its affairs. Legal rules and norms operate and apply in the same manner to all States, and States must comply with them in good faith. The stability and integrity of the architecture of the global order is ensured by the faithful observance of international norms and adherence by all States to the rule of law.

At times, international legal commitments and rules embodied in treaties ratified by a State will impose substantive constraints and obligations upon States Parties. Nevertheless, a State should not be allowed to undermine international law and ought to act as a responsible, law-abiding member of the international



community of nations. In the South China Sea, the rulings and awards of the arbitral tribunal are final, binding, and must be complied with. As ruled by the arbitral tribunal, there is no legal basis for the “historic rights” claimed by China over the South China Sea beyond the limits of its entitlements under UNCLOS. The assertion and exercise of “historic rights” by China within the area encompassed by its nine-dash line are incompatible with the letter and spirit of UNCLOS and general international law. UNCLOS does not permit a State party to maintain “historic rights” that contravene the express stipulations of the Convention and the duty of States Parties to implement its provisions in good faith.

It cannot be disregarded that geostrategic competition strongly affects the geopolitical dynamics in the South China Sea. The use of international law by small States to hedge against big, economically, and militarily more powerful States validates power asymmetry amongst claimant and non-claimant States.<sup>170</sup> The use of diplomatic notes by China demonstrates its confidence and increasingly assertive involvement in engaging and potentially shaping international law, or indeed, revising the global order to suit and serve its interests. The conduct of China in the South China Sea dispute reveals a preview of China’s understanding of its role and place in the international legal order. China, like other States, has utilized notes verbales to communicate to an international audience in the defense of its claims. China, like other States, also desires to appear to be adherent to international norms. However, China’s foreign policy behavior, posture, and approach to its ongoing territorial disputes particularly in the South China Sea raise valid concerns and often confirm otherwise. For instance, despite carefully crafted diplomatic notes strewn with lofty ideals and trite rhetoric, China’s intimidating and coercive gray zone operations in the South China Sea

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<sup>170</sup> See for example Mary Fides A. Quintos, *The Philippines: Hedging in a Post-Arbitration South China Sea?*, 10 *ASIAN POL. & POL’Y* 261, 261-282 (2018); Yew Meng Lai & Cheng-Chwee Kuik, *Structural Sources of Malaysia’s South China Sea Policy: Power Uncertainties and Small-state Hedging*, 75 *AUSTL. J. OF INT’L AFF.* 277, 277-304 (2021); Renato Cruz De Castro, *From Appeasement to Soft Balancing: the Duterte Administration’s Shifting Policy on the South China Sea Imbroglia*, 49 *ASIAN AFF.* 35, 35-61 (2022); Alfred Gerstl & Jeremy Garlick, *Malaysia’s Hedging Strategy Towards China Under Mahathir Mohamad (2018–2020): Direct Engagement, Limited Balancing, and Limited Bandwagoning*, 49 *J. OF CURRENT CHINESE AFF.* 106, 106-131 (2020).

hinder the exercise of other States' sovereign rights under international law and diminish the trust and goodwill of the littoral States vis-à-vis China.<sup>171</sup>

The exchange of notes verbales in the South China Sea confirms that States safeguard their interests using statecraft, diplomacy, international law, and established norms. The battle of the notes verbales is a reminder of the necessity for States to persistently articulate and clarify their territorial and maritime jurisdictional claims, to consistently contest and not recognize or acquiesce to claims contrary to international law, and to proactively respond to acts, statements, and policies of other States that infringe on one's national interests, sovereignty, and territorial integrity. The diplomatic exchanges have made ripples in the international arena, but they also usher in optimism that inter-State disputes—however complex and intractable such as that of the South China Sea—can be managed and ultimately resolved peacefully through diplomacy.

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<sup>171</sup> See for example Renato Cruz De Castro, *The Philippines' Responses to Chinese Gray Zone Operations Triggered by the 2021 Passage of China's New Coast Guard Law and the Whitsun Reef Standoff*, 49 *ASIAN AFF.* 193, 193-216 (2022); Rob McLaughlin, *The Law of the Sea and PRC Gray-Zone Operations in the South China Sea*, 116 *AM. J. OF INT'L L.* 821, 821-835 (2022). But see Alessio Patalano, *When Strategy is 'Hybrid' and Not 'Grey': Reviewing Chinese Military and Constabulary Coercion at Sea*, 31 *PACIFIC REV.* 811, 811-839 (2018), who challenges the notion that Chinese maritime coercion in the South China Sea is a grey zone strategy but rather better described as part of a "hybrid strategy."

**Annex I. List of Pre-Arbitration Notes Verbales (2009-2016)**

<b>Pre-Arbitration</b>					
<i>No.</i>	<i>Title</i>	<i>Issuing Country</i>	<i>Country Addressed to (and United Nations)</i>	<i>Referencing</i>	<i>Date of Issue</i>
1	VNM-N-ES-DOC A partial submission with respect to Vietnam's Extended Continental Shelf claims in the North Area	Vietnam	United Nations CLCS		April 2009
2	CML/12/2009	China	Philippines	Philippine Republic Act No. 9522	13 April 2009
3	MYS_VNM_ES_DOC-01-240409 A joint submission by Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf	Malaysia Vietnam	United Nations CLCS		6 May 2009
4	CML/17/2009	China	Malaysia Vietnam	Joint submission of Malaysia and Vietnam on 6 May 2009	7 May 2009
5	CML/18/2009	China	Vietnam	UN CLCS Submission by Vietnam on 7 May 2009	7 May 2009
6	No. 86/HC-2009	Vietnam	China	CML/12/2009 CML/17/2009 CML/18/2009	8 May 2009

