Marching Towards Exception: The Chinese Coast Guard Law and the Military Activities Exception Clause of the *Law of the Sea Convention*

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Structured Abstract

Article Type: Research Paper

Purpose—Recent Chinese legislation reconfigures the institutional framework of the China Coast Guard (CCG) to give it an unequivocally military character. This paper examine some implications of this law for the Philippines and other claimants in the South China Sea.

Design, Methodology, Approach—This article uses description and narrative as techniques to critically engage with the law and draw out its limitations as a source of remedy for rival claimants in the South China Sea.

Findings—This analysis suggests that China's militarization of the CCG seeks to prevent future adverse interpretations of its military activities exception under Article 298(1)(b) of the Law of the Sea Convention (LOSC). In 2016, the *South China Sea* Tribunal applied Article 298(1)(b) in refusing to consider the legality of China's activities on Second Thomas Shoal.

Practical Implications—This contribution argues that the Coast Guard Law makes it difficult for rival claimants in the South China Sea to overcome China's military activities exception in respect of future LOSC dispute-settlement proceedings.

Originality, Value—This contribution offers a timely analysis of the Coast Guard Law and the ways in which the military activities exception clause facilitates unilateralism and aggression in disputed waters.

Keywords: Coast Guard Law, military activities exception, South China Sea

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I. Introduction

In May 2013, Rear Admiral Zhang Zhaozong of the Chinese Navy stated in a television interview that China was using a "cabbage strategy" at Second Thomas Shoal to take over South China Sea features that had been under the jurisdiction of the Philippines: Mischief Reef and Second Thomas Shoal.[1] The cabbage strategy involves China's surrounding a maritime feature with fishing administration vessels, marine surveillance ships, and navy warships "until the feature is wrapped layer by layer like a cabbage."[2]

Nearly eight years later, on February 1, 2021, the Coast Guard Law of the People's Republic of China (Coast Guard Law) came into force.[3] The Coast Guard Law purports "to regulate and ensure the performance of maritime police agencies, safeguard national sovereignty, security and maritime rights and interests, and protect the legitimate rights and interests of citizens, legal persons and other organizations."[4] Three salient features of this law are found in Articles 22, 82, and 83. Article 22 authorizes the China Coast Guard (CCG) and other maritime police agencies to take "all measures necessary," including using weapons, to stop foreign organizations and individuals from illegally infringing China's national sovereignty, sovereign rights, and jurisdiction at sea.[5] Article 82 directs the CCG to formulate rules and regulations on "maritime rights protection and law enforcement matters" in accordance with laws, administrative regulations, and "decisions of the State Council and the Central Military Commission." Then, Article 83 mandates the CCG and other Chinese maritime police agencies to perform "defense operations" in accordance with "military regulations and orders of the Central Military Commission."[6] The Central Military Commission is China's "leading military organ and commander of its armed forces."[7] These provisions are significant in that they clearly signal a departure from Beijing's previous representations that Chinese activities in the South China Sea were civilian in purpose.[8]

The Coast Guard Law reinforces China's exclusion of military activities from the purview of dispute settlement under the law of the sea. In 2006, China declared under Article 298 of the Law of the Sea Convention (LOSC; the Convention)[9] that it does not accept the jurisdiction of any of the Convention's dispute-settlement mechanisms over "all the categories of disputes referred to in paragraph 1(a), (b) and (c) of Article 298 of the Convention." Article 298(1)(b) in particular refers to a class of disputes that involve military or law enforcement activities and is thus more commonly known as the military activities exception clause. Military, law enforcement, and other activities and disputes referred in Article 298 are optional exceptions to the jurisdiction of LOSC dispute-settlement mechanisms such as the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), or arbitration tribunals convened under Annex VII of the LOSC. This means that states may, upon ratifying the Convention or at any time thereafter, choose which disputes to exclude from their consent to accept the jurisdiction of dispute-settlement bodies.

This article describes some of the implications of the Coast Guard Law for the interests of the Philippines and other rival claimants in the South China Sea. It argues that China's Coast Guard Law reinforces legal hurdles to the jurisdiction of compulsory dispute-settlement bodies under the LOSC. Combined with China's 2006 declaration under Article 298 of the LOSC, the Coast Guard Law in effect places current and future Chinese

activities in the South China Sea outside the jurisdiction of LOSC dispute-settlement bodies. The move to militarize the CCG has significant ramifications (a) for rival claimants, like the Philippines, who have less robust military capability to assert sovereignty, sovereign rights, and jurisdiction over contested waters and (b) in terms of the ability to seek remedies against potential Chinese violations of the LOSC.

The second and third sections give a brief historical background of the military activities exception to the jurisdiction of dispute-settlement bodies under Article 298(1)(b) of the Convention. The account offered in these sections attends to China's activities in the South China Sea, particularly on Mischief Reef, from the late 1990s. The fourth section outlines some provisions of the Coast Guard Law and describes their potential impact on the rival claims of other states over the South China Sea. It then situates the Coast Guard Law in light of the interpretations of the military activities exception clause from the ITLOS in the *Three Ukrainian Naval Vessels* case of 2019 and the *Coast State Rights* Arbitral Tribunal in its preliminary objections award of 2020. The fifth section revisits the 2016 *South China Sea* (Philippines v China) Arbitral Tribunal's interpretation of the military activities exception clause with respect to China's activities on Mischief Reef and Second Thomas Shoal. The sixth and final section revisits the 'cabbage strategy' mentioned at the start of this article and concludes by suggesting that China's militarization of the CCG and its operations seeks to prevent future adverse interpretations of its optional military activities exception under Article 298(1)(b) of the Convention. It then gestures towards the limitations of the Convention as a source of legal protection and remedies for coastal states with considerably smaller naval fleets.

