

2016

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### **Recommended Citation**

Lori F. Damrosch, *Military Activities in the UNCLOS Compulsory Dispute Settlement System: Implications of the South China Sea Arbitration for U.S. Ratification of UNCLOS*, 110 AJIL UNBOUND 273 (2016).  
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## SYMPOSIUM ON THE SOUTH CHINA SEA ARBITRATION

### MILITARY ACTIVITIES IN THE UNCLOS COMPULSORY DISPUTE SETTLEMENT SYSTEM: IMPLICATIONS OF THE SOUTH CHINA SEA ARBITRATION FOR U.S. RATIFICATION OF UNCLOS

*Lori Fisler Damrosch\**

The Award on the Merits in the South China Sea Arbitration between the Philippines and China (Award)<sup>1</sup> is the first decision of any tribunal to interpret the provision of the 1982 United Nations Convention on the Law of the Sea (Convention or UNCLOS)<sup>2</sup> that allows states parties to exclude disputes concerning military activities from the Convention's compulsory dispute settlement regime. That optional exclusion, embodied in Article 298(1)(b) of the Convention, was a central component of the strenuously-negotiated compromise between states that favored compulsory jurisdiction in principle and those that would have preferred a strictly optional system for third-party legal dispute settlement. Its availability has been critical in enabling certain states to ratify the Convention and would be an indispensable condition of eventual U.S. ratification. For these reasons, the Award's treatment of the military activities exception transcends the South China Sea dispute.

On balance, the Award articulates a sound approach to the military activities exception, entailing valid legal criteria and objective factual determinations. Even in the procedural posture of nonappearance by the respondent, China, the Award gave the respondent the benefit of the exception in a "quintessentially military situation," thereby alleviating concerns that an UNCLOS dispute settlement organ might intrude upon military activities excluded from its jurisdiction.

#### *Background on Military Activities and Dispute Settlement*

The dispute settlement architecture under Part XV of the Convention is compulsory within its domain and provides for alternative mechanisms—the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), or arbitration under Annex VII of the Convention, with the latter being the default option—and also for several optional exclusions from compulsory dispute settlement, with an exclusion for military activities as a key element in achieving agreement on the compromise package.<sup>3</sup> The United

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Originally published online 12 December 2016.

<sup>1</sup> The South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award (July 12, 2016) [hereinafter Final Award].

<sup>2</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3.

<sup>3</sup> A.O. Adede, Law of the Sea—The Integration of the System of Settlement of Disputes under the Draft Convention as a Whole, 72 AJIL 84

States was a leading proponent of compulsory dispute settlement in the UNCLOS negotiations, as well as of the optional exclusion for military activities.<sup>4</sup> The existence of compulsory dispute settlement procedures with agreed exceptions was closely linked to the bargaining over concessions on the substance of other elements of the negotiated package.<sup>5</sup>

As ultimately embodied in UNCLOS Article 298(1)(b), any state may declare in writing upon signature, ratification, or accession to the Convention or at any time thereafter that it does not accept compulsory dispute settlement with respect to “disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service.” Of the 168 states parties to UNCLOS, fewer than twenty-five have invoked the military activities exception in whole or in part at any time. Those currently maintaining such an exclusion include the four permanent members of the Security Council who are UNCLOS parties—China, France, the Russian Federation, and the United Kingdom—as well as the following states: Belarus, Cabo Verde, Canada, Chile, Cuba, Denmark,<sup>6</sup> Ecuador, Greece, Mexico, Nicaragua,<sup>7</sup> Norway,<sup>8</sup> Portugal, Republic of Korea, Slovenia, Thailand, Tunisia, and Ukraine.<sup>9</sup> Argentina had such a declaration but withdrew it on October 26, 2012, before filing an application with ITLOS to seek relief against legal proceedings in Ghana that had restrained an Argentinian warship, the *ARA Libertad*.<sup>10</sup>

The small group of states making declarations excluding military activities from UNCLOS dispute settlement may be contrasted with the states that have made substantive declarations concerning interpretation and application of the Convention in respect of certain activities by military forces. Such substantive statements concern, in particular, (1) passage of warships in the territorial sea, (2) the carrying out of military exercises in the exclusive economic zone or on the continental shelf, and (3) threat or use of force in maritime areas.<sup>11</sup> Prospective disputes between pairs of states that maintain different substantive positions on military uses of the seas might or might not fall under the compulsory dispute settlement regime, depending on whether either state’s declaration excludes disputes involving military activities.

The pattern of relatively few invocations of the UNCLOS military activities exception may be compared to a likewise modest pattern of such reservations in declarations accepting ICJ compulsory jurisdiction under Article 36(2) of the ICJ Statute.<sup>12</sup> As of fall 2016, out of a total of seventy-two states with Article 36(2)

(1978).

