



**Statement before the  
House Foreign Affairs  
Subcommittee on Asia and the Pacific**

***“Diplomacy and Security in the South China  
Sea: After the Tribunal”***

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Two months ago, on 12 July 2016, the Arbitral Tribunal under the United Nations Convention on the Law of the Sea (UNCLOS) issued its landmark ruling in the case brought by the Philippines against China involving maritime rights and entitlements in the South China Sea. In the weeks that followed reactions to the ruling by the parties and others have played out more or less as anticipated. What was very unexpected however was the breadth and decisiveness of the ruling itself, which delivered an overwhelming legal victory to the Philippines—and by logical extension to other claimants in the South China Sea—and a decisive legal defeat to China.

The five judges on the tribunal panel ruled unanimously in favor of the Philippines on 14 of the 15 claims it had brought against China. In essence the ruling did four things. First, the judges ruled that China's nine-dash line was not consistent with the Law of the Sea, and found that any claim China makes in the South China Sea must be made based on maritime entitlements from land features. The ruling invalidated Beijing's claims to historic rights throughout the nine-dash line, saying that any historic rights China might once have claimed in what are now the exclusive economic zones (EEZs) or continental shelves of other countries were invalidated by UNCLOS.

Second, the tribunal found that features in South China Sea claimed by both China and the Philippines generate at most only 12 nautical mile (nm) territorial zones, and do not generate 200 mile exclusive economic zones (EEZs) or continental shelves. This means that China has no EEZ overlap with the Philippines, nor does it have a legal basis for claiming EEZ overlaps with Malaysia, Indonesia, or Brunei. This dramatically minimizes the scope of legally valid disputes.

Third, the tribunal ruled that China infringed on the traditional fishing rights of Filipinos by not allowing them to fish at Scarborough Shoal. Interestingly, the judges also noted that had the situation been reversed and the Philippines had prevented Chinese fisherman access to Scarborough Shoal, that also would be a violation by the Philippines. By logical extension, all countries that have historically fished in the area, which includes Taiwanese and Vietnamese fisherman, also have legally valid claims to maintain access to lawful fishing activities at the shoal, and the Philippines made the point during their legal arguments that those traditional rights were respected by the Philippines when it controlled and administered Scarborough Shoal until April 2012.<sup>i</sup>

Fourth, in one of the most legally significant parts of the ruling, the judges ruled that China in violation of its obligations under UNCLOS to preserve and protect the marine environment, finding that it created massive environmental damage through its reclamation activities on features in the South China Sea that destroyed pristine coral reefs, and that these large-scale reclamation and construction activities in addition to damaging Chinese fishing practices had decimated fragile marine ecosystems. According to legal scholars, these findings mark a significant step in the clarification of the environmental protection provisions of UNCLOS, and could boost efforts to apply these obligations more widely among states, in the South China Sea and beyond.<sup>ii</sup>

In sum, this was a deep and conclusive ruling that sweeps away a vast amount of ambiguity on questions surrounding the validity of China's maritime claims, the status of features under UNCLOS, and the strength of the environmental protections under UNCLOS.

## Responses to the arbitral tribunal ruling

China reacted swiftly and predictably to the ruling, denouncing the tribunal as “unjust and unlawful” and declaring the award “is null and void and has no binding force.” Just before the ruling during a visit to Washington, former Chinese state councilor Dai Bingguo said that the ruling would be “just a piece of trash paper.” China also quickly announced some symbolic military maneuvers, including naval exercises off of Hainan and combat air patrols over the South China Sea, as well as landing of a civilian aircraft for the first time on Mischief Reef. Overall however China’s actions to date have been somewhat restrained. Many observers had expected China to refrain from provocative actions until after it hosted the G-20 in Hangzhou in early September, but China appears to be continuing to exercise relative restraint, perhaps to avoid becoming a target of political debate in the run-up to the U.S. presidential election.

Reactions from the international community also played out more or less according to script. The United States, Japan, Australia and New Zealand issued strong statements underscoring that the ruling was final and legally binding on both parties. Of note, India also issued a relatively strong statement supporting the ruling and calling for UNCLOS to be respected, noting that India along with several ASEAN states have abided by rulings handed down by the International Tribunal in previous cases.<sup>iii</sup>

### ASEAN and individual Southeast Asian countries

Most countries in Southeast Asia have responded rather cautiously to the ruling. In addition to the Philippines, Indonesia, Malaysia, Myanmar, Singapore, Thailand, and Vietnam have issued official statements on the ruling.