II. Sovereign Immunity and Military Exceptions in the Law of the Sea

The claim that the state should not be made to account for acts of a military nature is said to follow from the traditional doctrine of sovereign immunity of states under international law. In 1961, Colombos articulated one way in which this doctrine has been understood in terms of warships:

> [A] warship remains under the exclusive jurisdiction of her flag–State during her entry and stay in foreign ports. No legal proceedings can be taken against her … for any … cause, and no official of the territorial State is permitted to board the vessel against the wishes of her commander.[10]

Examples of how treaty law embodied the above principle are found in Articles 32, 95, 96, and 236 of the LOSC. Article 236 in particular is titled "Sovereign immunity." It states that the Convention's provisions on the protection and preservation of the marine environment do not apply to warships, naval auxiliaries, and other state-owned or operated vessels used in "government non-commercial service." This immunity is subject only to the rather broad limitation that such vessels "act in a manner consistent, so far as is reasonable and practicable," with other parts of the Convention. It is important to note that Article 236 does not cover military activities that do not involve warships or other vessels in

government non-commercial service, whose immunities are preserved under Articles 32, 95, and 96.

The LOSC follows a number of earlier treaties that contain some form of immunity in favor of military vessels. To illustrate, the 1910 Brussels Convention on Collisions at Sea "does not apply to ships of war or to Government ships appropriated to a public service."[11] The 1926 Brussels Convention on the Immunity of State-owned Vessels recognizes that state-owned sea-going vessels and cargo are subject to the same rules of liability that govern private vessels and cargo,[12] but this liability does not extend

> to ships of war, State-owned yachts, patrol vessels, hospital ships, fleet auxiliaries and other vessels owned or operated by a State and employed exclusively … on Government and non-commercial service, and such ships shall not be subject to seizure, arrest, or detention by any legal process, nor to any proceedings *in rem*.[13]

The 1973 International Convention for the Prevention of Pollution from Ships (MARPOL 73/38) and the 1974 Helsinki Convention on the Protection of the Baltic Sea Marine Environment both use language that is identical to what would later become Article 236 of the LOSC in 1982, i.e., that those conventions do not apply "to any warship, naval auxiliary or other vessel owned or operated by a State and used … only on government non-commercial service."[14] The counterpart provisions of LOSC Article 236 in those conventions also impose the limitation that such ships "act in a manner consistent, so far as is reasonable and practicable" with those latter conventions' other provisions.[15]

Yet one of the important considerations for the drafters of the Convention was for a great number of states to ratify the rights and obligations that it established as one package, including the provisions on compulsory dispute-settlement mechanisms. The United States remains a prominent holdout from this single-package concept, claiming that it infringes upon its sovereign immunity and freedoms in the deep seabed and the high seas.[16] But even taking the Convention as a single package, some of its drafters felt that certain matters were simply too sensitive to be subject to compulsory dispute settlement under the LOSC.[17] They agreed that states should retain the discretion to exclude certain types of disputes from the jurisdiction of LOSC dispute-settlement bodies. These disputes included those that concerned the exercise of a state's regulatory or enforcement jurisdiction, sea boundary delimitations, historic bays, vessels and aircraft entitled to sovereign immunity under international law, and military activities.[18] Within the Convention, Article 298(1)(b) embodies another form of protection for military vessels, and military activities more broadly, in the law of the sea. This provision gives states parties to the Convention the discretion to exclude "disputes concerning military activities by government vessels and aircraft engaged in non-commercial service" from the jurisdiction of the Convention's dispute-settlement bodies.

Janis has argued that military exceptions to the law of the sea have sometimes favored naval powers and coastal states.[19] Writing in 1977, before the adoption of the Convention, he suggested that the inclusion of what is now Article 298(1)(b) would benefit coastal states more than naval powers that command large military fleets.[20] Following his argument, coastal state A, which activated the military activities exception clause, could interfere with naval power B's military activities within A's maritime zones without fear that B would bring A to compulsory dispute settlement under the Convention.[21] Janis's premise, however, was

that the general benefit of a military activities exception clause to a coastal state depends on "[i]f the naval power is generally satisfied with the provisions of the Law-of-the-Sea Convention."[22] Janis's argument was perhaps prescient of the United States' refusal to ratify the Convention as concluded in 1982. At present, however, the 24 states party to the LOSC that elected the military activities exception clause reflect a diversity of naval resources and capabilities, and even include one landlocked state.[23] This indicates that the perceived benefits of Article 298(1)(b) cut across the simple binary of naval power vs. coastal state to which Janis alluded in 1977. The next section suggests that military exceptions in the law of the sea actually unsettle, rather than protect, purportedly stabilized notions of sovereign immunity. It takes "sovereignty" as "an historically specific collection of practice through which authority is exercised"[24] rather than a doctrine with a stable meaning and describes some of the practices that Article 298(1)(b) has facilitated since the adoption of the Convention, i.e., China's construction activities in the South China Sea.

III. From Mischief (Reef) to Exception

China is among the states that activated the military activities exception clause of the Convention through a declaration. China ratified the LOSC in 1996.[25] This ratification took place over a year after China built four octagonal structures at Mischief Reef, an oval-shaped reef situated in the South China Sea, 125.4 nautical miles west of the archipelagic baseline of the Philippine island of Palawan.[26] At the conclusion of the *South China Sea* arbitration between the Philippines and China in 2016, the Arbitral Tribunal determined that Mischief Reef is a low-tide elevation that lies within the exclusive economic zone of the Philippines as defined under the Convention.[27]

The structures on Mischief Reef hosted a large military presence that included eleven Chinese vessels and about 1,000 uniformed personnel.[28] China sought to prevent Filipino fishermen from approaching Mischief Reef without its consent.[29] These structures came to the attention of the Philippines after a group of Filipino fishermen reported to the Philippine Coast Guard in February 1995 that they were held captive by Chinese soldiers on Mischief Reef for a week.[30] Following this incident, former Chinese president Jiang Zemin assured his Filipino counterpart Fidel Ramos that the structures were not military installations and were intended for use as a shelter for Chinese fishermen.[31]

