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The South China Sea Arbitration

Navigating Compliance Strategies through the Lens of Raya and the Last Dragon

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20.1 Introduction

This chapter offers an analysis of the South China Sea (SCS) Arbitration (*The Republic of the Philippines v The People's Republic of China*) (SCS Arbitration) and the corresponding arbitral award (the Award),[1] using a popular animated film as a lens. The film is Disney's *Raya and the Last Dragon* (Raya), which tells the story of the fictional land of Kumandra, a once-prosperous nation, and its peaceful and united people, where hundreds of years ago, magical dragons lived harmoniously amongst humans. Then evil spirits called the Druun mysteriously appeared and began to ravage the once wealthy unified nation. The people of Kumandra, distrusting each other, splintered into five warring nations/tribes: Fang, Heart, Tail, Spine, and Talon. It is against the backdrop of these fictional nations fighting each other for scarce resources that I approach this analysis. Law and Film has become a relatively mature discipline, and within the broader field of "law-in-film," there is now extensive scholarship that studies the impact of film in shaping our expectations of legal processes and how the public at large view law

I would like to thank Professor Caroline Foster and Professor Christina Voigt for their invaluable editorial comments and recommendations. All substantive views and errors are mine alone.

[1] In honor and loving memory of my husband, Simon Andrew Marvel, an audio-visual and information technology field expert, who always believed in me and understood my passion for the law. I would not have finished this chapter were it not for his inspiration. He will be forever deeply loved and missed.

and justice.[2] It has been said that film is an effective tool to communicate ideas[3] and the emotional impact of a film may shape public opinion. The conflict in Raya effectively communicates that conflict over scarce resources and overlapping territories cannot be resolved by aggression, mutual distrust, and lack of cooperation. This chapter analogizes the themes in Raya with the factual background of the SCS Arbitration with the aim of reshaping international support to help bring about compliance with the Award. While the 1982 United Nations Convention on the Law of the Sea (UNCLOS or the Convention) lacks a compliance mechanism, this chapter envisages that the Convention's conciliation procedure may offer a way forward if China does not voluntarily comply with the Award.

The first part of this chapter will introduce the SCS Arbitration, conducted under Annex VII of the UNCLOS, and discuss the enforcement of such awards. The second part of the chapter will explore further whether the Award may be capable of "enforcement," if necessary, through alternative, more practical means. The third and final part of this chapter will present a path for a cooperative process that reimagines bringing China back to the table in light of the dispute resolution strategies and tactics used in Raya and their potential to inspire renewed efforts towards a settled outcome.

20.2 The Annex VII Arbitration between the Philippines and China

As a voluntary dispute resolution mechanism where the parties submit their dispute to one or more arbitrators who render a binding arbitral award, arbitration is further distinguished by the principle of party autonomy. However, arbitration can only effectively function within the framework of a legal system establishing some "coercive" rules. In inter-State arbitration, these coercive rules will not always extend to the types of recognition and enforcement processes seen in international commercial arbitration. The Award issued in favor of the Philippines in the SCS Arbitration has yet to be enforced or even recognized by China. The Philippines finds itself in a conundrum as the recipient of a binding

[2] *South China Sea Arbitration* (*The Republic of the Philippines v The People's Republic of China*), PCA Case No 2013-19, Award of July 12, 2016, available at https://pcacases.com/web/sendAttach/2086.

[3] S Greenfield, G Osborn, and P Robson, *Film and the Law* (2nd ed., The Cinema of Justice 2010) 1–11.

arbitral award against China that, to this day, lacks an avenue of enforcement.

The Philippines initiated the SCS Arbitration proceedings on 22 January 2013,[4] invoking Article 287 of the UNCLOS, to which both the Philippines and China are party. The Convention provides compulsory third-party dispute settlement when parties cannot settle a dispute by negotiation, conciliation, or other peaceful means. States that do not make a written declaration setting out their choice of procedure for dispute resolution are deemed to have accepted Annex VII arbitration, as is the case between China and the Philippines.[5] Accordingly, the SCS Arbitration was heard by an arbitral tribunal operating under UNCLOS Annex VII.

The Philippines requested the constitution of the tribunal under Annex VII (the Tribunal) and on 22 January 2013 appointed the first Tribunal member under Article 3(b) of Annex VII of the Convention. On 23 March 2013, the International Tribunal for the Law of the Sea (ITLOS) President appointed the second Tribunal member for China upon the Philippines' request pursuant to Articles 3(c) and 3(e), which empower the ITLOS President to make such an appointment when a party fails to choose their party-appointed arbitrator within the allowed period.[6] Article 3(e) requires the ITLOS President to make such an appointment from a list of arbitrators maintained by the UN Secretary-General within thirty days of receiving such a request and in consultation with the parties. China did not participate in this process. Thereafter, the Philippines requested the President of ITLOS to appoint the three remaining members of the Tribunal under Article 3(d) and (e). On 24 April 2013, the President of ITLOS completed the constitution of the five-member tribunal, including the appointment of the Tribunal President. On 5 July 2013, the President of the duly constituted Tribunal requested the Permanent Court of Arbitration (PCA) to serve

[4] A Reichman, "The Production of Law (and Cinema): Preliminary Comments on an Emerging Discourse" (2008) 17 *Southern California Interdisciplinary Law Journal* 457–506.

