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THE IMPORTANCE OF INTERNATIONAL LAW IN THE RESOLUTION OF MARITIME DISPUTES IN THE SOUTH CHINA SEA

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August 2017



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INTRODUCTION

This paper discusses Australia's position on the 2016 arbitral ruling in the *South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China)*. Australia's Foreign Minister has stated that this was an important test-case for how the East Asian region can manage disputes peacefully.²

The paper will explain Australia's interests in the South China Sea, followed by an examination of the legal ruling alongside Australia's, China's and the Philippines' responses. It will make reference to the issue of emerging global powers in the East Asian region and argue that the arbitration should become a precedent for regional dispute resolution based on nation-state participation in a rules-based global order.

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WHY IS AUSTRALIA INTERESTED IN THE SOUTH CHINA SEA?

Australia's interest in the South China Sea dispute stems from Australia's stated and abiding interest in the upholding of a 'rules-based global order' as the premise of effective relationships between nation states in the modern world.³

This is not an arbitrary or abstract interest for Australia. It has been repeated in Australian policy documents since at least 2009, and is a core component of Australia's *2016 Defence White Paper*.⁴ Australia is party to the UN Convention on the Law of the Sea (UNCLOS) and was a founding member of the UN in 1945, just like China and the Philippines. Australia is currently the 12th biggest contributor globally to the UN's regular budget and played a constructive and influential role in the establishment of UNCLOS and its 1994 implementation agreement.⁵ It was UNCLOS on which the arbitral tribunal relied in the dispute between China and the Philippines over the South China Sea.⁶

Additionally, Australia currently receives 91 per cent of its fuel imports from countries that are on the edge of the South China Sea, or which travel through it. Roughly 60 per cent of Australia's exports transit the South China Sea, and 40 per cent of its imports travel through it.⁷ More than half of Australia's contribution to the global economy depends on the safe transit of goods through this region.



Australia's interest in the South China Sea is therefore a global and material one. Globally, Australia is concerned that the disputing parties behave in a way that will not inhibit the multiple parties depending on peaceful access to these waterways. Materially, the South China Sea is a vital artery for Australia that flows in both directions, both in what Australia gives to the world and what the world brings to Australia.

Australia does not take sides in the regional jurisdictional dispute concerning the South China Sea, and has not done so to date. Australia instead continues to hold that the best and only means of peaceful resolution of contesting claims is in accordance with international law. International law, for Australia, is the foundation of the rules-based global order and essential to the security such a system offers to all its participants.

THE HAGUE RULING

The award made by the arbitral tribunal on 12 July 2016 concerning China and the Philippines was unequivocal. It stated that:

- There was no legal basis for historical rights or other sovereign rights and jurisdiction beyond those provided for in UNCLOS, in the waters of the South China Sea encompassed by China's asserted 'nine-dash line';
- None of the features in the Spratly Islands could generate more than a 12-nautical mile territorial sea; and
- China had violated the Philippines' sovereign rights with respect to its EEZ (exclusive economic zone) and continental shelf in relation to both living and non-living resources.⁸

The Philippines, unsurprisingly, welcomed the Tribunal's decision and underlined its support of UNCLOS.⁹ Additionally, the Philippines urged restraint by all parties and noted that the ruling was a milestone in ongoing efforts to address disputes in the South China Sea, identified by the Philippines as the West Philippines Sea.

The Chinese Government, by contrast, responded by dismissing the arbitration as a 'farce' that may have been inappropriately influenced by money.¹⁰ The Chinese Foreign Ministry went on to state through China's Director General of Treaty and Law that the 'nine-dash line'—a maritime or sovereignty claim asserted by China, within which the dispute arose—'came into existence much earlier than UNCLOS'.¹¹ He further underlined the importance of history by stating that:

China's sovereignty and relevant rights in the South China Sea were formed throughout the long course of history and have been maintained by the Chinese Government consistently.

To close his point, he noted that UNCLOS 'does not cover all aspects of the law of the sea', contrary to the findings of the arbitration.



CHINA'S RESPONSE TO THE RULING

China's responses to the arbitral award were consistent with China's position on the Philippines' legal claim since the Philippines brought it to The Hague in 2013.