It was not until 2006, or ten years after ratifying the Convention, that China declared under Article 298(1)(b) that it does not accept any of the compulsory dispute-settlement procedures of the Convention in respect of military activities.[32] Satellite images contemporaneous to the 2006 declaration reveal that China had begun construction activities on South China Sea features other than Mischief Reef.[33] As proceedings in the *South China Sea* arbitration ran their course between 2013 and 2016, China transformed the 1995 "fishermen's shelter" on Mischief Reef into a full-scale military fortress complete with a deep-water harbor, runway, and several covered structures that may now contain anti-aircraft guns and close-in weapons systems.[34] The astonishing scale at which China's construction of artificial islands proceeded during this period is at odds with President Xi Jinping's statement during a state visit to the United States in 2015 that "China does not intend to pursue militarization" in the South China Sea.[35]

The recent enactment of the Coast Guard Law removes any lingering doubt that, moving forward, the "defense operations" of the CCG are military in character. While the Chinese Embassy in Manila continues to maintain that the CCG is an "administrative law enforcement agency,"[36] a careful reading of the provisions of the Coast Guard Law reveals otherwise. This new legislation complements China's 2006 declaration electing the military activities exception clause in that it creates higher hurdles to the jurisdiction of compulsory dispute-settlement mechanisms established under the Convention. This concrete situation contrasts with Janis's 1977 hypothesis that the military activities exception clause would more likely favor the interests of coastal states over naval or maritime powers. The rapid construction of militarized, artificial islands in the South China Sea, as proceedings in the *South China Sea* arbitration were underway, demonstrates that maritime states with strong naval capabilities are likely to benefit more from the Convention's military activities exception clause. In practice, what the protection afforded by Article 298(1)(b) has done is to provide emergent naval powers such as China with the vocabulary to exclude from mechanisms of international accountability those practices that cause marine environmental damage and raise great potential for conflict. The next section outlines some of the provisions of the Coast Guard Law and how they might impact the Philippines and other rival claimants in the South China Sea.

IV. From Exception to Unilateral Action in Contested Waters

The Coast Guard Law contains provisions that authorize the CCG to perform controversial acts in contested waters. Some of these are acts that are not necessarily performed or associated with military organs of the state and appear to fall within the class of law enforcement activities. As China had effectively placed the CCG under the command of the Central Military Commission, it is unclear whether any of the acts of the CCG could still be considered "law enforcement" exclusively. Article 298(1)(b) of the Convention covers both military and law enforcement activities as distinct classes of disputes that state parties may choose to exclude from the jurisdiction of LOSC dispute-settlement bodies. As the language of Article 298(1)(b) maintains a distinction between these two types of activities, moves to "militarize" acts that are exclusively "law enforcement" in character, or those which are neither military nor law enforcement activities, strongly indicate that militarization via national legislation is a necessary step towards bolstering flimsy claims over hotly contested waters such as the South China Sea. This pushes against the observation by the ITLOS in the ongoing *Three Ukrainian Naval Vessels* dispute between Ukraine and Russia that "the traditional distinction between naval vessels and law enforcement vessels in terms of their roles has become considerably blurred."[37] What is happening, in the case of China's Coast Guard Law, is not an obliteration of the military vs. law enforcement activities binary, but rather that Chinese law now explicitly gives military institutional support and authorization to a diverse range of activities in order to allow China to continually advance claims already determined to be excessive and unlawful in *South China Sea*.

This section describes how China's militarization of law enforcement activities might affect the interests of other claimants in the South China Sea, particularly in terms of the

legislation's geographical scope, the immunity of the CCG under Chinese domestic law, and the acts that the CCG may perform against other users of the South China Sea. It will also situate the Coast Guard Law in the context of the *Three Ukrainian Naval Vessels* and *Coastal State Rights* disputes between Ukraine and Russia.

4.1 Geographical Scope

Article 3 of the Coast Guard Law applies the legislation to "maritime rights enforcement" activities in "sea areas under the jurisdiction of the People's Republic of China."[38] This language is sufficiently broad to encompass China's sovereignty claims over the Spratly Islands and other maritime features across the South China Sea. Article 12(2) of the law directs the CCG to protect "key islands and reefs, as well as *artificial islands*, facilities, and structures in the exclusive economic zone and the continental shelf."[39]

The mention of artificial islands in Article 12(2) of the Coast Guard Law is significant for the Philippines because China constructed many artificial islands situated within what is the Philippines' exclusive economic zone—and well beyond 200 nautical miles from any Chinese baseline—following the provisions of the LOSC. Article 12(2), in effect, suggests an extension of Chinese claims to maritime entitlements that far exceed those that the Convention prescribes, and well into the exclusive economic zones of the Philippines and other claimants in the South China Sea. These excessive claims are based on what China calls the "nine-dash line." The nine-dash line is a series of a series of nine (originally eleven)[40] line segments depicting the spatial extent of the Chinese claim to about 90 percent of the South China Sea in the *Locations Map of Islands in the South China Sea*, first published by Republican China in 1948.[41] In 2016, the *South China Sea* Arbitral Tribunal declared China's claims over the South China Sea based on the nine-dash line to be excessive and unlawful.[42]

Another problematic provision of the Coast Guard Law is Article 12(5), which empowers the CCG to use sea areas, protect and develop uninhabited islands, explore and develop marine mineral resources, and "investigate and deal with illegal acts."[43] On their own, these acts do not necessarily involve military operations or law enforcement activities. Yet by authorizing a military organ to perform these acts, China could easily argue that these acts are "military activities" within meaning of LOSC Article 298(1)(b) and so covered by its 2006 declaration. When Articles 3, 12(2), and 12(5) of the Coast Guard Law are read together, they appear to enable the CCG to annex to Chinese territory large swathes of the South China Sea in which sovereignty, sovereign rights, or jurisdiction are being disputed by other states. Annexation refers to the "forcible acquisition of territory by one State at the expense of another State."[44] Following the prohibition on the threat or use of force against the territorial integrity or political independence of any state,[45] annexation is no longer considered a legally admissible mode of territorial acquisition.[46]