[5] In its Notification and Statement of Claim, the Philippines appointed Judge Rüdiger Wolfrum, a German national, as a member of the Tribunal in accordance with Article 3 (b) of Annex VII to the Convention. *South China Sea Arbitration* (*Republic of the Philippines v People's Republic of China*), PCA Case No 2013-19, Award on Jurisdiction and Admissibility of October 29, 2015, available at https://pcacases.com/web/sendAttach/2579, para 28.

[6] Ibid., para 109.

as registry for the proceedings,[7] which the PCA accepted, and the Philippines acceded to. Consistent with its stance that the Tribunal had no jurisdiction in the case, China neither confirmed nor refused approval of the PCA registry appointment.[8] The seat of arbitration was in the Netherlands.[9]

The Philippines filed the arbitration to address aspects of the legal dispute between the parties' respective rights and entitlements in the South China Sea after failed bilateral and multilateral negotiations (involving other Association of Southeast Asian Nations (ASEAN) member States) and consultations with China.[10] Meanwhile, the Philippines ably characterized the subject matter in these proceedings as involving only the interpretation and application of relevant UNCLOS provisions and thus falling well within the jurisdiction of the Tribunal. The Philippines argued that China's claim to "historic rights," together with China's "nine-dash line" and associated action, was effectively preventing the Philippines from exercising its rights under the Convention, to wit:

> The nine-dash line embraces over two million km[11] of maritime space, more than 60 percent of the totality of the South China Sea, one of the largest and most important semi-enclosed seas in the world, that is abutted by no less than seven coastal States. China's assertion of these purported "historic rights," and its recent efforts to enforce them, have unlawfully interfered with the enjoyment and exercise by the Philippines of its rights under UNCLOS.[12]

China, through public statements, diplomatic correspondence, and pro-actively, by way of China's occupation or control of eight maritime features in the SCS, had claimed "sovereign rights and jurisdiction over

[7] Ibid., paras 28 and 29.

[8] Some commentators have mistaken the PCA as the tribunal that heard the proceedings and decided the arbitration. The Award was issued by an ad hoc tribunal constituted under Annex VII of the Convention and the PCA acted merely in an administrative capacity as the Registry. Since the UNCLOS came into force in 1994, the PCA has served as the registry for thirteen arbitrations under Annex VII of UNCLOS. As the registry for the Annex VII Arbitration between the Philippines and China, the PCA performed administrative services. PCA Dispute Resolution Services, *UNCLOS Annex VII Cases Arbitrated under the Auspices of the PCA*, available at https://pca-cpa.org/en/services/arbitration-services/unclos/.

[9] Award on Jurisdiction and Admissibility of October 29, 2015 (n 5) paras 32 and 33.

[10] PCA Cases, "The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)," available at https://pca-cpa.org/en/cases/7/.

[11] *South China Sea Arbitration (Republic of the Philippines v People's Republic of China)*, PCA Case No 2013-19, *Memorial of the Philippines Volume I* (March 30, 2014) paras 1 and 28.

[12] Ibid., para 1.9.

the waters, seabed and subsoil of the South China Sea"[13] outside the entitlements allowed under UNCLOS but claimed by China to fall within its territory as encompassed by the "nine-dash line." According to China, "its 'historic rights,' which are said to pre-date and exist apart from the Convention, entitled it alone to exercise 'sovereign rights' in these areas, including the exclusive right to exploit living and non-living resources, and to prevent exploitation by other coastal States, even in areas within 200 nautical miles (nm) of their coasts."[14] The Philippines alleged that China's exaggerated maritime claims and attempts to enforce them were contrary to the Convention and without lawful effect and had violated the Philippines' rights under the Convention.[15] The Philippines went on to argue both:

> (a) that any rights that China may have had in the maritime areas of the South China Sea beyond those provided for in the Convention were extinguished by China's accession to the Convention, and (b) that China never had historic rights in the waters of the South China Sea.[16]

The Philippines expertly crafted its submission not as one concerning territorial sovereignty or maritime boundary delimitation but rather as a request for the determination of whether certain "insular features in the South China Sea were either rocks (entitled to a 12 nm territorial sea), low-tide elevations with no territorial sea, or islands (entitled to a 200 nm zone),"[17] even though sovereignty over the features in question remained disputed between the parties.

The Tribunal held it had jurisdiction to decide the South China Sea case under UNCLOS.[18] Thus, the issues raised by the Philippines were determined to be arbitrable and within the Tribunal's remit.[19] On 12 July 2016, the Tribunal issued its unanimous merits Award.