From the outset, China refused to participate in the hearings since it took the position that 'the Tribunal did not have jurisdiction over this case'.¹² Moreover, in China's unequivocally-stated view, Philippines' initiation of the proceedings was in breach of its own obligations in international law. Although China made no direct submissions, the procedures of the arbitral tribunal permitted it to note China's 2014 Position Paper on the matter, that:

- The essence of the subject-matter of the arbitration was the territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention;
- China and the Philippines have agreed, through bilateral instruments and the Declaration on the Conduct of Parties in the South China Sea, to settle their relevant disputes through negotiations. By unilaterally initiating the present arbitration, the Philippines had breached its obligation under international law; and
- Even assuming, *arguendo* [for the sake of the argument], that the subject-matter of the arbitration were concerned with the interpretation or application of the Convention, that subject-matter would constitute an integral part of maritime delimitation between the two countries, thus falling within the scope of the declaration filed by China in 2006 in accordance with the Convention, which excludes, *inter alia* [among other things], disputes concerning maritime delimitation from compulsory arbitration and other compulsory dispute settlement procedures.¹³

THERE IS NO LEGAL BASIS FOR HISTORICAL RIGHTS OR OTHER SOVEREIGN RIGHTS ... IN THE WATERS OF THE SOUTH CHINA SEA ENCOMPASSED BY CHINA'S ASSERTED 'NINE-DASH LINE'.

This made clear that for China, the South China Sea dispute represents much more than participation in international tribunals and the credibility of the legal frameworks established to support them. In essence, the South China Sea dispute for China is a territorial discussion rather than one pertaining to UNCLOS. For that reason, China asserted its rights unilaterally to dismiss the arbitral ruling as well as the legitimacy of the Philippines' legal claims.

China's action in this regard has been consistent. It is important to note that China has held this position while continuing to emphasise its preference to resolve the territorial disputes of the South China Sea through processes such as ASEAN's 2002 Declaration on the Conduct of Parties in the South China Sea; and the conclusion of a code of conduct for the South China Sea.¹⁴ This demonstrates that China's dismissal of the arbitration, while fierce, was not without balance in China's preferred modes of treating the issue of territorial disputes in the South China Sea.



AMBIGUITY AND COMPLEXITY

China's response to the Philippines' legal claim has underlined its history of ambiguity and complexity with respect to international conventions, as well as to the South China Sea in which it claims it has maritime and territorial rights beyond those affirmed by the arbitral ruling on UNCLOS.

The 'nine-dash line'

China's claims concerning its maritime territories in the South China Sea were delineated in a map published in 1948, more recently referred to as the 'nine-dash line' claim.¹⁵ It roughly covers the maritime area extending from China's mainland toward the Philippines and encompassing Scarborough Shoal, the Paracel Islands, the Pratas and Macclesfield Banks, and the Spratly Islands.

However, the arbitral tribunal noted the ambiguity that has accompanied this line during its history, especially that:

- The length and precise placement of the line's individual dashes do not appear to be entirely consistent among different depictions of the line; and
- The original 1948 line featured 11 dashes; two in the Gulf of Tonkin were removed in 1953.¹⁶

Thus, China's own maritime boundaries in the original 'dashed' line have themselves been subject to revision.¹⁷ This indicates the uncertainty and inconsistency that has accompanied China's claims about its maritime boundaries, which it has not tested in international law.¹⁸ The arbitral ruling affirmed, however, that assertion of the nine-dash line had been consistent by China since 1953; and observed that an additional tenth 'dash' added in 2013 was a reflection purely of the change of orientation of China's more recent map.¹⁹ To this extent, the arbitration noted the complexity and history of China's claims, consistent with China's official public material on the nine-dash line claim.



UNCLOS

China's ratification of UNCLOS in 1996 places it among the 168 signatories to the Convention.²⁰ The UNCLOS negotiations began in 1973 and represented China's first major international negotiations as the People's Republic of China since its official UN recognition in 1971.²¹ To this extent, UNCLOS was a milestone moment for China, and for the further development of a rules-based international order such as the UN helped initiate in 1945.

China's decision, therefore, to disregard the arbitral ruling on its compulsory jurisdiction represents a significant change in Chinese behaviour from its strong participation in the international order since 1971; and, indeed, before that as a co-founder of the UN.

The rules-based international order

China's decision to dismiss the arbitral rulings has added complexity to the ability of other nations to understand China's participation in the rules-based global order in which it plays an important role as a permanent voice in the UN Security Council, and as a global power.

CHINA'S CONDUCT IN THIS MATTER HAS GIVEN RISE TO THE IMPRESSION THAT CHINA INTENDS TO CHOOSE ARBITRARILY WHICH INTERNATIONAL CONVENTIONS ... IT WILL ACCEPT FULLY, AND WHICH IT WILL NOT.