4.2 Domestic Immunity

Article 6 of the Coast Guard Law states that coastal police agencies and their staff "are protected by law" and that no organization or individual may "interfere, refuse, or obstruct" CCG operations.[47] Under Article 11 of the law, not even the local administrative divisions of China may restrict or interfere with CCG operations. Within the Chinese legal system,

Article 6 immunizes the CCG from suit for possible wrongful acts committed in the performance of its duties. This means that an individual (regardless of nationality), such as a fisherman, who may have suffered injury or damage as a consequence of CCG operations will have no remedy for the harm done from within the Chinese justice system. As Article 6 appears to completely preclude all legal claims against the CCG, an aggrieved Filipino fisherman may be exempt from the requirement to exhaust local remedies in China before the Philippines is able to take up that individual's claims before an international adjudicatory body. The principle of exhaustion of local remedies in international law means that a person injured by the acts of a state should first seek redress before the judicial or administrative courts or bodies of that state before the injured person's state of nationality is able to bring an international claim against the injuring state.[48]

4.3 Powers of the CCG

Article 12 of the Coast Guard Law empowers the CCG to perform a broad range of acts that may potentially violate Philippine sovereignty and jurisdiction and endanger the lives of Filipino fishermen. These include

> (a) implementing maritime security management, including investigation and punishment of entry and exit violations (Article 12[3]);
>
> (b) inspecting vehicles, goods, and persons suspected of smuggling at sea (Article 12[4]);
>
> (c) supervising and inspecting marine engineering construction projects (Article 12[6]); and
>
> (d) supervising and inspecting motorized boat fishing and bottom trawling activities (Article 12[7]).[49]

To reiterate, some of the activities mentioned above, particularly those relating to marine engineering construction projects, fishing, and bottom trawling, are neither inherently military nor law enforcement activities. When considered with Articles 20 and 22 of the Coast Guard Law, Article 12 effectively arrogates not only policing and law enforcement but also natural resource extraction, construction, and broad economic development prerogatives in the South China Sea into the hands of a Chinese military organ.

Article 20 is alarming as it empowers the CCG to demolish buildings, structures, and other fixed or floating devices installed by other claimant states in the South China Sea. This provision directly poses danger to Philippine civilian communities in the Spratly Islands as well as existing Philippine installations in the South China Sea. Article 22, as mentioned earlier, authorizes the CCG to "use all necessary measures, including weapons," to stop foreign organizations and individuals at sea from illegally infringing national sovereignty, sovereign rights, and jurisdiction.[50] Batongbacal suggests that any act of the CCG under this provision might actually be considered an act of aggression that is contrary to the UN Charter "and tantamount to an act of war if [China tries] to use it on the waters of another country" to enforce its claims.[51] Considering the extensive geographical scope in which the Coast Guard Law is intended to apply, Articles 12, 20, and 22 leave the door wide open for the CCG to harass, injure, and endanger fishermen of various nationalities as well as local communities in the Spratly Islands.[52]

4.4 The Coast Guard Law in the Context of the Ukraine-Russia Disputes

The *Three Ukrainian Naval Vessels* and *Coastal State Rights* cases are two disputes between Ukraine and Russia, both of which involve an interpretation of the Convention's military activities exception clause. The *Three Ukrainian Naval Vessels* dispute arose from a request presented by Ukraine to the ITLOS for provisional measures for the immunity of three Ukrainian naval vessels seized by Russia in late 2018.[53] On the other hand, the *Coastal State Rights* arbitration (in its preliminary objections phase at the time of this writing) was considered by an arbitral tribunal convened under Annex VII of the Convention to determine, among other questions, whether a number of actions taken by Russia in the Black Sea, the Sea of Azov, and the Kerch Strait opposite Ukraine are military activities and therefore excluded from that tribunal's jurisdiction by virtue of Russia's military activities exception declaration under Article 298(1)(b) of the Convention.[54] These disputes are significant to Chinese moves to militarize its activities in the South China Sea because they provide recent interpretations of Article 298(1)(b).

In *Three Ukrainian Naval Vessels*, the ITLOS observed that the distinction between military and law enforcement activities cannot be based "solely on the characterization of the activities in question by the by the parties to a dispute."[55] The distinction between military activities and law enforcement, according to the ITLOS, should be based on "an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case."[56] The ITLOS, however, did not elaborate on what it meant by "objective evaluation," and neither did it give any guidance as to what constitutes military activity within meaning of Article 298(1)(b). These findings suggest that the classification of certain activities as "military" in national legislation is not dispositive of the question of whether those activities are military activities that preclude the jurisdiction of LOSC dispute-settlement bodies. Yet in recognizing that the distinction between naval and law enforcement vessels "has become considerably blurred,"[57] the ITLOS in effect gave strong naval states an indirect incentive to use national legislation in consolidating claims, no matter how tenuous, that their vessels or activities are "military" in character.