[13] Ibid., para 4.4.
[14] Ibid., at paras 3.73 and 4.4.
[15] Award of July 12, 2016 (n 2) para 112.
[16] Ibid., para 188.
[17] TL McDorman, "The South China Sea Arbitration" (2016) 20(17) *American Society of International Law*, available at www.asil.org/insights/volume/20/issue/17/south-china-sea-arbitration. See also Award on Jurisdiction and Admissibility of October 29, 2015 (n 5) para 8.
[18] Award on Jurisdiction and Admissibility of October 29, 2015 (n 5) paras 397–412.
[19] The Tribunal, however, reserved a decision on its jurisdiction with respect to some of the Philippines' submissions as they were closely linked to the merits of the Philippines' claims. Ibid., paras 398, 399, 402, 405, 406, 409, 411, and 412.

Commentators have hailed the Award as a "landmark," the most crucial part of which is the Tribunal's finding that "China's claim to 'historic rights' to the living and non-living resources within the 'nine-dash line' is incompatible with the Convention to the extent that it exceeds the limits of China's maritime zones as provided for by the Convention."[20] Interpreting the text of the Convention, the Tribunal held that the Convention grants exclusive sovereign rights in favor of the coastal State to the living and non-living resources within its exclusive economic zone and that, under the Convention, claims of sovereign rights over living and non-living resources would generally be incompatible with claims of historic rights to the same resources, specifically if such historic rights are claimed to be exclusive, as in China's case.[21] The Tribunal concluded that by its text, the Convention has comprehensively addressed the rights of other (coastal) States within the areas of the exclusive economic zone and continental shelf and leaves no space for an assertion of historic rights.[22] The Tribunal further concluded that upon China's accession to the Convention "any historic rights that China may have had to the living and non-living resources within the 'nine-dash line' were superseded, as a matter of law and as between the Philippines and China, by the limits of the maritime zones provided for by the Convention."[23]

The invalidity of China's "nine-dash line" implied a recognition of the integrity of the Philippines' full 200 nm exclusive economic zone (EEZ) in the West Philippine Sea. In effect, the Award affirms that the Philippines' maritime area is in fact bigger than the combined land area of all its islands and that all the living and non-living resources, such as fish, gas, oil, and other natural resources, in this huge maritime area belong to this archipelagic State – the Philippines.[24] Additionally, the Award would, in ordinary circumstances, also be expected to secure the freedom of the high seas in this part of the world. The waters and fish in

[20] Award of July 12, 2016 (n 2) para 261.
[21] Ibid., para 243.
[22] The Tribunal added that China even staunchly advocated for the rights of developing States over their EEZ and continental shelf as reflected in the Convention's negotiating record. Ibid., para 261.
[23] Ibid., para 262.
[24] AT Carpio (former Philippines Supreme Court Associate Justice), "Enforce Arbitral Award for Present, Future Generations" (*Thought Leaders*, July 12, 2018), available at www.rappler.com/voices/thought-leaders/207094-second-anniversary-arbitral-ruling-west-philippine-south-china-sea/.

the high seas, including the mineral resources outside the extended continental shelf, unequivocally now form part of the global commons,[25] and are therefore *res communis*.

As an offshoot of the invalidity of the "nine-dash line," the Philippines' other claims were also predominantly decided in its favor. The other salient points of the Award may be broadly categorized as involving a ruling on either "the status of certain maritime features in the South China Sea or the legality of Chinese activities in the South China Sea."[26]

The Tribunal ruled that the Spratly Islands do not generate an EEZ because they are not islands in a strict legal sense but are instead categorized as rocks[27] or low-tide elevations. The Tribunal concluded that the high-tide features in the Spratly Islands (including Itu Aba, Thitu, West York, Spratly Island, South-West Cay, and North-East Cay);[28] the high-tide features at Scarborough Shoal;[29] the high-tide features at Johnson Reef, Cuarteron Reef, and Fiery Cross Reef;[30] the high-tide features at Gaven Reef (North) and McKennan Reef, are all considered rocks.[31] They are not, in their own natural condition and without relying on external human intervention, capable of sustaining human habitation within the meaning of Article 121(3) of the Convention, nor of sustaining an economic life of their own, and thus have no EEZ nor continental shelf.[32]

Having already invalidated the "nine-dash line," the Tribunal also concluded that there is no legal basis under the Convention for China's claim of any entitlement to maritime zones in the area of Mischief Reef, Second Thomas Shoal, and Subi Reef. Being low-tide elevations, they generate no entitlement to maritime zones of their own that would overlap with the entitlement of the Philippines to an EEZ and continental shelf

[25] Ibid.

[26] C Pichel Medina, "Legal Victory for the Philippines against China: A Case Study" (Geneva Graduate Institute, *Global Challenges*, 1, February 2017), available at https://globalchallenges.ch/issue/1/legal-victory-for-the-philippines-against-china-a-case-study/.

[27] 1982 United Nations Convention on the Law of the Sea (UNCLOS), Part VII, Article 121 on Regime of Islands, December 10, 1982, available at www.un.org/Depts/los/index.htm.

[28] Award of July 12, 2016 (n 2) para 622.