China's conduct in this matter has given rise to the impression that China intends to choose arbitrarily which international conventions (to which it is a party) it will accept fully, and which it will not. While not disputing China's right to act unilaterally in matters of its own sovereign interest, consistent with international law, China's conduct has caused reasonable concern from other regional players as to what version of a rules-based global order China envisages in its ongoing rise and development.

This paper will return to this problem in its conclusion but will first treat Australia's response to the arbitral ruling on the South China Sea. It will also treat a parallel case in Australia's own backyard, that of the Timor Sea, which exemplifies the extent to which Australia is prepared to commit to the rules-based international order on which Australia's South China Sea position rests.

AUSTRALIA'S RESPONSE TO THE ARBITRAL RULING

Australia's response to the arbitral ruling was swift, along with both China and the Philippines. The Australian Foreign Minister released a statement on the day of the ruling, stating that:

The Australian Government calls on the Philippines and China to abide by the [Hague] ruling, which is final and binding on both parties.... The Tribunal's decision was not about sovereignty, but about maritime rights under UNCLOS.... Australia supports the right of all countries to seek to resolve disputes peacefully in accordance with international law, including UNCLOS.²²

The Australian Foreign Minister went on to point out the benefit all parties to the dispute had received from a rules-based international order in the prospering of East Asia. She urged all parties to resolve their dispute through peaceful means and 'refrain from coercive behaviour and unilateral actions designed to change the status quo in disputed areas'. Foreign Minister Bishop's statement identified the arbitration as a test-case for how the East Asian region can manage disputes peacefully.

Australia's response to the arbitral ruling highlighted:

- That although Australia was not a party to the South China Sea legal dispute, Australia's interest includes the regional stability that every East Asian country—including Australia, China, and the Philippines—has benefited from;
- The importance of international laws, and conventions such as UNCLOS, as the basis for managing dispute resolution in the East Asian neighbourhood; and
- That Australia does not take sides in the competing territorial claims in the South China Sea, a position it has held consistently.²³

Australia therefore affirmed its primary interest in the South China Sea to be the maintenance of regional peace and stability, along with unimpeded trade for the purpose of regional prosperity.

AUSTRALIA AND THE TIMOR SEA – A PARALLEL CASE?

Echoing the Foreign Minister's points, on 26 September 2016 Australia indicated that it would continue to participate in the ongoing hearings of a compulsory Conciliation Commission on a disputed area in the Timor Sea, in which it has been involved since April 2016.²⁴ The Conciliation Commission was established further to UNCLOS and will rely on UNCLOS in its considerations. Immediately prior, the Conciliation Commission had ruled against Australia's submissions that the Commission did not have compulsory jurisdiction in the Timor Sea dispute.

The issue in question is the delimitation of a permanent maritime boundary between Australia and Timor-Leste, and the effect of the 'Certain Maritime Arrangements in the Timor Sea' (CMATS) treaty on available dispute resolution options.²⁵ This is an agreement reached in 2006 between the Australian and Timor-Leste Governments on revenue distribution from mineral resources in the Timor Sea, while placing the determination of a permanent boundary on hold for a specified period. Australia had initially objected to the Conciliation Commission's compulsory jurisdiction to hear Timor-Leste's application under UNCLOS, due to the existence of CMATS, and Australia's preference to negotiate an eventual permanent maritime boundary with Timor-Leste directly.

However, when the Conciliation Commission found against Australia on 19 September 2016—that is, that compulsory conciliation under UNCLOS did apply to this case—Australia continued its participation in the Commission's conciliation process due to its support for the rules-based international order. The Australian Foreign Minister and the Australian Attorney-General mutually affirmed this stance, only one week after the preliminary ruling.²⁶

This is an important point for the discussion of the South China Sea. Just like the Philippines and China in the South China Sea, Australia considered that it had acted in good faith and consistently with international law in its efforts to address the question of a permanent boundary and the sharing of the mineral wealth in the Timor Sea. Australia did this through bilateral agreement and negotiations. As the arbitration noted, both China and the Philippines similarly acted in good faith with their understanding of UNCLOS. The root of the problem for China and the Philippines stemmed from different interpretations of their obligations under this Convention.²⁷



Differently from China's conduct in the South China Sea, however, Australia continues to participate in the conciliation processes on the Timor Sea, as it has from the outset. Australia is doing this even though the Conciliation Commission has already ruled against Australia on the question of compulsory jurisdiction and may make ultimate recommendations adverse to Australia.²⁸

This demonstrates that Australia is prepared to uphold its commitment to a rules-based global order independent of whether this may, from time to time, work against Australia's stated interests. This is a position Australia has held historically and on which it has already followed through in legal rulings on maritime resource issues.²⁹

HISTORY AND THE WAY AHEAD – REGIONAL LEADERSHIP

FOR CHINA TRULY TO AVOID THE THUCYDIDES TRAP, CHINA MUST AVOID THE IMPRESSION IT SEEKS TO BECOME A REGIONAL HEGEMON ... THAT WILL ACTIVELY WORK AGAINST THE STATED INTERESTS OF OTHER REGIONAL PLAYERS.