Malaysia, Singapore, Vietnam, and, surprisingly, Myanmar, have expressed their support for the resolution of disputes through peaceful means, including diplomatic and legal processes, and in accordance with international law and UNCLOS.<sup>iv</sup> Singapore and Vietnam indicated that they are studying the content of the ruling. Vietnam went a step further to reiterate that it “strongly supports” the “maintenance of [...] freedoms of navigation and over-flight” in the sea. Notably, Vietnam also reaffirmed its previous statements on the arbitration, including its submission to the tribunal which, among other things, recognized the judges’ jurisdiction.

Indonesia called on all parties to resolve their disputes according to international law, including UNCLOS, but without any direct reference to the arbitration.<sup>v</sup> And Thailand issued a statement ahead of the ruling that urged for peace and stability in the South China Sea, and called on all parties to exercise self-restraint.<sup>vi</sup>

The Philippines had a notably low key response to its resounding legal victory, reflecting the new direction that newly inaugurated President Rodrigo Duterte had signaled he wanted to move toward a “soft landing” with China.<sup>vii</sup> Foreign Secretary Perfecto Yasay welcomed the ruling and called on all parties “to exercise restraint and sobriety,” adding the following day that “we cannot gloat about our triumphs.”<sup>viii</sup> Manila also signaled it would be willing to begin quiet talks with Beijing seeking a *modus vivendi* to manage disputes. However, when China sought to precondition talks on excluding any consideration of the legal ruling, Manila made clear that it would insist that talks must be based on the verdict.

In August, President Duterte dispatched a special envoy, former Philippine president Fidel Ramos, to Hong Kong to meet with current and former Chinese officials as an “ice breaker” to explore grounds for talks between the two sides. The visit did not appear to lead to any tangible results or a clear way forward. Chinese officials continue to reject any talks that are launched on the basis of the ruling, but they have invited Ramos to Beijing for further discussion.

ASEAN as a whole failed to project any unity over its response to the arbitral tribunal ruling. Two weeks after the ruling, ASEAN foreign ministers convened in Vientiane, Laos for the ASEAN Regional Forum meetings, and they discussed recent developments in the South China Sea. In the joint communiqué they issued at the meeting, the ASEAN ministers made no mention of the outcomes of the ruling, but they did devote significant attention to the issue by ASEAN standards. Of note, they acknowledged concerns expressed by “some ministers” on land reclamation and escalation of activities in the sea, which they said “have eroded trust and confidence, increased tensions and may undermine peace, security and stability in the region.” The “some ministers” formulation was a way to give voice to ASEAN members that have increasingly strong concerns, such as Vietnam and the Philippines, while giving an out to members like Cambodia who do not want to express such concern about China. Also of note was the fact that the language included in the Sunnylands Declaration of “full respect for legal and diplomatic processes” was lifted out of the section on the South China Sea and put into the introductory section, reportedly at Cambodia’s insistence.<sup>ix</sup> The section on the South China Sea in the July communiqué was the longest ever devoted to the South China Sea issue in official ASEAN meetings, and yet by pulling punches it perfectly reflects the glass half-full, glass half-empty nature of ASEAN’s ability to deal with this issue and stand as a counterweight to China. ASEAN is both essential for bringing moral pressure to bear on China, but also is, and probably always will be, a very imperfect vessel for expressing unity and cohesion on this issue.

### **ASEAN at a crossroads**

The South China Sea continues to be a divisive issue within ASEAN. While it is not the single most important issue on the grouping’s agenda, it is often the most difficult issue around which to forge consensus among all member states—the principle on which ASEAN operates. China has been able to use its economic patronage to peel away Cambodia and sometimes Laos from ASEAN consensus on the South China Sea at ASEAN meetings, making it difficult for ASEAN to forge an effective collective position on developments in the South China Sea.