<sup>4</sup> Louis B. Sohn, *U.S. Policy Toward the Settlement of Law of the Sea Disputes*, 17 VA. J. INT’L L. 9 (1976); *Statement by Expert Panel: U.S. Policy on the Settlement of Disputes in the Law of the Sea*, 81 AJIL 438 (1987).

<sup>5</sup> Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions*, 71 AJIL 247, 267-68 (1977).

<sup>6</sup> Denmark’s declaration excludes Annex VII arbitration for any of the Article 298 categories of disputes, including military activities, without excluding the ICJ or ITLOS. All declarations are available at [UNITED NATIONS TREATY COLLECTION](#).

<sup>7</sup> Nicaragua’s declaration accepts only the ICJ for Article 298 disputes.

<sup>8</sup> Norway’s declaration is similar to that of Denmark.

<sup>9</sup> The declarations of Cuba and Guinea-Bissau also refer to Article 298, but only by excluding ICJ jurisdiction. Uruguay has made a declaration under Article 298(1)(b), but only in respect of law enforcement rather than military activities.

<sup>10</sup> *ARA Libertad*, (Arg. v. Ghana), ITLOS Case No. 20, Provisional Measures (Dec. 15, 2012).

<sup>11</sup> On warships in the territorial sea, see declarations of Algeria, Argentina, Bangladesh, Cabo Verde, Chile, China, Croatia, Egypt, Iran, Malta, Montenegro, Oman, Romania, Sao Tome and Principe, Serbia, Sudan, Sweden, and Yemen.

On military exercises in the exclusive economic zone or on the continental shelf, compare the declarations of Brazil, Cabo Verde, India, Malaysia, Thailand, and Uruguay with the declarations of Germany, Italy, the Netherlands, Pakistan, and the United Kingdom.

On threat or use of force, see declarations of Brazil and Malaysia.

Additionally, several states, including Argentina, Bolivia, Morocco, and Vietnam, have referred in their declarations to past wars or conflicts still to be peacefully resolved.

<sup>12</sup> On trends concerning ICJ compulsory jurisdiction and exclusion of disputes concerning military activities, see Lori Fisler Damrosch, *The Impact of the Nicaragua Case on the Court and Its Role: Harmful, Helpful, or In Between?*, 25 LEIDEN J. INT’L L. 135, 138-39 (2012).

declarations on file, only fourteen had entered reservations excluding disputes involving armed conflicts, hostilities, or military activities. That group—Djibouti, Germany, Greece, Honduras, Hungary, India, Kenya, Lithuania, Malawi, Malta, Mauritius, Nigeria, Romania, and Sudan—has only minimal intersection with the group listed above as having invoked the UNCLOS military activities exception (only Greece appears on both lists). However, many of the states that have exempted themselves from UNCLOS dispute settlement in respect of military activities are not part of the ICJ Article 36(2) system at all. A vastly larger number of states, in particular militarily significant states, are parties to UNCLOS (168, including four permanent members of the Security Council) than to the ICJ Article 36(2) optional system of compulsory jurisdiction (seventy-two, including only one permanent member, the United Kingdom).

International decisions preceding the Award had done little to clarify the contours of what constitutes a military activity for jurisdictional purposes and had not addressed the UNCLOS military activities exception.<sup>13</sup> Among recent holdings in other contexts, the ICJ in its *Jurisdictional Immunities* judgment, involving armed activities during World War II, concluded that customary international law requires immunity from national judicial jurisdiction “in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict.”<sup>14</sup> Whether armed forces *per se* (when not conducting armed conflict) enjoy jurisdictional immunity was at issue when Argentina invoked UNCLOS dispute settlement against Ghana over the ARA Libertad.<sup>15</sup> An Argentinian naval vessel, which had entered Ghanaian waters on a training mission, became embroiled in legal proceedings initiated by creditors of Argentina to attach the vessel. As noted, Argentina had withdrawn its declaration invoking the military activities exception before filing its ITLOS application and thus ITLOS had no occasion to address the exception. Its ruling upheld the immunity from national jurisdiction of a public vessel characterized as a warship forming part of a state’s armed forces, even though the ship was unarmed and not engaged in any forcible conduct.

Whether any and all activities carried out by naval vessels should be considered “military activities” within the meaning of Article 298(1)(b) of the Convention was an open question prior to the Award, to which we now turn.

### *The Tribunal’s Treatment of the Military Activities Exception*

The military dimension of the complex and tense disputes in the South China Sea has already produced episodes of confrontation between naval forces, with ongoing potential for escalation. As between the Philippines and China, each side has repeatedly accused the other of “aggressive” behavior; China has protested about a Philippine naval vessel that ran aground in a disputed area and has used forceful measures to prevent resupply of the vessel; and the navies and coast guards of both countries have enforced their positions on fishing rights. Meanwhile, China has occupied and altered natural features through construction of artificial islands, runways, and other major works, giving rise to concerns that China is adapting them for military purposes. China characterizes its own behavior as peaceful and complains that other states have violated obligations to settle disputes peacefully under the UN Charter and other agreements.