7	HA 24/09	Malaysia	China	CML/17/2009	20 May 2009
8	No. 000818	Philippines	Vietnam	Submission by Vietnam on 6 May 2009 to the Commission on the Limits of Continental Shelf	4 August 2009
9	No. 000819	Philippines	Malaysia Vietnam	Malaysia HA 59/19	4 August 2009
10	No. 240/HC-2009	Vietnam	Philippines	No. 000818 No. 000819	18 August 2009
11	HA 41/09	Malaysia	Philippines	No. 000819	21 August 2009
12	No. 480/POL-703/VII/10	Indonesia	China	CML/17/2009	8 July 2010
13	No. 000228	Philippines	China	CML/17/2009 CML/18/2009	5 April 2011
14	CML/8/2011	China	Philippines	No. 000228	14 April 2011
15	No. 77/HC-2011	Vietnam	Philippines China	No. 000228 CML/8/2011	3 May 2011
16	No. 13-0211	Philippines	China	Notification on the Initiation of Arbitral Proceedings	22 January 2013
17	No. (13) PG-039	China	Philippines	No. 13-0211	19 February 2013

**Annex II. List of Post-Arbitration Notes Verbales (2016-2021)**

<b>Post-Arbitration</b>					
<i>No.</i>	<i>Title</i>	<i>Issuing Country</i>	<i>Country Addressed to (and United Nations)</i>	<i>Referencing</i>	<i>Date of Issue</i>
1	United States' Note Verbale to the People's Republic of China	United States	China	CML/14/2019  A/74/874-S/2020/483	28 December 2016
2	MYS_ES_DOC-01_281117 Malaysia's partial submission to the Commission on the Limits of the Continental Shelf	Malaysia	United Nations CLCS		November 2017
3	HA 59/19	Malaysia	UN Secretary-General		12 December 2019
4	CML/14/2019	China	Malaysia	HA 59/19	12 December 2019
5	No. 000191-2020	Philippines	China	CML/14/2019	6 March 2020
6	No. 000192-2020	Philippines	Malaysia	HA 59/19	6 March 2020

7	CML/11/2020	China	Philippines	No. 000191-2020 No. 000192-2020	23 March 2020
8	No. 22/HC-2020	Vietnam	China	CML/14/2019	30 March 2020
9	No. 24/HC-2020	Vietnam	Malaysia	HA 59/12 (HA 59/19)	10 April 2020
10	No. 25/HC-2020	Vietnam	Philippines	No. 000191-2020 No. 000192-2020	10 April 2020
11	CML/42/2020	China	Vietnam	No. 22/HC-2020 No. 24/HC-2020	17 April 2020
12	No. 126/POL-703/V/20	Indonesia	China	CML/14/2019 CML/11/2020 CML/42/2020	26 May 2020
13	A/74/874-S/2020/483	United States of America	China	CML/14/2019	2 June 2020
14	CML/46/2020	China	Indonesia	No. 126/POL-703/V/20	2 June 2020
15	A/74/886	China	United States of America	A/74/874-S/2020/483	9 June 2020
16	No. 148/POL-703/VI/20	Indonesia	China	CML/46/2020	12 June 2020
17	CML/48/2020	China	Indonesia	No. 148/POL-703/VI/20	18 June 2020
18	No. N20/026	Australia	China	CML/11/2020	23 July 2020

				CML/14/2019 CML/42/2020 CML/46/2020 CML/48/2020	
19	CML/54/2020	China	Australia	No. N20/026	29 July 2020
20	HA 26/20	Malaysia	China	CML/14/2019	29 July 2020
21	CML/56/2020	China	Malaysia	HA 26/20	7 August 2020
22	HA 30/20	Malaysia	Philippines	No. 000192-2020	27 August 2020
23	UK NV No. 162/20	United Kingdom	China	CML/11/2020 CML/14/2019 CML/42/2020 CML/46/2020 CML/48/2020 CML/54/2020 CML/56/2020	16 September 2020
24	BF N° 2020-0343647	France	China	CML/11/2020 CML/14/2019 CML/42/2020 CML/46/2020 CML/48/2020 CML/54/2020 CML/56/2020	16 September 2020
25	No. 324/2020	Germany	China	CML/11/2020 CML/14/2019 CML/42/2020 CML/46/2020 CML/48/2020 CML/54/2020 CML/56/2020	16 September 2020
26	CML/63/2020	China	United Kingdom France	BF No.2020-0343647 No. 324/2020	18 September 2020

			Germany	UK NV No. 162/20	
27	No. 0929-2020	Philippines	Malaysia	HA 30/20	9 October 2020
28	SC/21/002	Japan	China	CML/63/2020	19 January 2021
29	CML/1/2021	China	Japan	SC/21/002	28 January 2021
30	No. 08/21/02	New Zealand	China	CML/11/2020 CML/14/2019 CML/42/2020 CML/46/2020 CML/48/2020 CML/54/2020 CML/56/2020 CML/63/2020 CML/1/2021	3 August 2021
31	CML/32/2021	China	New Zealand	No. 08/21/02	16 August 2021