This paper has discussed the legal and policy implications of the 2016 arbitral ruling on the South China Sea, with particular reference to the rules-based global order. In closing, it will discuss some examples from history raised by the leaders of both China and Australia to exemplify the importance of peaceful dispute resolution, and the significance of leadership by example in the development of this emerging Asian region.

Australian Prime Minister Malcolm Turnbull addressed the issue of regional growth and power shift in a speech to the Center for Strategic and International Studies in Washington in January 2016.³⁰ There, he cited Chinese

President Xi Jinping's oft-repeated reference to the ancient Greek author Thucydides, who reflected on the causes of the Peloponnesian War in ancient Greece in the following way:

The growth of power of Athens and the alarm which this inspired in Sparta made war inevitable.³¹



China is often described as resembling Athens in its re-emergence as a global force whose rising power is causing alarm to its neighbours. For this reason, the Prime Minister noted President Xi's stated concern to avoid the 'Thucydides Trap', where China's growing power inevitably triggers a conflict because of the change in power dynamics that China's rise brings.³²

However, as Prime Minister Turnbull went on to say, China must seek to reassure its neighbours of China's intentions if China is, for its part, to avoid the Thucydides Trap. Such reassurance can come only if China demonstrates greater transparency in its dealings with regional neighbours on issues like the South China Sea. Indeed, for China truly to avoid the Thucydides Trap, China must avoid the impression it seeks to become a regional hegemon (leader, commander or governor) that will actively work against the stated interests of other regional players.³³

Importantly, ancient Greek history furnishes us with another example of regional leadership of a kind that is instructive for China, Australia and the Philippines in the management of emerging power dynamics. The ancient Greek historian Herodotus, a predecessor of Thucydides, recounts how Athens deliberately ceded an opportunity for Greek hegemony during an earlier national crisis in the invasion of Greece by the Persian army of King Xerxes.³⁴ There, Athens was presented with the opportunity to become the leader of Greece against Persia but chose not to do so because it was aware of Sparta's suspicions of Athens' intentions. Athens recognised that seeking the role of hegemon in these circumstances would have fractured the Greek coalition and put at risk the possibility of a stable Greek future in which Athens' interests would be served, alongside those of Greece's other city-states.³⁵

Athens chose regional stability and a certain future over preeminence which it might otherwise have taken—and which it had the military capability to carry—but which could have put in jeopardy the Mediterranean region in which its interests were enmeshed. Only later did Athens demonstrate that it did not have the moral capability to fulfil its leadership potential, something Thucydides reflects on at length.³⁶



THE HISTORY OF EUROPE AND THE FUTURE OF ASIA – ENDURING LESSONS FROM DIFFERENT TIMES, DIFFERENT PLACES

Modern states possess the ability to reflect on history in depth and at length; and an equal responsibility not to repeat history's known mistakes for generations following it. The French philosopher Simone Weil commented following the Second World War in Europe that:

It is very necessary, above all for the sake of the next few generations, to change our conception of human greatness so that we no longer think of mass-fixated, mean-spirited men of power, like Hitler or Stalin, as 'great men', nor of 'empires' (economic or militaristic) as 'great societies', but reserve the term of 'greatness' for those humans and those smaller communities that truly deserve it.³⁷

ASIAN COUNTRIES HAVE THE OPPORTUNITY TO ESTABLISH PRINCIPLES OF HUMAN FLOURISHING THAT WILL SERVE THE INTERESTS OF THE ASIAN REGION CONSIDERED AS A WHOLE—TO THE INCLUSION AND PROTECTION OF ALL, AND NOT SIMPLY THE GREAT POWERS RISING WITHIN IT.

Weil's reflections carry weight for reminding us that, just like Europe, Asian countries have the opportunity to establish principles of human flourishing that will serve the interests of the Asian region considered as a whole—to the inclusion and protection of all, and not simply the great powers rising within it.