The deadlock that ASEAN frequently encounters on the South China Sea issue has prompted a broader and more serious debate among its leaders about the “ASEAN Way,” which favors consensus-building above all. ASEAN secretary-general Le Luong Minh announced earlier this month that he has received the mandate of all ASEAN foreign ministers to review and update the charter of ASEAN—which was adopted in 2007 and spells out the grouping’s norms, rules, and values—in order to make it more efficient in the current environment. While the principle of consensus, which is enshrined in the charter, will not likely be modified since it helps ensure that no member state is marginalized on major decisions, he admitted that “very often it delays the very process of reaching that consensus.”<sup>x</sup> Vietnamese president Tran Dai Quang recently suggested that “it is possible for countries of ASEAN to consider and supplement a number of

other principles [...] to the principle of consensus in ASEAN” in order to address newly emerging issues—a clear reference to the South China Sea.<sup>xi</sup>

While there are structural forces that prevent ASEAN from speaking more cohesively on the South China Sea, the ruling offered the grouping an important equalizer in its engagement with China on the issue. China has said it neither accepts nor will abide by the ruling, yet its actions indicate that it at least recognizes that it needs to begin engaging ASEAN more substantively than in the past. After years of dragging its feet on talks for a binding Code of Conduct (COC) for parties in the South China Sea, China announced last month that it aims to conclude a framework for the COC with ASEAN in mid-2017. China and ASEAN also recently agreed to establish a hotline to manage maritime emergencies, and to employ the Code for Unplanned Encounters at Sea between their navies in the South China Sea—both initiatives had been put forward by ASEAN. While skeptics can rightly point to the extremely slow pace which China will likely continue to exhibit in implementing these initiatives, it is hard to imagine that China would have agreed to them without the pressure of the arbitral ruling.

The Philippines will chair ASEAN in 2017. To date, President Duterte’s approach to the South China Sea has marked a stark shift from his predecessor. Under President Aquino the Philippines was a consistently strong voice in ASEAN meetings on South China Sea developments, but the current government has pulled back quite a bit from seeking ASEAN support on the issue. Other ASEAN members, in particular claimant states, recognize that this new dynamic could carry significant implications for their own interests and ASEAN’s collective position, given the consensus principle that guides the grouping. Other states with claims or stakes in the South China Sea are not necessarily averse to Duterte’s overtures to China in the aftermath of the ruling. However, they recognize that Manila’s willingness to find common ground with China and be more confrontational with its ally, the United States, could in the process result in additional leverage for China and, in that event, force them to recalculate their own interests and approaches toward both Washington and Beijing.

### **The Impact of the Ruling**

More than two months after the verdict was announced, government lawyers and diplomats across the region are still absorbing the 500-page ruling and its legal implications. Meanwhile strategists and legal scholars are debating its long-term impact. Will the dramatically altered legal landscape lead to significant behavioral changes among claimant states, and most importantly China? Or will China continue to flout the ruling, double-down on its defiant rejection, and seek to further change facts on the ground to support its maritime claims? Will the ruling be a game changer?<sup>xii</sup> Or a paper tiger?

In the proceedings at The Hague, then Philippine foreign secretary Alberto Del Rosario began his closing remarks by noting that “International law is the great equalizer among states. It allows small countries to stand on an equal footing with more powerful states. Those who think ‘might makes right’ have it backwards. It is exactly the opposite, in that right makes might.” But as many observers and China itself were quick to point out, the tribunal does not have an army or police force to enforce its ruling. The ruling will only have an impact if the weight of world opinion, and the legitimacy of UNCLOS legal process, leads China eventually into

grudging compliance. The Philippines' lead counsel for the case, Paul Reichler, predicts that it will. He has argued in the wake of the decisive ruling that this will ultimately lead China to seek to settle its disputes with other claimants through negotiations.<sup>xiii</sup> He points to the "reputational damage ...and the loss of prestige and loss of influence with other states when you declare yourself an international outlaw, a state that doesn't care for or respect international law."<sup>xiv</sup> Reichler, who also served on the Nicaragua legal team in its 1980s dispute with the United States, notes that even in that case, although the United States defied the ICJ judgement, it ended up coming into substantial compliance after the publicity of the case led the U.S. Congress to cut off funding for the Contra rebels in 1988 and the U.S. lifted the trade embargo in 1990.<sup>xv</sup>