After the Philippines initiated arbitration under Annex VII of the Convention, China announced its flat-out rejection of jurisdiction and refusal to participate in the proceedings. Scholars sympathetic to the Chinese position thereafter published detailed analyses of jurisdictional objections that would need to be resolved by

<sup>13</sup> Scholarship on the military activities exception is likewise sparse. See Mark Weston Janis, *Dispute Settlement in the Law of the Sea Convention: The Military Activities Exception*, 4 OCEAN DEVEL. & INT’L L. J. 51 (1977).

<sup>14</sup> *Jurisdictional Immunities of the State* (Ger. v. It.: Greece intervening), 2012 ICJ REP. 99, para. 78 (Feb. 3).

<sup>15</sup> *ARA Libertad* (Arg. v. Ghana), ITLOS Case No. 20, Provisional Measures (Dec. 15, 2012).

the Arbitral Tribunal in fulfillment of its obligation under UNCLOS Annex VII, Article 9 to satisfy itself of jurisdiction over the dispute. Such analyses laid out a view that the Article 298(1)(b) military activities exception should foreclose jurisdiction over Philippine submissions touching in any way on Chinese actions backed by force. Stefan Talmon, for example, argued:

The Convention does not provide a definition of “military activities” but there is widespread agreement that, considering the highly political nature of military activities, the term must be interpreted widely. Military activities are not limited to actions taken by warships and military aircraft or governmental vessels and aircraft engaged in non-commercial service.<sup>16</sup>

However, China may well have preferred to avoid incurring the diplomatic costs of characterizing its activities as military. Indeed, its official position paper issued December 7, 2014, refrained from doing so, relying instead on other approaches for a total negation of arbitral jurisdiction. In September 2015, President Xi Jinping publicly stated about the ongoing construction that “China does not intend to pursue militarization.”<sup>17</sup>

At the hearing on the merits, counsel for the Philippines urged that the military activities exception should not apply when the respondent had not described its conduct as military and in any event should not be interpreted as reaching activities such as construction of infrastructure which are not exclusively military, or to law enforcement activities.<sup>18</sup> In subsequent response to a question inviting elaboration of a positive definition of military activities, counsel suggested that “one would ordinarily expect military activities to be designed with a view to the objectives identified in Chapter VII of the Charter of the United Nations, with particular attention to Articles 42 and 51.”<sup>19</sup> The Tribunal rather clearly “accept[ed] China’s repeatedly affirmed position that civilian use comprises the primary (if not the only) motivation underlying the dramatic alterations” and that this evidently civilian activity falls outside the Article 298(b)(1) exception.<sup>20</sup>

In Solomonic fashion, the Award offered something to both sides. On the one hand, the Philippines prevailed on its contention that China’s construction of installations and artificial islands at Mischief Reef did not qualify as “military activities,” in view of China’s repeated high-level affirmations (even by its President) that the facilities in question were civilian and that no militarization was intended.<sup>21</sup> On the other hand, activity at Second Thomas Shoal involving a stand-off between armed forces of the two sides “arrayed in opposition to one another” was found to be a “quintessentially military situation” requiring application of the military activities exception regardless of whether the respondent had specifically invoked it.<sup>22</sup> The Tribunal reached the latter conclusion on the basis of its own appreciation that the nature of the activities in question could only be deemed military.

The Tribunal emphasized that the relevant question is “whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute.”<sup>23</sup>

<sup>16</sup> Stefan Talmon, *The South China Sea Arbitration: Is There a Case to Answer?*, in THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE 15, 57-58 (Stefan Talmon & Bing Bing Jia eds., 2014).

<sup>17</sup> *Final Award*, *supra* note 1, at para. 1027.

<sup>18</sup> *The South China Sea Arbitration* (Phil. v. China), PCA Case No. 2013-19, Hearing on Merits, Day 3, at 84-90 (Nov. 26, 2015).

<sup>19</sup> *The South China Sea Arbitration* (Phil. v. China), PCA Case No. 2013-19, Hearing on Merits, Day 4, at 101-106 (Nov. 30, 2015).

<sup>20</sup> *Final Award*, *supra* note 1, at para. 1028.

<sup>21</sup> *Id.* at para. 1028.

<sup>22</sup> *Id.* at para. 1161.

<sup>23</sup> *Id.* at para. 1158.