[29] Ibid., para 643.

[30] Ibid., para 644.

[31] Ibid., para 645.

[32] Ibid., para 626; See also RD Williams, "Tribunal Issues Landmark Ruling in South China Sea Arbitration" (Lawfare, July 12, 2016), available at www.lawfareblog.com/tribunal-issues-landmark-ruling-south-china-sea-arbitration#3.

generated from baselines on the island of Palawan.[33] Mischief Reef and Second Thomas Shoal are well within the Philippines' 200 nm off Palawan Island. As between the Philippines and China, Mischief Reef and Second Thomas Shoal lie within the Philippines' EEZ and continental shelf.[34]

As the Convention is clear on coastal State rights in EEZs and on continental shelves,[35] the Tribunal held that China had breached UNCLOS provisions and violated the Philippines' sovereign rights to its EEZ and continental shelf,[36] as underpinned by the events and acts committed by China in the years leading up to the filing of the arbitral proceedings, such as

> interfering with the Philippine fishing and hydrocarbon exploration; constructing artificial islands; failing to prevent Chinese fishermen from fishing in the Philippines' EEZ. China also interfered with Philippine fishermen's traditional fishing rights near Scarborough Shoal . . . China's construction of artificial islands at seven features in the Spratly Islands, as well as illegal fishing and harvesting by Chinese nationals, violate UNCLOS obligations to protect the marine environment. Finally, Chinese law enforcement vessels unlawfully created a serious risk of collision by physically obstructing Philippine vessels at Scarborough Shoal in 2012. China has aggravated and extended the disputes through its dredging, artificial island-building, and construction activities.[37]

Although the Award is binding,[38] the UNCLOS does not provide for an enforcement mechanism, unlike for instance, the World Trade Organization (WTO) dispute settlement mechanism, which has the WTO Dispute Settlement Body (DSB). The DSB is the official WTO body with powers to monitor disputants' compliance with dispute settlement reports/rulings and to authorize, upon request by the party invoking the dispute settlement procedures, suspension of concessions or other obligations under the covered agreements if no satisfactory compensation has been agreed within the mandated period.[39]

[33] Award of July 12, 2016 (n 2) paras 631, 632, 633.
[34] Ibid., para 647.
[35] Ibid., paras 629 and 698.
[36] Ibid., para 700.
[37] Ibid., paras 702–16, 735–57, 814, 992, and 993; Williams (n 32).
[38] "The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute." UNCLOS (n 27) Annex VII, Article 11.
[39] WTO Dispute Settlement Understanding (Annex 2 of the WTO Agreement) (DSU), Article 22.2 on Compensation and the Suspension of Concessions, April 15, 1994, available at www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#22.

The UNCLOS and the WTO Agreements have notable similarities in their structure and scope in that they are both multilateral agreements having a broad mandate and reach. They both include arbitration as a dispute resolution mechanism that the parties may choose to resolve their disputes.[40] But, while these similarities exist, significant differences remain concerning enforcement. Where a dispute settlement report has been adopted, and the losing WTO Member fails to correct its breach of the relevant WTO rules, the DSB can authorize the prevailing State party to take appropriate countermeasures.[41] Disputes over the scope of such measures may themselves be the subject of Panel and Appellate Body proceedings.[42] Such measures are not made available to State parties as part of the UNCLOS dispute settlement regime,[43] although general international law will continue to apply. In respect of damage caused by pollution of the marine environment, States are to ensure the availability of compensation through their domestic legal systems[44] and to cooperate in the implementation and development of international law on liability and compensation.[45]

[40] Ibid., Articles 25.1 and 25.2; "If the parties disagree on the complainant's proposed form of retaliation, arbitration may be requested." Ibid., Articles 22.6 and 22.7; See also World Trade Organization, *Dispute Settlement System Training Module. The Process: Stages in a Typical WTO Dispute Settlement Case* (2004), available at www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p2_e.htm, chapter 6.

[41] DSU (n 39) Articles 3.7, 16, and 2.1; "In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate countermeasures, unless the DSB decides by consensus to reject the request." (n 39) Article 4.10; "In less technical terms, the DSB is responsible for the referral of a dispute to adjudication (establishing a panel); for making the adjudicative decision binding (adopting the reports); generally, for supervising the implementation of the ruling; and for authorizing 'retaliation' when a Member does not comply with the ruling." WTO, *Dispute Settlement System Training Module. The WTO Bodies Involved in the Dispute Settlement* (2004), available at www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm, chapter 3.

[42] "Currently, the Appellate Body is unable to review appeals. The term of the last sitting Appellate Body member expired on 30 November 2020." WTO, "Dispute Settlement, Appellate Body" (2004), available at www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm.

[43] J Brower, C Koningisor, R Liss, and M Shih, *UNCLOS Dispute Settlement in Context: The United States' Record in International Arbitration Proceedings*, Yale Law (December 10, 2012), available at https://law.yale.edu/sites/default/files/documents/pdf/cglc/yale_law_school_-_unclos_and_arbitration.pdf; J Pauwelyn, "Enforcement and Countermeasures in the WTO. Rules are Rules: Toward a More Collective Approach" (2000) 94 *American Journal of International Law* 335, 336–37.