Ultimately the impact of the ruling will depend on a several key developments. The first is the role of domestic public opinion in the claimant states. The verdict provides a clear-cut legal case against excessive Chinese maritime claims and actions that infringe on Philippines' rights, and by logical extension this provides legal ammunition for other claimant states—Vietnam, Malaysia, and Brunei—as well as Indonesia, which has challenged China's fishing practices within its EEZ near its Natuna Islands, to push back on China's excessive claims and pursuant actions. Will the domestic publics of these states absorb and embrace the legal ruling and demand that their governments stand up to China? We have already seen strong public opinion in the Philippines in favor of the ruling push the Duterte government to take a somewhat firmer line with Beijing than the cooperative approach initially favored by Duterte. Indonesia, one of the architects of the UNCLOS treaty, reacted to the ruling with a muted response, leading several dozen Indonesian scholars to sign a letter calling for a more vigorous embrace of the ruling. Will nationalist public sentiment push governments in Indonesia, Malaysia and other countries to be more firm in response to incursions in their EEZs, and to insist on Chinese compliance with the ruling?

Second, and relatedly, will domestic and international environmental advocates seize on the environmental aspects of the ruling to further publicize/highlight the catastrophic impact of China's reclamation and fishing activities on the fragile marine ecosystem? To date, environmental non-governmental organizations (NGOs) have been remarkably silent on China's environmental destruction, which the court, citing biologist Kent Carpenter, said "constitutes the most rapid nearly permanent loss of coral reef area" ever caused by human activity.<sup>xvi</sup> But the ruling may lead to more calls from international NGOs and domestic groups to insist that joint management of resources and monitoring and protection of the marine environment is essential to preserve the maritime environmental commons, and is a legal obligation of states under UNCLOS.

Third, will claimant governments be encouraged by the ruling to file their own cases against China at the Permanent Court of Arbitration? Vietnam and Indonesia have each previously indicated that they were considering their own legal action against China, and the strong precedent set by this case could encourage them further down this legal path. On the other hand, the leverage that comes with the "threat" of bringing a legal claim against China to arbitration may be more useful to coax China to the negotiating table, or at minimum induce better behavior from China, rather than actually filing a claim at The Hague.

Fourth, and obviously most significant, is how China chooses to respond in the coming months and years. Will Beijing double-down on its defiant non-compliance, and seek to further change facts on the ground to support its position? Many observers expected that China would take steps in this direction immediately after the ruling, such as declaring an Air Defense Identification Zone (ADIZ) in the South China Sea, or moving to begin reclamation on Scarborough Shoal. So far China has restrained from these kinds of provocative actions, but several windows are worth watching for potential Beijing actions—including the period after China hosts the G-20 in Hangzhou in early September through the U.S. election and transition period in November-January, and then again in the early months of a new U.S. administration. If China wanted to “test the waters” when the U.S. government is constrained or less fully focused, these timeframes might seem tempting.

In the most optimistic scenario, over time China will nudge its claims in the South China Sea towards compliance with UNCLOS. Some observers have already seen some signs that they believe point to Chinese movement in this direction. Andrew Chubb, for example, highlights the degree to which Chinese leadership is now focusing on Chinese sovereignty over the features, which was not actually challenged in the arbitral tribunal ruling. “Driving attention towards this tough-sounding stance on territorial sovereignty provides good political cover for the quiet clarification of China’s maritime rights claims that may be underway” he writes.<sup>xvii</sup>

Yet not even the most optimistic observers can expect China to come into full compliance of the tribunal ruling. Full compliance by China would seem to be nearly impossible to achieve, given that it would require them to abandon their facilities on Mischief Reef, which the tribunal determined was a low-tide elevation not entitled to maritime claims, and situated squarely within the Philippines’ EEZ. Short of full compliance, then, what would “substantial compliance” look like? What could the international community realistically expect China to do in order to demonstrate that it is not flouting international law? I would suggest that if China clarifies the nine-dash line in a manner consistent with UNCLOS; quietly refrains from interfering with resource exploitation by other claimants within their own EEZs, and refrains more broadly from interfering with traditional fishing activities; and limits maritime law enforcement activities to the territorial waters of SCS features it controls, would constitute a case of “substantial compliance” that would mark a huge victory for international law and the weight of world opinion.