Russia's arguments in *Coastal State Rights* are indicative of this tendency of naval powers—old or new—to make sweeping claims that an activity in dispute is military in character. There, Russia claimed that ordinarily, "military activities are simply any activity conducted by the armed forces of a State or paramilitary forces" and contended that "issues concerning military activities must not be interpreted restrictively."[58] Russia also stated that the "minimal substantive regulations under [the Convention], along with the optional exclusion covering military activities, are indicative of an intention 'to retain considerable flexibility in the military uses of the oceans and thereby allow States to pursue their assorted strategic objectives.'"[59] A key point in the Russian argument was that since Ukraine alleged that Russia had unlawfully used force to usurp living and non-living marine resources along the Ukrainian coast, such "use of force" meant that the "specific conduct complained of by Ukraine is military in nature" and so excluded from the *Coastal State Rights* Arbitral Tribunal's jurisdiction.[60] Russia sought to distinguish *Coastal State Rights* from *South China Sea*, arguing that unlike China, Russia was present in the proceedings to actually invoke its Article 298(1)(b) declaration before the *Coastal State Rights* Arbitral Tribunal.[61]

Citing *Three Ukrainian Naval Vessels*, the *Coastal State Rights* Arbitral Tribunal held that law enforcement forces "are generally authorized to use physical force without their activities being considered being military for that reason."[62] The tribunal considered that Russia's activities in the Black Sea, the Sea of Azov, and the Kerch Strait included the grant of hydrocarbon licenses to civilian commercial companies and the regulation of the exploitation of fisheries under a civilian legal framework. This meant, in the tribunal's view, that Ukraine's allegations that Russia had unlawfully used force did not, as such, turn the *Coastal State Rights* dispute into one that concerned military activities excluded from its jurisdiction.

Further, the *Coastal State Rights* Arbitral Tribunal observed that it was unclear whether the forces involved in the activities in dispute belonged to the Russian armed forces and thus could not "objectively classified as military in nature."[63] It found that the mere fact that some of the vessels impeded by Russian activities belonged to the Ukrainian navy was not enough to characterize the entire dispute as one concerning military activities.[64]

In both *Three Ukrainian Naval Vessels* and *Coastal State Rights*, neither the Ukrainian nor Russian Article 298(1)(b) declaration operated to deprive the ITLOS and the Arbitral Tribunal, respectively, of their jurisdiction over the activities in dispute. Neither dispute-settlement body elucidated what Article 298(1)(b) means by "military activities." It can be argued that defining "military activities" remains within the prerogative of states. The next section reveals the limits of the Convention as a source of legal remedy for smaller states in instances when naval powers shore up military exceptions to the law of the sea through national legislation.

V. A Tale of Two Coral Reefs

One way to understand the militarization of the CCG under Chinese law is to revisit how the *South China Sea* Arbitral Tribunal considered military activities in the disputes concerning Chinese activities in Mischief Reef and Second Thomas Shoal. As mentioned earlier, the *South China Sea* Arbitral Tribunal determined Mischief Reef to be a low-tide elevation lying within the exclusive economic zone of the Philippines.[65]

Second Thomas Shoal, like Mischief Reef, is a coral reef that is located 104 nautical miles west of the archipelagic baseline of the Philippine island of Palawan.[66] Mischief Reef and Second Thomas Shoal are roughly 21 nautical miles apart. The *South China Sea* Arbitral Tribunal likewise found Second Thomas Shoal to be a low-tide elevation[67] within the exclusive economic zone and continental shelf of the Philippines.[68] It also concluded that both Mischief Reef and Second Thomas Shoal are located in a portion of the South China Sea that is not overlapped by the zone entitlements that might be generated by any of the features claimed by China.[69]

In its memorial, the Philippines argued that China's 2006 declaration electing the Convention's military activities exception did not apply to any of the disputes in *South China Sea*.[70] At the time of the submission of the memorial, the artificial island construction and other activities being challenged by the Philippines were performed by law enforcement vessels of the CCG, China Marine Surveillance, and the Fisheries and Law Enforcement Command.[71] Prior to the passage of the Coast Guard Law, the CCG was under the command of the now-defunct State Oceanic Administration, a civilian bureau under the Chinese Ministry of Land and Resources.

5.1 Mischief Reef

As mentioned above, China in 1995 assured the Philippines that the structure on Mischief Reef was intended as a wind shelter for Chinese fishermen. China maintained through 1998 and 1999 that the facilities there would "remain for civilian purposes."[72] Yet at present, Mischief Reef forms the south-eastern vertex of what is now known as the Big Three—a triangle of militarized Chinese-occupied artificial islands that include Subi and Fiery Cross reefs—in the southern South China Sea.[73]

In the case of Mischief Reef, the tribunal declared that it would not consider activities to be military in character "when China itself has consistently and officially resisted such classification and affirmed the opposite at the highest levels."[74] Having classified the construction of an artificial island as a civilian activity, the tribunal refused to apply Article 298(1)(b) and concluded that it had jurisdiction to consider the dispute concerning Mischief Reef. In this regard, the tribunal concluded that China breached several of its obligations to protect and preserve the marine environment of the South China Sea by constructing an artificial island on Mischief Reef and several other features.[75]

5.2 Second Thomas Shoal

On the other hand, the dispute concerning Second Thomas Shoal arose *after* the Philippines commenced the *South China Sea* arbitration in 2013. Just three weeks before the Philippines submitted its memorial in 2014, two CCG vessels barred two Philippine vessels from conducting a routine rotation and resupply mission to Second Thomas Shoal.[76] Following China's construction at Mischief Reef in 1995, the Philippines had maintained a small detachment of sailors and marines on the BRP *Sierra Madre*, an old naval vessel which it ran aground on nearby Second Thomas Shoal in 1999.[77] In 2013, China warned the Philippine ambassador to Beijing that if the Philippines did not remove its presence at Second Thomas Shoal, China would forcibly remove it.[78]

The Philippines claimed further that two CCG vessels chased away two Philippine Navy chartered vessels that were on their way to Second Thomas Shoal to deliver food, water, and essential supplies to Philippine marines stationed there and to conduct a rotation of personnel.[79] The CCG vessels used sirens, megaphones, and a digital signboard and warned the Philippine vessels to leave Second Thomas Shoal or "bear full responsibility of the consequences."[80] This caused the Philippine vessels to retreat and abandon their mission. The Philippines did provide essential food and water to its personnel on the BRP *Sierra Madre* through an airdrop several days later, but this was at best a temporary solution as it was still unable to rotate its personnel there.[81] The Philippine claim was that the acts of the CCG aggravated or extended the dispute between the Philippines and China, contrary to the right of the Philippines to have the dispute settled peacefully.[82]