Put simply, transparent participation by all regional states in a rules-based global order is a proven basis for creating the conditions for regional success. It does so by enabling strategic competition in a way that will not inevitably result in conflict in the way our historians remind us. It is also most likely to reduce the possibility of strategic miscalculation between rising nation-

states, which in their own way seek to set the conditions under which future generations within the Asian region will live.

Transparent participation in a rules-based global order also has the potential to alter the nature of the regional strategic conversation to one of reasonable participation in this order. This could conceivably replace one-dimensional discussions of regional hegemony that sometimes characterise public commentary on the emerging dynamics of the East Asian region. In this paper's view, such discussions fail to truly illuminate the successful characteristics of global leadership and example in an age of geopolitical change.³⁸

CONCLUSION

This paper has identified why transparent participation in a rules-based global order, as demonstrated by Australia within the confines of international law, is critical to the resolution of maritime disputes in the South China Sea.

Australia's view on the importance of the rules-based global order, and its undertakings to abide by the principles of this order, mark an important baseline that can and should be considered normative for all regional players in East Asia. As this paper has highlighted, participation in this order and its ongoing constructive establishment—rather than its coercive imposition—will be a test for every regional player to see how far the possibilities for regional growth without strategic interruption can continue.

ENDNOTES

- 1 This paper was submitted as an essay for the International Symposium titled 'A Changing World and China', held at the National Defence University, Beijing, from 17 October to 1 November 2016. The views in the paper are the author's own and are not those of the Royal Australian Air Force or the Australian Department of Defence. This paper is published as an Occasional Piece as part of the Institute For Regional Security's Series on relevant policy and strategic issues in Australia and globally.
- 2 Australian Foreign Minister, 'Australia supports peaceful dispute resolution in the South China Sea', *Foreign Minister* [website], 12 July 2016, available at <http://foreignminister.gov.au/releases/Pages/2016/jb_mr_160712a.aspx> accessed 23 March 2017.
- 3 See, for example, Australian Government, *2016 Defence White Paper*, Department of Defence: Canberra, 2016, p. 14.
- 4 See, for example, Australian Government, *2016 Defence White Paper*, paragraph 1.17. It also appears in the *Australian Defence White Paper 2009* (paragraph 5.25) and throughout Australia's *Defence White Paper 2013*. It has been a recurring element of Australia's approach to international engagement for considerably longer. See, for example, (former Australian Foreign Minister) Gareth Evans, *Cooperating for peace: the global agenda for the 1990s and beyond*, Allen & Unwin: Sydney, 1993, p. 41, which asserts that '[t]his activity of states – seeking to secure common objectives and meet common needs through treaty-based law making ... is a crucial tool in promoting international peace and stability and is fundamental to good habits of cooperating for peace'. Evans goes on to note the role of UNCLOS 'in promoting international peace and security by regulating conflicting claims over waters and continental shelves and the passage of vessels and aircraft'.
- 5 For Australia's UN budgetary contributions, see Australian Department of Foreign Affairs and Trade (DFAT), 'United Nations', DFAT [website], available at <<http://dfat.gov.au/international-relations/international-organisations/un/pages/united-nations-un.aspx>> accessed 23 March 2017; see also DFAT, 'UNCLOS', DFAT [website], available at <<http://dfat.gov.au/international-relations/international-organisations/un/Pages/international-law.aspx>> accessed 23 March 2017. The implementation arrangement was adopted by the UN General Assembly in 1994 to address significant concerns with the operation of Part II of UNCLOS (the deep seabed arrangements).
- 6 Specifically, the Tribunal was an Annex VII Ad Hoc Tribunal which sat under UNCLOS in this dispute. The Permanent Court of Arbitration at The Hague was the registry for the case.
- 7 James Brown, 'South China Sea row: what's at stake for Australia', *The Australian*, 16 July 2016. Estimates vary but the *2016 Defence White Paper* notes that 'nearly two thirds of Australia's exports pass through the South China Sea, including our major coal, iron ore and liquefied natural gas products'. For earlier estimates, see Michael Wesley, 'Australia's interests in the South China Sea', in Leszek Buszynski and Christopher Roberts (eds.), *The South China Sea and Australia's regional security environment*, National Security College: Canberra, September 2013, p. 46.
- 8 For a summary of the arbitral findings, see Permanent Court of Arbitration, 'The South China Sea arbitration (The Republic of the Philippines vs. the People's Republic of China)', *Permanent Court of Arbitration* [website], 12 July 2016, available at <<https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>> accessed 12 October 2016. For the full award, see Permanent Court of Arbitration, 'Permanent Court of Arbitration Case No. 2013-19 in the matter of the South China Sea arbitration before an Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China, Award', *Permanent Court of Arbitration* [website], available at <<https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>> accessed 14 October 2016.
- 9 See, for example, Global Nation, 'Full text: DFA Secretary Yasay statement of West PH Sea ruling', *Global Nation* [website], 12 July 2016, available at <<http://globalnation.inquirer.net/140968/full-text-dfa-foreign-affairs-perfecto-yasay-west-philippine-sea>> accessed 23 March 2017.