Finally, what role will the United States play? So far, the United States has sought to rally a strong diplomatic message to convey that world opinion is decidedly on the side of the legally binding nature of the UNCLOS-mandated tribunal ruling while providing some space for the Philippines to approach China for consultations towards a peaceful resolution of their dispute. Let me end with two recommendations for U.S. policy going forward. First, the United States needs to visibly demonstrate that it will continue to “fly, sail and operate wherever international law allows.” This means continuing to conduct regular Freedom of Navigation Operations (FONOPs), and other presence operations, in the vicinity of these disputed features on a regular basis. FONOPs, which are a global program designed to challenge excessive maritime claims, and other presence activities should be a regular occurrence, and not something that is ratcheted up and then down in response to legal developments or short-term behavioral changes. They should not be seen as provocations, nor are they bargaining chips.

Second, the United States should continue its efforts to build capacity of key partners and allies, in particular the Philippines but also Vietnam, Indonesia, Malaysia, and Thailand. Stepping up efforts to accelerate capacity building through the Maritime Security Initiative (MSI) and Foreign Military Financing (FMF) and International Military Education and Training (IMET) will be critical to shape the regional environment in our favor.

And finally, perhaps the ruling will at long last lead the U.S. Senate to ratify UNCLOS. Although it has never ratified UNCLOS, the United States accepts the UN convention as customary international law. And yet the ruling of the arbitral tribunal panel, and regional reactions to the ruling, have cast a glaring light once again on the mismatch between what U.S. rhetoric on upholding international law and the need for all countries to be bound by rules and norms, and the fact that it has not ratified UNCLOS. For the weight of world opinion to have any chance of shaping China's behavior, ratifying UNCLOS is an important first step.

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<sup>i</sup> Asia Maritime Transparency Initiative (AMTI), Podcast: Arbitration Outcomes with Paul Reichler, Philippines' Lead Counsel, Part 2, <https://amti.csis.org/podcast-arbitration-outcomes-paul-reichler-philippines-lead-counsel/>.

<sup>ii</sup> Julie Makinen, "China's Claims in South China Sea Are Invalid, Tribunal Rules, In Victory for the Philippines," *Los Angeles Times*, July 12, 2016, <http://www.latimes.com/world/asia/la-fg-south-china-sea-ruling-20160712-snap-story.html>; HerbertSmithFreehills Dispute Resolution, "Final Award Published in the South China Sea Arbitration," July 20, 2016, <http://hsfnotes.com/publicinternationallaw/2016/07/20/final-award-published-in-the-south-china-sea-arbitration/>; AMTI, Podcast, Arbitration Outcomes with Paul Reichler, Philippines' Lead Counsel, Part 2.

<sup>iii</sup> See <http://mea.gov.in/Speeches-Statements.htm?dtl/27140>. "In the context of the Award of the Arbitral Tribunal constituted under Annex VII of the 1982 UNCLOS in the matter concerning the Philippines and China, India, as a State Party to the UNCLOS, urges all parties to show utmost respect for the UNCLOS, which is the foundation of the international legal order of the seas and oceans. Like several ASEAN countries, India too has respected the decision of the International Tribunal to resolve maritime disputes with its neighbors peacefully. India believes that States should resolve disputes through peaceful means, without threat or use of force, and exercise self-restraint in the conduct of activities that could complicate or escalate disputes affecting peace and stability."

<sup>iv</sup> Ministry of Foreign Affairs of Malaysia, Statement by Malaysia Following the Decision on the Arbitral Tribunal on the South China Sea Issue (press release), [http://www.kln.gov.my/web/ukr\\_kiev/home/-/asset\\_publisher/8pPT/blog/statement-by-malaysia-following-the-decision-of-the-arbitral-tribunal-on-the-south-china-sea-issue?redirect=%2Fweb%2Fukr\\_kiev%2Fhome](http://www.kln.gov.my/web/ukr_kiev/home/-/asset_publisher/8pPT/blog/statement-by-malaysia-following-the-decision-of-the-arbitral-tribunal-on-the-south-china-sea-issue?redirect=%2Fweb%2Fukr_kiev%2Fhome); Ministry of Foreign Affairs of Singapore, MFA Spokesman's Comments on the Ruling of the Arbitral Tribunal in the Philippines v China Case Under Annex VII to the 1982 United Nations Convention on the Law of the Sea (press release), [https://www.mfa.gov.sg/content/mfa/media\\_centre/press\\_room/pr/2016/201607/press\\_20160712\\_2.html](https://www.mfa.gov.sg/content/mfa/media_centre/press_room/pr/2016/201607/press_20160712_2.html); Ministry of Foreign Affairs of Vietnam, Remarks of the Spokesperson of the Ministry of Foreign Affairs of Viet Nam on Viet Nam's reaction to the issuance of the Award by the Tribunal constituted under Annex VII to the United Nations Convention on the Law of the Sea in the arbitration between the Philippines and China (press release), [http://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns160712211059/view](http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns160712211059/view); and Ministry of Foreign Affairs of Myanmar, Myanmar's Statement on the Award of the Arbitral Tribunal on the South China Sea under Annex VII of UNCLOS (press release), <http://www.mofa.gov.mm/wp-content/uploads/2016/07/Press-Releases.pdf>.