5.3 Interpreting the Military Activities Exception Clause

The tribunal distinguished its interpretation and application of Article 298(1)(b) in the disputes concerning Mischief Reef and Second Thomas Shoal. For the tribunal, the military activities exception clause applies to "'*disputes concerning* military activities' and not to 'military activities' as such."[83] In its view, what matters is the question of "whether

the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute."[84] This may suggest that if the Philippines initiates another LOSC proceeding against China that does not involve a dispute over military activities, China's military activities exception would not apply even if China were to begin using military tactics in relation to the dispute over the course of proceedings. Yet through the enactment of the Coast Guard Law, it seems difficult to imagine a scenario in which a resulting future dispute involving the CCG or some other Chinese coastal police agency would not already be a military activity coming within the 2006 Chinese declaration.

What the tribunal did in relation to Second Thomas Shoal was to consider the Philippine claim of aggravation and extension of the dispute as itself constituting an independent and substantive claim rather than a mere allegation connected with a request for provisional measures.[85] The tribunal thus determined the Second Thomas Shoal dispute to be one such dispute concerning military activities and that accordingly, it has no jurisdiction to consider it.[86]

The tribunal offered some useful guidance on the finer points between military activities and disputes involving such activities. Yet this distinction appears rather artificial. An interpretation that distinguishes between "disputes concerning military activities" and "military activities" raises questions as to whether the Convention realizes the stated goals of promoting the "peaceful uses of the seas and oceans" and the "protection and preservation of the marine environment."[87] Instead, what has happened, following the *South China Sea* arbitration, is that China has been emboldened by its own 2006 LOSC declaration to raise stakes in the South China Sea through domestic legislation that empowers its military organs to carry out various activities in contested waters in complete disregard of the interests of other states. Whether the tribunal's interpretation of Article 298(1)(b) complies with the obligation to interpret the Convention in good faith and in accordance with the ordinary meaning of its terms, context, and object and purpose remains an open legal question.[88]

As the Philippines raised in its memorial, Chinese fishermen were not known to frequent the waters surrounding Second Thomas Shoal prior to the commencement of the *South China Sea* arbitration.[89] On this basis it is difficult to see the acts of the CCG around the time of the submission of the Philippine memorial as anything other than a situation in which "a party has employed its military in some manner in relation to the dispute." It was a maneuver by which China had sought to undermine dispute-settlement proceedings already in progress. The weakness of the Philippine argument, as the tribunal pointed out, was that the Philippines had "never clearly identified the dispute that it considers to have been aggravated by China's actions at Second Thomas Shoal."[90] It is important to note that the tribunal applied the military activities exception clause to the incident at Second Thomas Shoal at a time before Chinese law reclassified the CCG as a military organ of the state.

One practical import of the tribunal's interpretation of Article 298(1)(b) is that the Philippines should be cautious that however it chooses to respond to potential Chinese military aggression in the South China Sea, such response should not be construed or characterized as a military activity itself. The perverse logic that arises is that any Philippine response to increasingly aggressive Chinese militarism in the South China Sea needs to be sufficiently tempered in order to prevent escalation into a full-blown dispute that would place such a response outside the context of ongoing practices that destroy the marine

environment and endanger fishermen and local communities in the South China Sea. In addition, future Philippine military and other responses to the practices of the CCG should be connected to some other dispute that is not military in nature in order to exclude the 2006 Chinese declaration.

Yet the enactment of the Coast Guard Law has facilitated unilateral acts by maritime powers like China and the invocation of military exceptions to jurisdiction for a broad range of activities in disputed sea areas. In contrast, the Philippines and other claimant states in the South China Sea with modest naval capabilities are held hostages to fortune—never really knowing whether the most calculated responses to Chinese militarism at sea would provoke a military dispute excluded from the jurisdiction of LOSC dispute-settlement bodies.

VI. Conclusion

Recalling Rear Admiral Zhang's televised remarks describing China's "cabbage strategy," the recent passage of the Coast Guard Law can be seen as the latest in a series of well calculated steps, spanning decades, in the Chinese bid to exclude its activities from mechanisms for international accountability within the Law of the Sea Convention. Taken together with an account of Chinese activities in disputed waters of the South China Sea from the late 1990s, in the contemporary moment it seems that there are fewer cabbage layers to peel in order to see that these acts serve military objectives aligned with long-term territorial ambitions.

In *Three Ukrainian Naval Vessels*, the ITLOS observed that an objective evaluation of the "nature of the activities" should be the basis for distinguishing between military and law enforcement activities, noting the specific circumstances that might be relevant to a particular case.[91] A case-by-case approach, however, might be unsuitable in the South China Sea, where China's actions have been demonstrably and progressively escalatory, aggressive, and confrontational over time. These acts are arguably steps within a coherent, deliberate, and logical program geared towards consolidating sovereign and jurisdictional claims already determined to be unlawful and excessive. These alarming practices seem well placed to unravel the safeguards of one exceptional clause of the Convention—and turn it into license for unbridled unilateralism, the destruction of the marine environment, and violence against local communities in the South China Sea.

Notes

1. Memorial of the Republic of the Philippines, *South China Sea (Philippines V. China) (Award)* [2016] PCA Case No. 2013–19, p. 64, at para. 3.67 (Memorial—Philippines).