[44] UNCLOS (n 27) at Part XII, Article 235, para (2).

[45] Ibid., para (3).

Arbitration under UNCLOS can also be compared and contrasted with investor-state arbitration. In both UNCLOS and International Convention for the Settlement of Investment Disputes (ICSID Convention) an award of a tribunal is binding on all parties to the proceedings and each party must comply with it pursuant to its terms.[46] However, in respect of ICSID arbitration, if a party fails voluntarily to comply with an award, the other party can seek to have the pecuniary obligations recognized and enforced in the courts of any ICSID member State as though the award were a final judgment of that State's courts.[47] There is no similar mechanism available in UNCLOS.[48]

This is not however to suggest that this type of remedy (i.e., imposition of countermeasures as in the WTO) or legal process (enforcement action in respect of pecuniary obligations before a national court as in investment treaty arbitration) would be helpful or even effective in the SCS Arbitration. The latter does not involve trade issues or pecuniary obligations, and economic sanctions or judgments in respect of unmade payments do not seem appropriate.

Nevertheless, the Award in favor of the Philippines remains final and binding between the parties and must be complied with by the parties to the dispute.[49] The Award is without appeal as the parties had not agreed to an appellate procedure in advance.[50] Failure by one State party to participate does not change nor affect the final and binding nature of the Award.

20.3 Compliance Mechanisms for the SCS Arbitral Award

Years after the UNCLOS was adopted, scholars like Professor Robin Churchill have suggested that UNCLOS should have included the type of non-compliance procedure now found in several multilateral environmental agreements (MEAs).[51] Professor Churchill has further elaborated that

[46] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Section 6, Article 53(1) on Recognition and Enforcement of the Award (ICSID Convention), October 14, 1966, available at https://icsid.worldbank.org/sites/default/files/ICSID_Convention_EN.pdf.

[47] Ibid., Article 54(1).

[48] See also United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 (1958 New York Convention).

[49] UNCLOS (n 27), Annex VII, Articles 11 and 296.

[50] Ibid., Article 11.

[51] R Churchill, "Compulsory Dispute Settlement under the United Nations Convention on the Law of the Sea: How Has It Operated? Pt. 1." The PluriCourts Annual Lecture, June 9, 2016, available at www.jus.uio.no/pluricourts/english/blog/guests/2016-06-09-churchill-unclos-pt-1.html.

> UNCLOS suffers from widespread systemic non-compliance, e.g. illegitimate baselines, claims to coastal State jurisdiction in the contiguous zone and EEZ in excess of that permitted by UNCLOS, IUU fishing, substandard ships etc. The UNCLOS dispute settlement system has not (yet) really been used to address such non-compliance. To have included in UNCLOS the less confrontational non-compliance procedures (NCPs) of MEAs would have potentially been a very useful tool to address such non-compliance.[52]

In the case of the SCS dispute, would the non-adversarial nature of NCPs have led to a creative path in addressing, for example, the issues of the "nine-dash line" claim based on China's so-called "historic rights" and of China's encroachment on the Philippines' EEZ?

Non-compliance mechanisms (NCMs) may be considered a better alternative to the more traditional and adversarial dispute settlement mechanisms that may be resorted to under UNCLOS, such as the ICJ, ITLOS, and even Annex VII arbitration. Although the primary aim of NCMs is not dispute settlement, they nonetheless often produce that effect.[53] This may be attributed to the following: firstly, they provide a

[52] One of the difficult issues in UNCLOS is the matter of conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. Thus, the UN General Assembly, in its Resolution 72/249 of December 24, 2017, convened an Intergovernmental Conference to consider the text of an international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, with a view to developing the instrument.

The first session of negotiations was convened from September 4 to 17, 2018. The fifth session was convened in New York, in August 2022. The BBNJ Treaty is intended to build on the "vision of the Law of the Sea Convention to protect, conserve and restore marine life and sustainably and equitably use our shared ocean resources while strengthening the existing governance framework for this vast global commons." IUCN, "Looking Towards the Resumption of IGC5" (The International Union for Conservation of Nature, July 14, 2022), available at www.iucn.org/story/202207/looking-towards-resumption-igc5. The *Further Revised Draft Text of an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* stresses "the need for the comprehensive global regime to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction … Respecting the sovereignty, territorial integrity and political independence of all States." UN, *Further Revised Draft Text of an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, Intergovernmental Conference, Fifth Session (August 15–26, 2022), available at www.un.org/bbnj/sites/www.un.org.bbnj/files/igc_5_-_further_revised_draft_text_final.pdf.

[53] Churchill (n 51).