- 10 Chinese Foreign Ministry press conference, 13 July 2016, describing The Hague's proceedings as a 'farce and a legal pretext': see Foreign Ministry of People's Republic of China, 'Vice Foreign Minister Liu Zhenmin at the press conference on the White Paper titled "China adheres to the position of settling through negotiation the relevant disputes between China and the Philippines in the South China Sea"', *Foreign Ministry of People's Republic of China* [website], 13 July 2016, available at <http://www.fmprc.gov.cn/mfa_eng/wjbxw/t1381980.shtml> accessed 23 March 2017. The Chinese Vice Minister for Foreign Affairs contended that The Hague's judges were 'paid' and asked if either the Philippines or 'some other country' had paid them. He drew a contrast between the arbitral tribunal and other international legal frameworks such as the International Court of Justice and International Law of the Sea, which he described as funded 'independently' through the UN. See also *Xinhua* commentary following 12 July 16, referenced in Hannah Beech, 'China slams the South China Sea decision as a "political farce"', *Time*, 13 July 2016, available at <<http://time.com/4404084/reaction-south-china-sea-ruling/>> accessed 23 March 2017.
- 11 Ministry of Foreign Affairs, People's Republic of China, 'Briefing by Xu Hong, Director-General of the Department of Treaty and Law on the South China Sea arbitration initiated by the Philippines (12 May 2016)', *Foreign Ministry of People's Republic of China* [website], available at <http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1364804.shtml> accessed 23 March 2017. Whether the 'nine-dash line' concerns maritime rights, access or sovereignty remains unclear from China's positions, which appear to conflate or interchange the three on any given occasion.
- 12 See Permanent Court of Arbitration, 'The South China Sea arbitration (The Republic of the Philippines vs. the People's Republic of China), Permanent Court of Arbitration, The Hague, 12 July 2016', p. 6: also Ministry of Foreign Affairs, People's Republic of China, 'The position paper of the Government of the People's Republic of China on the matter of jurisdiction in the South China Sea arbitration initiated by the Republic of the Philippines, published by China on 7 December 2014', paragraph 2, *Foreign Ministry of People's Republic of China* [website], available at <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml> accessed 13 October 2016.
- 13 Ministry of Foreign Affairs, People's Republic of China, 'The position paper of the Government of the People's Republic of China on the matter of jurisdiction in the South China Sea arbitration initiated by the Republic of the Philippines, published by China on 7 December 2014.
- 14 ASEAN, 'Declaration on the conduct of parties in the South China Sea', *ASEAN* [website], available at <http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2> accessed 23 March 2017. The code of conduct is noted as an aspiration in ASEAN's 2002 Declaration, Declaration 10: see the text at National University of Singapore, '2002 Declaration on the Conduct of Parties in the South China Sea signed on 4 November 2002 in Phnom Penh, Cambodia by the Foreign Ministers', *National University of Singapore* [website], 4 November 2002, available at <<https://cil.nus.edu.sg/2002/2002-declaration-on-the-conduct-of-parties-in-the-south-china-sea-signed-on-4-november-2002-in-phnom-penh-cambodia-by-the-foreign-ministers/>> accessed 29 March 2017.
- 15 Permanent Court of Arbitration, 'The South China Sea arbitration (The Republic of the Philippines vs. the People's Republic of China), Permanent Court of Arbitration, The Hague, 12 July 2016', paragraph 181. For the 1948 map, the Chinese-language version is available at Ministry of Interior, Republic of China, 'South China Sea, the first official historical exhibition prove ownership of the South China Sea islands', *Ministry of Interior* [website], available at <http://www.moi.gov.tw/chi/chi_ipmoi_note/ipmoi_note_detail.aspx?sn=140> accessed 28 March 2017. For the map alone, see Boundary Department of the Ministry of Interior, Republic of China, 'Map showing the location of the various islands in the South Sea', *Oxford Public International Law* [website], available at <<http://opil.ouplaw.com/oxlaw/fullsizeimage?imageUri=%2F10.1093%2Fflaw%3Aicgj%2F495pca16.case.1%2Fflaw-icgj-495pca16-graphic-002-full.gif&uriChapter=%2F10.1093%2Fflaw%3Aicgj%2F495pca16.case.1%2Fflaw-icgj-495pca16>> accessed 28 March 2017. Scholarly accounts indicated that the map was prepared in 1947 and published in 1948: see, for example, K. 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', *International Journal of Marine and Coastal Law*, Vol. 14, No. 27, 1999.
- 16 Permanent Court of Arbitration, 'The South China Sea arbitration (The Republic of the Philippines vs. the People's Republic of China), Permanent Court of Arbitration, The Hague, 12 July 2016', paragraph 181. See also footnotes to this section, especially notes 147 and 148, citing 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', and Z. Gao and B.B. Jia, 'The nine-dash line in the South China Sea: history, status, and implications', *American Journal of International Law*, Vol. 107, No. 1, 2013, p. 2013.