2. *Ibid.*

3. Full text is available in Chinese through the universal resource locator (URL) published at https://npcobserver.com/legislation/coast-guard-law/. I disclose that I have no skills in the Chinese language and that all references to the Coast Guard Law in this article are browser translations to English from the Chinese text. See the link to the current text at NPC Observer, "Coast Guard Law of the People's Republic of China," *NPC Observer*, 2021, https://npcobserver.com/legislation/coast-guard-law/, accessed February 18, 2021.

4. *Ibid.*, at art. 1.

5. *Ibid.*, at art. 22.

6. *Ibid.*, at arts. 82 and 83.

7. People's Republic of China, "Central Military Commission," *Ministry of Foreign Affairs of the People's Republic of China*, 2014, https://www.fmprc.gov.cn/mfa_eng/ljzg_665465/zgjk_665467/3579_665483/t17843.shtml, accessed February 18, 2021.

8. See *South China Sea (Philippines V. China) (Award)* [2016] PCA Case No. 2013–19, p. 373, at para. 938 (*South China Sea Award*). Notably, the URL to the article titled "China Not to Pursue Militarization of Nansha Islands in South China Sea" from news.xinhuanet.com referenced at footnote 1091 on page 372 of the Award is no longer accessible. Xinhua is the official state-run press agency of the People's Republic of China.

9. *United Nations Convention on the Law of the Sea*, December 10, 1982, 1833 U.N.T.S. 397 (entered into force November 16, 1994) (*Law of the Sea Convention*).

10. C. John Colombos, *The International Law of the Sea* (London: Longmans, 1961), p. 227.

11. *Convention for the Unification of Certain Rules of Law with Respect to Collisions Between Vessels*, September 23, 1923 (entered into force March 1, 1913), art. 11.

12. *International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels*, April 10, 1926, 176 L.N.T.S. 199 (entered into force January 8, 1936), art. 1.

13. *Ibid.*, at art. 3.

14. *International Convention for the Prevention of Pollution from Ships*, November 2, 1973, 1340 U.N.T.S. 61 (entered into force October 2, 1983), Article 3(3); *Convention on the Protection of the Marine Environment of the Baltic Sea Area*, March 22, 1974, 1507 U.N.T.S. 166 (entered into force May 3, 1980), art. 4. See *Law of the Sea Convention*, art. 236.

15. *Ibid.*

16. For an account of the tension between those who claimed that the Convention offers a single package of rights and obligations and those who sought to protect and recognise only a particular bundle of rights and obligations, see Jon M. Van Dyke (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention* (Honolulu: Law of the Sea Institute, University of Hawaii, 1985).

17. Myron H. Nordquist, Shabtai Rosenne, and Louis B. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. 5 (Dordrecht, Boston, London: Martinus Nijhoff, 1989), p. 109, at para. 298.2.

18. *Ibid.*

19. Mark W. Janis, "Dispute Settlement in the Law of the Sea Convention: The Military Activities Exception," *Ocean Development and International Law* 4(1) (1977), pp. 51, 54, https://doi.org/10.1080/00908327709545581.

20. *Ibid.*, pp. 56–57.

21. *Ibid.*, p. 56.

22. *Ibid.*

23. These states are Algeria, Argentina, Belarus (landlocked), Cabo Verde, Canada, Chile, China, Denmark, Ecuador, Egypt, France, Greece, Mexico, Norway, Portugal, the Republic of Korea, Russia, Saudi Arabia, Slovenia, Thailand, Togo, Tunisia, Ukraine, and the United Kingdom. See United Nations, "Status of Treaties: 6. United Nations Convention on the Law of the Sea," *United Nations Treaty Collection*, 2021, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#16, accessed February 20, 2021.

24. Sundhya Pahuja, "Laws of Encounter: A Jurisdictional Account of International Law," *London Review of International Law* 1(1) (2013), pp. 63, 70, https://doi.org/10.1093/lril/lrt009.

25. *United Nations Treaty Collection*, 2021.

26. *South China Sea Award*, 2016, p. 122, at para. 290.

27. *Ibid.*, p. 412, at para. 1025.

28. Marites Dañguilan Vitug, *Rock Solid: How the Philippines Won Its Maritime Case Against China* (Quezon City: Ateneo de Manila University Press, 2018), p. 29, https://doi.org/10.1355/cs40-3j.

29. Republic of the Philippines and People's Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue*, August 10, 1995, p. 1 (Annex 180, vol. 6 of the Memorial of the Philippines, *South China Sea* Arbitration) (Philippines-China Bilateral Consultations 1995).

30. Vitug, 2018, p. 30.

31. Philip Shenon, "Manila Sees China Threat on Coral Reef," *New York Times*, February 19, 1995, https://www.nytimes.com/1995/02/19/world/manila-sees-china-threat-on-coral-reef.html, accessed February 21, 2021.

32. *United Nations Treaty Collection*, 2021.

33. The Asian Maritime Transparency Initiative maintains an online "Island Tracker" containing satellite imagery of various South China Sea features over time. A November 29, 2004 image of Johnson Reef shows two small structures at https://amti.csis.org/johnson-reef/#jp-carousel-24304. A small structure is also clearly visible from a March 12, 2008, image of Hughes Reef at https://amti.csis.org/hughes-reef/#jp-carousel-24262. Both structures have since expanded after the commencement of the *South China Sea* arbitration in 2013. See Asia Maritime Transparency Initiative, "Occupation and Island Building," various dates, *Island Tracker*, https://amti.csis.org/island-tracker/, accessed February 21, 2021.

34. Center for Strategic and International Studies, "China's New Spratly Island Defenses," *Asia Maritime Transparency Initiative*, December 13, 2016, https://amti.csis.org/chinas-new-spratly-island-defenses/, accessed February 21, 2021.

35. Shannon Tiezzi, "China Won't 'Militarize' the South China Sea—But It Will Build Military Facilities There," *The Diplomat*, October 16, 2015, https://thediplomat.com/2015/10/china-wont-militarize-the-south-china-sea-but-it-will-build-military-facilities-there/, accessed February 21, 2021.