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reportorial mechanism on how State parties implement their treaty commitments; secondly, if there are allegations of acts of non-compliance, they offer a venue for examining these incidents; and thirdly NCMs offer mechanisms for direct support to address these incidents.[54]

When the Philippines filed the arbitral proceedings in 2013, an NCM was not available. However, the Philippines' foreign policy (then led by the late President Benigno Aquino) was to obtain an unequivocal and enduring ruling that would outline the rights of the Philippines to its EEZ and its continental shelf, and recognize its citizens' unhampered rights to the fish, oil, gas, and other natural resources in these zones for its own use and benefit. The Chinese government's strategy, on the other hand, was to seek to muster international support for its stance as well as garner political capital from its own citizens.

The economic and military might of China seem daunting to a smaller developing State like the Philippines, but the SCS Arbitral Award has given the Philippines political and moral leverage. However, although the Philippines obtained the best possible outcomes from this arbitration against China, the nature of the claims raised by the Philippines lend themselves to a most difficult enforcement or compliance process: for example, in respect of the claim of sovereign rights as compared with China's "nine-dash line" claim to "historic rights"; EEZ boundaries; classification of a land feature as either an "island" or rock; the claimed violation by China of its international navigation and marine conservation treaty obligations during law enforcement and land reclamation activities;[55] illegal fishing and harvesting by Chinese nationals; and violation of UNCLOS obligations to protect the marine environment.[56] The issues raised by the Philippines did not entail trade or investment interests, but rather "largely non-economic calculations."[57] Such interests are not easily quantifiable in monetary terms, unlike for example a commercial dispute involving a mining contract and its interpretation or application, which

[54] Ibid.
[55] (n 37).
[56] Ibid.
[57] EJA Ibarra, "Probing the (Im)possibility of China's Compliance with the South China Sea Arbitration Award." Center for International Relations and Strategic Studies, The Philippine Foreign Service Institute, IV(2) (July 2017), https://fsi.gov.ph/probing-the-impossibility-of-chinas-compliance-with-the-south-china-sea-arbitration-award/.

might be unilaterally submitted to binding arbitration,[58] and dealt with through a monetary award. A claimant making these kinds of claims, as the Philippines did, is generally looking for a resumption of compliance by the other party rather than compensation. At the same time, the claims went beyond ordinary claims of maritime pollution or violations of marine conservation that might more obviously have been susceptible to multilateral NCPs, if such procedures had been available, or simply to "performance review information (self-reporting)";[59] or where improved compliance might be brought about through direct support such as by providing technical and financial assistance.[60]

As a push-back of sorts, without an outright butting of heads with China, the Philippines can and must continue to exercise its rights and jurisdiction over its 200 nm EEZ and its 12 nm territorial sea. Entering into multilateral arrangements with other neighbouring coastal States on the conservation and management of living resources in the high seas[61] could arguably be viewed as a form of unilateral "enforcement," as a confirmatory act of the ruling that China's "nine-dash line" claim is inconsistent with UNCLOS and that the high seas, as part of *res communis*, shall be enjoyed as a global commons.[62] The conclusion of a new agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (ABNJ) emphasizes that the "high seas and marine ABNJ are open for legitimate and reasonable use by all States, and may not be appropriated to the exclusive sovereignty of any one State."[63]

Further, UNCLOS does include provisions on support for developing State parties[64] to assist them in discharging their primary marine

[58] M-A Carreira da Cruz, "Deep Sea Mining, Arbitration and Environmental Rules: What Role for Standards?" (*Kluwer Arbitration Blog*, October 27, 2018), available at http://arbitrationblog.kluwerarbitration.com/2018/10/27/deep-sea-mining-arbitration-environmental-rules-role-standards.

[59] GL Rose, *Report on the Comparative Analysis of Compliance Mechanisms* (University of Wollongong 2006), available at http://ro.uow.edu.au/lawpapers/36.

[60] Ibid., 10.

[61] Rose (n 59) Citing UNCLOS, Article 117.

[62] Carpio (n 24).

[63] S Hart, *Elements of a Possible Implementation Agreement to UNCLOS for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction*, IUCN Environmental Policy and Law Papers online – Marine Series No 4 (2008), available at https://portals.iucn.org/library/sites/library/files/documents/eplp-ms-4.pdf.

[64] UNCLOS (n 27), PART XII, Article 202.

environmental obligations, including technical assistance.[65] Such assistance may be provided in the form of scientific, educational, and other technical assistance programmes aimed at marine environmental conservation and marine pollution control and prevention;[66] as well as "marine research and exploitation of the deep seabed; providing available scientific information relevant to the conservation of fish stocks and catch and fishing statistics."[67] This assistance could help the Philippines advance its marine science technological capacity or even strengthen the country's existing technology infrastructure for the exploration and exploitation of its marine resources,[68] its EEZ, and continental shelf. This would help the Philippines exercise its rights under UNCLOS, consistent with the SCS Arbitration Award.