Because the facts of record “fall well within the exception,” it was not necessary “to explore the outer bounds of what would or would not constitute military activities for the purposes of Article 298(1)(b).”<sup>24</sup>

*Conclusion: Implications for U.S. Policy*

Every U.S. administration since 1994 has urged the Senate to give advice and consent to the Convention, subject to declarations and understandings of which the military activities exception would be an indispensable condition.<sup>25</sup> The Senate Foreign Relations Committee has previously recommended in favor of ratification with the following declaration:

The Government of the United States of America declares, in accordance with article 298(1), that it does not accept any of the procedures provided for in section 2 of Part XV . . . with respect to the categories of disputes set forth in subparagraphs (a), (b), and (c) of article 298(1). The United States further declares that its consent to accession to the Convention is conditioned upon the understanding that, under article 298(1)(b), each State Party has the exclusive right to determine whether its activities are or were “military activities” and that such determinations are not subject to review.<sup>26</sup>

Opponents of U.S. ratification have seized on the possibility—however remote—that UNCLOS organs might disregard this limitation on U.S. consent to the Convention as part of their argumentation against subordinating U.S. “sovereign” prerogatives to compulsory dispute settlement.<sup>27</sup>

If a future administration mounts new efforts to persuade the Senate to give advice and consent to the Convention—as strongly urged by the Department of Defense—the treatment of the military activities exception in the Award should provide reassurance to skeptics willing to entertain reasonable arguments. The fact that naval elements were carrying out land reclamation and building of artificial islands did not make those activities “military” in the legal sense, in the absence of a formal governmental claim to qualify them as such. Nor would it be in U.S. interests to favor a theory of Article 298(1)(b) under which, to paraphrase Justice Jackson, the “power to do anything, anywhere, that can be done with an army or navy”<sup>28</sup> would have the automatic consequence of precluding scrutiny of the exercise of otherwise civilian power.

Where a government, at the highest levels, had characterized its activities as civilian in nature, the exception was held inapplicable. Under this approach, an official U.S. government determination explicitly and publicly invoking the military activities exception in respect of actions of U.S. armed forces should unquestionably remove the matter from the domain of compulsory dispute settlement.

<sup>24</sup> *Id.* at para. 1161.

<sup>25</sup> On bipartisan efforts spanning many years to obtain advice and consent of the Senate, and the recommendation of the Senate Foreign Relations Committee in favor of ratification subject to conditions (including a self-judging understanding of a declaration invoking the military activities exception), see, e.g., Sean D. Murphy *Senate Testimony Regarding U.S. Adherence to Law of the Sea Convention*, 98 AJIL 173 (2004); Herbert J. Hansell et al., *Former Legal Adviser’s Letter on Accession to the Law of the Sea Convention*, 98 AJIL 307 (2004); John R. Crook, *Administration Urges Senate Action on Law of the Sea Convention*, 99 AJIL 498 (2005); John R. Crook, *President Urges Senate Approval of the Law of the Sea Convention*, 101 AJIL 650 (2007); John R. Crook, *Law of the Sea Treaty Reported out of Committee; Timing and Prospects for Full Senate Action Unknown*, 102 AJIL 168 (2008); John R. Crook, *Secretary of State Urges Multilateral Approach to China’s South China Sea Claims*, 104 AJIL 664 (2010); John R. Crook, *Senate Foreign Relations Committee Holds Hearings on the Law of the Sea Convention*, 106 AJIL 659 (2012).

<sup>26</sup> United Nations Convention on the Law of the Sea: Report to Accompany Treaty Doc. 103-39, Sen. Exec. Rpt. 108-10, 108th Cong., 2d Sess. 17 (Mar. 11, 2004).

<sup>27</sup> Jack Goldsmith & Jeremy Rabkin, *A Treaty the Senate Should Sink*, WASH. POST (July 2, 2007) (arguing that the proposed self-judging understanding of the military activities exception “amounts to a ‘reservation’ disallowed by the treaty. International Tribunals would still have the last word on the validity of the U.S. condition and the resulting scope of permissible U.S. naval actions.”)

<sup>28</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

At the same time, the Award deliberately leaves open a variety of questions that did not have to be resolved in the case at hand. Future cases could lead to further development of either of two lines of reasoning—on the one hand, a focus on how the respondent understood and explained its own behavior, in terms of subjective intent, purpose, or primary motivation;<sup>29</sup> and on the other hand, a focus on appreciating the “nature” of a given activity. The Tribunal refrained from prescribing a specific definition of the term “military activities,” which under the circumstances it did not need to do. While the “outer bounds” of the military activities exception have not yet been fully delimited, the prudent approach of the Award ought to reassure states for whom the Article 298(1)(b) exception is an essential condition of participation in the Convention.<sup>30</sup>

<sup>29</sup> *Final Award*, *supra* note 1, at para. 1028.

<sup>30</sup> *Id.* at para. 1161.