- 17 As asserted by the Chinese news agency *Xinhua*, 'Full text of Chinese gov't statement on China's territorial sovereignty and maritime rights and interests in S. China Sea', *Xinhua* [website], 12 July 2016, available at <http://news.xinhuanet.com/english/2016-07/12/c_135507754.htm> accessed 2 April 2017.
- 18 This paper rejects the assertion that that between 1948 and the mid-1990s, 'no protests or opposition were lodged by the international community ... [hence] the Chinese government did not think it necessary to clarify the status of "enclosed waters" within the dashed-line': Xiaoqin Shi, 'UNCLOS and China's claim the South China Sea', *Indo-Pacific Strategic Papers* [website], available at <http://www.defence.gov.au/ADC/Publications/IndoPac/Shi_IPS_Paper.pdf> accessed 28 March 2017. The lack of clarification has been accompanied by significant international concerns concerning the validity of China's claims, which is what prompted the Philippines to initiate the Hague arbitration on the South China Sea disputes in the first instance. The paper also observes that at the time of Xiaoqin Shi's published work, China had refused even to participate in the Hague's arbitral dispute proceedings. This substantially undermines Shi's argument concerning China's confidence in its South China Sea claims. China's military behaviours in this region, that prompted the Philippines' arbitral case, remain of significant concern to numerous international actors. These concerns are described across multiple literary sources.
- 19 Permanent Court of Arbitration, 'The South China Sea arbitration (The Republic of the Philippines vs. the People's Republic of China)', Permanent Court of Arbitration, The Hague, 12 July 2016', footnotes 149 and 72.
- 20 For full list of signatories and treaty status, see UN, 'UN treaty collection', *UN* [website], available at <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 12 October 2016.
- 21 UN Resolution 2758, 'Restoration of the lawful rights of the People's Republic of China in the United Nations', 25 October 1971, available at *UN* [website], <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/327/74/IMG/NR032774.pdf?OpenElement>> accessed 2 April 2017.
- 22 Australian Foreign Minister, 'Australia supports peaceful dispute resolution in the South China Sea'.
- 23 See also, for example, the Australian Minister for Defence's interview with ABC radio, available at *Minister for Defence* [website], 15 July 2016, <<http://www.minister.defence.gov.au/2016/07/15/transcript-of-senator-the-hon-marise-payne-minister-for-defence-abc-rn-breakfast-with-patricia-karvelas/>> accessed 28 March 2017 ; and Australian Foreign Minister, 'Japan-United States-Australia trilateral strategic dialogue', *Foreign Minister* [website], 25 July 2016, available at <http://foreignminister.gov.au/releases/Pages/2016/jb_mr_160725.aspx> accessed 28 March 2017.
- 24 See Australian Foreign Minister, 'Timor Sea conciliation', *Foreign Minister* [website], 26 September 2016, available at <http://foreignminister.gov.au/releases/Pages/2016/jb_mr_160926.aspx?w=tb1CaGpkPX%2FIS0K%2Bg9ZKEg%3D%3D> accessed 28 March 2017. Australia engaged with the Conciliation Commission proceedings from their initiation in April 2016: see Australian Foreign Minister, 'Conciliation between Australia and Timor-Leste', *Foreign Minister* [website], 29 August 2016, available at <http://foreignminister.gov.au/releases/Pages/2016/jb_mr_160829c.aspx> accessed 28 March 2017.
- 25 Details of the treaty are available at <<http://www.austlii.edu.au/au/other/dfat/treaties/2007/12.html>> accessed 28 March 2017.
- 26 Australian Foreign Minister, 'Timor Sea conciliation', line 27.
- 27 Permanent Court of Arbitration, 'The South China Sea arbitration (The Republic of the Philippines vs. the People's Republic of China)', *Permanent Court of Arbitration* [website], 12 July 2016, Summary paragraph 3e, available at <<https://www.pcacases.com/web/sendAttach/1801>> accessed 2 April 2017.
- 28 This paper notes that conciliation is a more flexible process than arbitration, as happened in the South China Sea case, where the parties chose a panel which gave them a binding ruling. Conciliators will offer recommendations to parties on how to solve their dispute, which may include recommendations and findings on the law. The paper notes that these recommendations will not be binding strictly as a matter of law as was the case in the South China Sea arbitration.