<sup>v</sup> Ministry of Foreign Affairs of Indonesia, Indonesia Calls on All Parties to Respect International Law Including UNCLOS 1982 (press release), <http://www.kemlu.go.id/en/berita/Pages/Indonesia-Calls-On-All-Parties-To-Respect-International-Law-Including-UNCLOS-1982.aspx>.

<sup>vi</sup> Ministry of Foreign Affairs of Thailand, Statement of Thailand on Peace, Stability and Sustainable Development in the South China Sea (press release), <http://www.mfa.go.th/main/en/media-center/14/68341-Statement-of-Thailand-on-Peace,-Stability-and-Sust.html>.



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<sup>vii</sup> “Duterte to Seek ‘Soft Landing’ with China after Dispute Ruling,” ABS-CBN News, June 30, 2016, <http://news.abs-cbn.com/focus/06/30/16/duterte-to-seek-soft-landing-with-china-after-dispute-ruling>.

<sup>viii</sup> Paterno Esmaquel, “PH-China Ruling: Why Yasay Wasn’t Smiling,” Rappler, July 13, 2016, <http://www.rappler.com/newsbreak/inside-track/139620-yasay-somber-statement-philippines-china-ruling>.

<sup>ix</sup> Prashanth Parameswaran, “Assessing ASEAN’s South China Sea Position in its Post-Ruling Statement,” The Diplomat, July 25, 2016, <http://thediplomat.com/2016/07/assessing-aseans-south-china-sea-position-in-its-post-ruling-statement/>.

<sup>11</sup> Tan Qiuyi, “ASEAN Charter under Review: ASEAN Secretary-General,” Channel News Asia, September 7, 2016, <http://www.channelnewsasia.com/news/asiapacific/asean-charter-under-review-asean-secretary-general/3108772.html>.

<sup>xi</sup> “Asean Urged to Look beyond Consensus in Decision Making,” *Bangkok Post*, August 30, 2016, <http://www.bangkokpost.com/news/asean/1074425/asean-urged-to-look-beyond-consensus-in-decision-making>.

<sup>xii</sup> Alexander L. Vuving, “Why the South China Sea Ruling Is a Game Changer,” The Diplomat, July 27, 2016, <http://thediplomat.com/2016/07/why-the-south-china-sea-ruling-is-a-game-changer/>.

<sup>xiii</sup> Jane Perlez, “Defending David against the World’s Goliaths in International Court,” *New York Times*, July 15, 2016, <http://www.nytimes.com/2016/07/16/world/asia/south-china-sea-philippines-hague.html>.

<sup>xiv</sup> Asia Maritime Transparency Initiative, Podcast: Arbitration Outcomes with Paul Reichler, Philippines’ Lead Counsel, Part 3, <https://amti.csis.org/podcast-arbitration-outcomes-paul-reichler-philippines-lead-counsel/>.

<sup>xv</sup> Lan Nguyen and Truong Minh Vu, “After the Arbitration: Does Non-Compliance Matter?,” Asia Maritime Transparency Initiative, July 22, 2016, <https://amti.csis.org/arbitration-non-compliance-matter/>.

<sup>xvi</sup> Makinen, “China’s Claims in South China Sea Are Invalid.”

<sup>xvii</sup> Andrew Chubb, “Did China just clarify the nine-dash line?,” East Asia Forum, July 14, 2016, <http://www.eastasiaforum.org/2016/07/14/did-china-just-clarify-the-nine-dash-line/>.