36. People's Republic of China, "Statement of Chinese Embassy Spokesperson on the China Coast Guard Law and Some Other Issues," *Ministry of Foreign Affairs of the People's Republic of China*, February 2, 2021, http://ph.china-embassy.org/eng/sgdt/t1850430.htm, accessed February 24, 2021.

37. *Three Ukrainian Naval Vessels (Ukraine V. Russia) (Provisional Measures)* [2019] ITLOS Case No. 26, p. 17, at para. 64 (*Three Ukrainian Naval Vessels*).

38. *NPC Observer*, 2021.

39. *Ibid.*, emphasis added.

40. The two dashes drawn near the Gulf of Tonkin between northern Vietnam and Hainan, China, were deleted in 1953, reducing the eleven-dash line to nine dashes. See Zhiguo Gao and Bing Bing Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications," *American Journal of International Law* 107(1) (2013), pp. 98, 103, https://doi.org/10.5305/amerjintelaw.107.1.0098.

41. Maria Adele Carrai, *Sovereignty in China: A Genealogy of a Concept Since 1840* (Cambridge: Cambridge University Press, 2019), p. 124.

42. *South China Sea Award*, 2016, p. 473, at para. 1203(B)(2).

43. *NPC Observer*, 2021.

44. Oxford Public International Law, *Max Planck Encyclopedias of International Law*, January 2020, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1376?rskey=mNtUAp&result=1&prd=MPIL, accessed February 23, 2021 ("Annexation," at para. 1).

45. *Charter of the United Nations*, October 24, 1945, 1 U.N.T.S. XVI (entered into force September 24, 1973), art. 2(4) (*UN Charter*).

46. Oxford Public International Law, 2020, at para. 1.

47. *NPC Observer*, 2021.

48. Oxford Public International Law, *Max Planck Encyclopedias of International Law*, January 2007, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e59?rskey=zDQJdy&result=1&prd=MPIL, accessed February 24, 2021 ("Local Remedies, Exhaustion Of," at para. 5).

49. *NPC Observer*, 2021.

50. *Ibid.*

51. Kristel Limpot, "PH, Other ASEAN Countries Must Unite Against China's Coast Guard Law, Says Expert," *CNN Philippines*, January 31, 2021, https://www.cnn.ph/news/2021/1/31/PH--Asean-countries-unite-China-Coast-Guard-law-expert-.html, accessed February 24, 2021.

52. Frances Mangosing, "Filipino Fisherman Narrates Harassment by China Coast Guard Near Pag-asa Island," *Inquirer.net*, January 26, 2021, https://globalnation.inquirer.net/193321/filipino-fisherman-narrates-harassment-by-china-coast-guard-near-pag-asa-island, accessed February 24, 2021; Anthony Bergin, "China's Coastguard Adds Ballast to Case for Regional Code of Conduct," *The Australian*, 2021, https://www.theaustralian.com.au/world/chinas-coastguard-adds-ballast-to-case-for-regional-code-of-conduct/news-story/64ef38741a6712d71122ca9b49214e49, accessed February 24, 2021.

53. *Three Ukrainian Naval Vessels*, 2019, p. 6, at para. 22.

54. *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine V Russia) (Preliminary Objections)* [2020] PCA Case No 2017–06, p. 88, at para. 303 (*Coastal State Rights*).

55. *Three Ukrainian Naval Vessels*, 2019, p. 17, at para. 65.

56. *Ibid.*, pp. 17–18, at para. 66.

57. *Ibid.*, p. 17, at para. 64.

58. *Coastal State Rights*, 2020, p. 89, at para. 306.

59. *Ibid.*, p. 89, at para. 307.
60. *Ibid.*, p. 90, at para. 311.
61. *Ibid.*, p. 91, at para. 313.
62. *Ibid.*, p. 97, at para. 336.
63. *Ibid.*, p. 98, at para. 338.
64. *Ibid.*
65. *South China Sea Award*, 2016, p. 412, at para. 1025.
66. *Ibid.*, p. 122, at para. 290.
67. *Ibid.*, p. 174, at para. 381.
68. *Ibid.*, p. 260, at para. 647.
69. *Ibid.*
70. Memorial of the Republic of the Philippines, 2016, p. 266, at para. 7.147.
71. *Ibid.*
72. *Ibid.*, p. 196, at para. 6.97.
73. Center for Strategic and International Studies, "Updated: China's Big Three Near Completion," *Asia Maritime Transparency Initiative*, June 29, 2017, https://amti.csis.org/chinas-big-three-near-completion/, accessed February 25, 2021.
74. *Ibid.*, p. 373, at para. 938.
75. *Ibid.*
76. Memorial of the Republic of the Philippines, 2016, p. 214, at para. 6.148 (citations omitted).
77. *Ibid.*, p. 61, at para. 3.59.
78. *Ibid.*
79. *Ibid.*, p. 62, at para. 3.62.
80. *Ibid.*
81. *South China Sea Award*, 2016, p. 444, at para. 1126.
82. *UN Charter*, 1945, art. 2(2).
83. *South China Sea Award*, 2016, p. 455, at para. 1158.
84. *Ibid.*
85. *Ibid.*, p. 455, at paras. 1159, 1160.
86. *Ibid.*, p. 456, at para. 1162.
87. *United Nations Convention on the Law of the Sea*, 1982, Preamble, at 5th para.
88. *Vienna Convention on the Law of Treaties*, May 23, 1969 (entered into force January 27, 1980), art. 31(1).
89. Memorial of the Republic of the Philippines, 2016, p. 188, at para. 6.74.
90. *South China Sea Award*, 2016, p. 455, at para. 1159.
91. *Three Ukrainian Naval Vessels*, 2019, p. 17, at para. 64.

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