20.4 Reimagining Compliance: Film and Reality

Having envisaged aspects of a unilateral "enforcement" of the Philippines' rights under the SCS Arbitral Award, we may now examine the potential for China's cooperative compliance. Reimagining even a powerful State like China voluntarily complying with the Award is not far-fetched. China has quite a history of voluntarily complying with its international obligations, and, despite appearances, still aims to be seen as a rules-based player. China is not completely immune to the reputational costs of completely disregarding the Award and "compliance with the arbitral award may also be in China's national interests."[69] China did participate in the arbitral proceedings in certain ways, despite its repeated claims that it did not recognize the Tribunal's jurisdiction and all the proceedings therein. Indeed one writer describes China's non-participation as only "nominal."[70] China's behavior during the arbitration and after the Award was issued showed China maintaining "informal communications with the tribunal to partially comply with some requirements during the proceedings."[71] For instance, although China did not submit a counter-memorial to the Tribunal, it issued a position

[65] Ibid.
[66] S Maljean-Dubois, *Chapter 16: Compliance and Implementation, Companion to Global Environmental Governance* (HAL 2020), available at https://shs.hal.science/halshs-02926756/document.
[67] Ibid.
[68] UNCLOS (n 27), PART XIV, Article 269(a).
[69] Ibarra (n 57).
[70] Ibid.
[71] Ibid.

paper (identifying what China said it believed were the reasons for the Tribunal's lack of jurisdiction) corresponding to the Tribunal's timeline on 7 December 2014. China's embassy in the Netherlands requested, by way of a *note verbale* deposited with the PCA, as the registry, that its position paper be forwarded to the Tribunal. Finally, China reiterated all of its counter-arguments in a remark by the spokesperson of the Ministry of Foreign Affairs (MFA) released on 24 August 2015.[72]

China is not oblivious to how the international community will react to a hardline stance of complete non-compliance. Proof of this is seen in China's efforts to garner international support for its claims. Indeed, public opinion has mattered to China because at the time of the proceedings, it alleged that it had the support of about sixty-five other States, of which, eventually, thirty-one would publicly confirm, and four would deny this.[73] When a ruling was issued, five States opposed the Award, and nine States would not mention the Award, but issued neutral statements. At the same time, thirty-three gave positive statements without necessarily calling for China to comply, and only seven outrightly called for the parties to comply.[74] As of 2020, Vietnam and Malaysia tacitly supported the Award by rejecting China's "historic rights," while Indonesia "endorsed" the Award, with Taiwan stating that "any claim inconsistent with international law should not be accepted."[75] As at August 2, 2021, the Asia Maritime Transparency Initiative and the Center for Strategic and International Studies had "identified 8 governments that have publicly called for the ruling to be respected, 35 that have issued generally positive statements noting the verdict but have stopped short of calling for the parties to abide by it, and 8 that have publicly rejected it."[76]

Meanwhile, the United States continues to assert a foreign policy consistent with the law as the Tribunal viewed it. The US Navy conducts ongoing freedom of navigation operations and naval exercises with allies and partners and the US Air Force has ramped up military surveillance flights in the region. India aligns with US policy, supporting freedom of navigation and overflight in the SCS and deploying its Indian Navy

[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] G Grieger, "China Tightens its Grip over the South China Sea," Members' Research Service, EU European Parliamentary Research Service (February 2021), available at EPRS_ATA(2021)689338_EN.pdf.
[76] The Asia Maritime Transparency Initiative and the Center for Strategic and International Studies, *Arbitration Support Tracker* (AMTI) (August 2, 2021), available at https://amti.csis.org/arbitration-support-tracker/.

warship to the SCS. Japan has recognized the Award by performing anti-submarine drills in the SCS.[77] All these activities underscore the "geo-strategic significance"[78] of the SCS – a "strategic maritime link between the Indian Ocean and the Pacific Ocean stretching from the Strait of Malacca to the Strait of Taiwan."[79] The SCS connects the eight South-East Asian countries of Brunei, Cambodia, Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Vietnam; as well as China and Taiwan "into global trade flows and is essential for their livelihoods and food security."[80] Viewed through this lens, the SCS conflict patently reflects a desire from all parties (including the nominal parties who submitted position papers or indirectly benefitted from the Award) to ensure the integrity of their territories, bearing in mind their respective national interests, as permitted under the UNCLOS.

The SCS Arbitral Award gives the disputants a reality test. The Award makes it clear that, by international law standards, the rules favor one party or are less favorable to the other, and international opinion may thus be influenced to retract or confirm public support. Therefore, public opinion (or international support) is central to a reimagined path of voluntary compliance by China with its international law obligations, or cooperation, as it were. While China has exerted certain efforts to influence international public opinion through think-tanks releasing position papers and other scholarly legal articles, there are also different modes of approach to such problems. Storytelling – compelling storytelling – can influence the discourse that shapes public perception (even international support), in general, and specifically concerning the SCS Arbitration. "The intermingling of truth and fiction in legal discourse is nothing new ... and the best, most compelling stories are the ones that adapt familiar narrative forms featuring recognizable character types driven by ordinary feelings, motives, and desires."[81]

In Raya, the answer to the question of "How does one go back to the negotiating table?" was hardly clear-cut. Still, the film eventually reached its primary goal – to have everyone cooperate to defeat the Druuns and give everyone an acceptable and fair slice of the proverbial pie. Although

[77] Grieger (n 75).