- 29 An important example of this is *Southern Bluefin Tuna Case (New Zealand v Japan; Australia v Japan)* (2000), available at UN [website], <http://legal.un.org/riaa/cases/vol_XXIII/1-57.pdf> accessed 2 April 2017. In this case, an UNCLOS Annex VII Ad Hoc Arbitral Tribunal (the legal mechanism also used in the South China Sea case) rejected the Australian and New Zealand claims that it had compulsory jurisdiction under international law to consider the case, and Australia and New Zealand were unable to prosecute their case legally. As a consequence, the interim orders issued by the International Tribunal on Law of the Sea were rescinded and Australia and New Zealand were forced to address the case through further negotiations with Japan. This did not diminish Australia or New Zealand's respect for, or compliance with, international law. The negotiations have since resulted in the resumption of work, indeed expansion of membership, of the Commission for the Conservation of Southern Bluefin Tuna in managing the fish stock.
- 30 Australian Prime Minister, 'Australia and the United States: new responsibilities for an enduring partnership', *Prime Minister* [website], 18 January 2016, available at <<https://www.pm.gov.au/media/2016-01-18/australia-and-united-states-new-responsibilities-enduring-partnership>> accessed 2 April 2017.
- 31 Thucydides, *History of the Peloponnesian War*, English edition, trans. Rex Warner, Penguin: Harmondsworth, 1974, p. 1.
- 32 The so-called "Thucydides Trap" receives comprehensive treatment in Graham Allison's 2017 work, *Destined for war: can America and China escape Thucydides' Trap?* Houghton, Mifflin, Harcourt: Boston-New York, 2017. Australian commentary on the Australian Prime Minister's 2016 speech included Alan Dupont, 'Beijing must beware the Thucydides Trap', *Lowy Institute* [website], 2 February 2016, available at <<http://www.lowyinstitute.org/publications/beijing-must-beware-thucydides-trap>> accessed 14 October 2016. The Prime Minister was reported to have made similar remarks to China directly at the 10th East Asia Summit in November 2015: see Phillip Coorey, 'Malcolm Turnbull tells China it risks a war in the South China Sea', *Australian Financial Review*, 22 November 2015.
- 33 For the Greek definition of "hegemon", see H.G. Liddell and R. Scott, *A Greek-English lexicon*, Harper: New York, 1897.
- 34 Herodotus, *The histories*, Books 7-9, transl. and ed. A.E. Godley, Harvard University Press: Cambridge, 1920.
- 35 See Herodotus, *The histories*, 8.3.1-2. A strong treatment of this theme in Greece's history is John Moore Wickersham, *Hegemony and the Greek historians*, Rowan and Littlefield: Washington DC, 1994. For *hegemony* in Herodotus' account of the Persian conflict, see Wickersham, *Hegemony*, pp. 1-30.
- 36 The Melian dialogue is a classic presentation of Athens' great power conduct that raised questions about Athens' leadership capabilities: see Thucydides, *History of the Peloponnesian War*, pp. 5.84-5.116. Thucydides' *History of the Peloponnesian War*, while a textbook for modern strategy, is in fact primarily a historical and philosophical text. Dislocating it from its 'strategic' uses frequently enables the reader grasp new insights from history, rather than adhering too stringently to Thucydides' geopolitical realism, an insightful but incomplete reading of Thucydides' thought.
- 37 Cited in H.L. Finch, 'Simone Weil: harbinger of a new renaissance?', in Richard H. Bell (ed.), *Simone Weil's philosophy of culture*, Cambridge University Press: Cambridge, 1993, p. 308.
- 38 Contrary to Hugh White's oft-quoted position, this paper does not believe Australia has a 'China choice', in which Australia needs to choose between its security relationship with the US and its economic relationship with China. See Hugh White, *The China choice: why America should share power*, Black Inc.: Collingwood, 2013. Instead, this paper has argued that China has a choice about how it chooses to re-emerge in the region.



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