[78] G Grieger, "China and the South China Sea Issue," Members' Research Service, EU European Parliamentary Research Service (September 2016), available at www.europarl.europa.eu/RegData/etudes/BRIE/2016/586671/EPRS_BRI(2016)586671_EN.pdf.

[79] Ibid.

[80] Ibid.

[81] R Sherwin, "Law in Popular Culture" (2004). *Articles & Chapters*, available at https://digitalcommons.nyls.edu/fac_articles_chapters/1226.

the situation in relation to the SCS Arbitration appears to be untidy, as in Raya, the Award can be used as a tool not to force "cooperation" from China but to impress upon China that it is to its best (reputational) interest to follow a path of cooperation.

In Raya, the Heart tribe and its chief became the "guardians" of the ancient Dragon Gem that not only kept evil Druuns away but also served to remind the peoples of Kumandra of their past, and of how the Druuns had ravished their lands, laying them to waste. The peace in Kumandra was fragile and kept barely intact by the Dragon Gem. Despite the advantage of having in its possession the Dragon Gem, the Heart tribe wanted to reach out to the other four tribes to ensure continuing peace in the region. The Heart tribe lowered its defenses and invited the leaders of the other tribes with their delegates to "share a meal." However, Heart trusted all the opposing parties without caution, without an exit plan, and certainly without obtaining as much information as they could about the conflict and the negotiating positions and intentions of the other tribal chiefs. While everyone was busy enjoying the festivities, the only daughter of the Fang tribe's tribal chief tried to steal the Dragon Gem from its highly secured vault. As the Heart tribe tried to stop the thief, other tribe leaders and their delegates made their own attempts to steal the Dragon Gem, which broke into pieces. This paved the way for the Druuns to resurface and lay waste to Kumandra once again.

The situation is different in the SCS dispute. The Award itself is the Philippines' "shared meal" strategy – here is a paradigm that is rooted in international law and that the (international) "public" can get behind. However, the Philippines' "shared meal" strategy is rules-based, and the Philippines is fully informed of everyone's interests and positions, unlike in the film. In effect, and ironically enough, the Award itself becomes a source of expectations for compliance with international law, now or through future legal processes. After the Award was issued, China released a statement, a portion of which stated that

> Pending final settlement, China is also ready to make every effort with the states directly concerned to enter into provisional arrangements of a practical nature, including joint development in relevant maritime areas, in order to achieve win–win results and jointly maintain peace and stability in the South China Sea.[82]

[82] China's MFA, *Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea*, Ministry of Foreign Affairs (July 12, 2016), available at www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379493.shtml.

This statement reflects that China does understand, and indeed recognizes, that the arbitral Award forms part of a broader paradigm in the South China Sea region. Every coastal State impacted by this Award may look to it as an authoritative statement of rights and obligations.

One potential pathway forward reimagines bringing China back to the table through conciliation. Conciliation is a well-established international dispute resolution process: "The main purpose of conciliation is to lead the parties to reach an amicable settlement of their dispute; its function is not to settle a dispute by applying law per se, but rather to bring the parties to an agreement by way of negotiation and compromise."[83] Conciliation is also an UNCLOS process and in fact one of the options that other Filipino experts suggested, after the Philippines filed the arbitral claim, would have been preferable. Consider for instance the successful UNCLOS conciliation launched by East Timor with Australia,[84] that the latter opposed initially but which eventually led to an amicable agreement between the parties with the assistance of the Conciliation Commission.[85] There is nothing in the UNCLOS rules that prevents any State party from resorting to other "informal" conciliatory measures or even voluntary modes of compliance, even after a binding arbitral award has been issued, as in the case of the SCS Arbitral Award.

An audio-visual experience of a story can be an effective tool, and a film such as *Raya and the Last Dragon* may help us in distilling pathways forward to bring all concerned parties towards a settlement. A film can show heroes and anti-heroes and develop a narrative that persuades the public to choose sides. Although Raya was the apparent central character and the Heart tribe were presented as the "good side," the movie nonetheless characterized the anti-heroine (Namaari of the Fang tribe) as likeable and someone the public can also support if she chooses to do the "right" thing. In the end, both Raya and Namaari were essential cogs in the machinery that would restore Kumandra to its peoples.

[83] D Tamada, "The Timor Sea Conciliation: The Unique Mechanism of Dispute Settlement" (2020) 31(1) *The European Journal of International Law* 321–44.

[84] Ibid. In that case, Tamada observes: "As Australia's declaration under Article 298(1)(a)(i) 11 of 22 March 2002 excepted maritime delimitation disputes from the jurisdiction of litigation and arbitration, there was no other means open to Timor-Leste than conciliation."

[85] PCA, *Conciliation Commission Constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, Timor Sea Conciliation (*Timor-Leste v Australia*) (April 11, 2016), available at https://pca-cpa.org/en/cases/132/.