PHILIPPINES V. CHINA AFTERMATH: RULE OF LAW AND LEGITIMACY UNDER ASSAULT

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I. INTRODUCTION

From Crimea to the South China Sea ("SCS"),[1] aggression or the threat of aggression is on the increase, presenting new challenges for international rule of law.[2] The development of international law and adjudication was premised on the objective, *inter alia*, of avoidance of war.[3] However, the current situation in the SCS presents a real risk that the power of international law could be reduced to naught; with China intent on protecting its claims to maritime features in the SCS, by force if necessary, the United States ("U.S.") determined to protect freedom of navigation, and the Philippines wedged between the two, the stakes for the international rule of law could not be higher.[4] This risk continues notwithstanding the recent decision in *Philippines v. China*, which should have resolved the situation.[5] Enforcement of international law and compliance with decisions of international courts and tribunal can only succeed if international norms, as well as the adjudicatory process based on those norms, are perceived as legitimate. Consistent with this backdrop, this Article proposes that one way to end the impasse in the SCS is to salvage respect for the international law of the sea by amending the United Nations Convention on the Law of the Sea ("UNCLOS"),[6] particularly regarding provisions covering matters such as composition of the arbitral tribunal, non-participation of one of the parties, an

1. According to Jia Yu, "South China Sea is a marginal sea that is part of the Western Pacific Ocean . . . is approximately 3,500,000 square kilometers 1,400,000 sq mi). The South China Sea contains over 250 small islands, atolls, cays, shoals, reefs and sandbars, most of which were formed by Coral reefs . . . The features are grouped into four archipelagos, which are the Xisha Islands (the Paracel Islands), the Dongsha Islands (the Pratas Islands), the Zhongsha Islands (The Macclesfield Bank, including the Scarborough Shoal), and the Nansha Islands (the Spratly Islands)." Jia Yu, *International Perspective On The Dotted Line In The South China Sea*, 1 CHINA LEGAL SCI. 25, 26 (2013).

2. This is so, even as some scholars have claimed that "the [*Philippines v. China*] award represents progress for the international rule of law in the law of the sea." Lucy Reed & Kenneth Wong, *Marine Entitlements in The South China Sea: The Arbitration Between the Philippines and China*, 110 AM. J. INT'L L. 746, 760 (2016); *see also* Kevin A. Baumert, *The South China Sea Disputes and Law of the Sea*, 110 AM. J. INT'L L. 152, 159 (2016) (claiming that "[w]hile the award will be binding only on China and the Philippines, the broader implications for the rule of law in the oceans may be considerable.").

3. *See* U.N. Charter art. 1, ¶ 1.

4. *See* Baumert, *supra* note 2, at 159 (observing that "[t]oday, mere reference to the South China Sea connotes tension and conflict.").

5. *See* Republic of the Phil. v. China, Case No. 2013-19, Arb. Mat'l, Award (Perm. Ct. Arb. 2016).

6. *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

exclusive economic zone, islands, and rocks.[7] This Article will hopefully make a significant contribution to the literature[8] on how to improve UNCLOS and international adjudicatory processes, in ways that promote international rule of law and legitimacy.

The background for this Article is the dispute over maritime features[9] in the SCS that has been ongoing for a long time,[10] but intensified on July 12, 2016 when the Arbitral Tribunal of the Permanent Court of Arbitration ("Tribunal") issued a truly eviscerating – overwhelmingly in favor of the Philippines – decision in *The Republic of the Philippines v. The People's Republic of China ("Philippines v. China")*,[11] following a process in which China did not directly participate. The *Philippines v. China* decision came "after more than a decade of

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7. *See generally id.* at annex VII, annex IX, art. V, art. VIII.

8. Little literature exists that has been written based on the *Philippines v. China* 2016 decision, although there is a little more literature from the years leading to this decision. A review of this literature doesn't indicate that there has been a focus on how to improve UNCLOS or the adjudicatory processes to the extent those improvements would contribute to international rule of law. *See* Reed & Wong, *supra* note 2, at 759-60 (focusing on the extent to which the "award has succeeded in clearly demarcating the disputed areas in the South China Sea" and, to that extent, has "significant ramifications for states beyond the South China Sea."); Stephen Wakefield Smith, *ASEAN, China, and the South China Sea: Between a Rock and a Low-Tide Elevation*, 29 U.S.F. MAR. L.J. 29, 30 (2016) (exploring possibilities of negotiated settlement to SCS disputes particularly "the suitability for ASEAN for this task"); Kamrul Hossain, *The UNCLOS and the US-China Hegemonic Competition Over The South China Sea*, 6 J. OF EAST ASIA & INT'L L. 1, 2 (2013) (investigating "the on-going competition between the two hegemonic powers-the US and China-over the SCS within the limited context of the law of the sea."); Thomas J. Schoenbaum, *The South China Sea Arbitration Decision and a Plan for Peaceful Resolution of the Disputes*, 47 J. MAR. L. & COM. 451, 474 (2016) (proposing, among other things, that without requiring China to accept the tribunal's judgment, "[a]s a first step to starting negotiations to resolve the disputes, the states riparian to the South China Sea that are impacted by China's nine-dash line— the Philippines, Malaysia, Brunei, Indonesia, and Vietnam—should make formal offers to China to open good faith negotiations to rehabilitate the nine-dash line as a right of China, under international law recognized by UNCLOS."); *see generally* THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE (Stephan Talmon & Bing Bing Jia eds., 2014) (offering a Chinese perspective on some of the legal issues before the Arbitral Tribunal; but this discussion took place prior to the Tribunal's rendering of its judgment on the merits).

9. There are four archipelagoes in South China Sea—the Pratas, Paracel, McClesfied Bank, and Spratly—consisting of maritime features such as islands, rocks, islets, sandbanks, reefs, atolls, and cays. WU SHICUN, SOLVING DISPUTES FOR REGIONAL COOPERATION AND DEVELOPMENT IN THE SOUTH CHINA SEA: A CHINESE PERSPECTIVE 62 (2013).

10. Teh-Kuang Chang, *China's Claim of Sovereignty Over Spratly and Paracel Islands: A Historical and Legal Perspective*, 23 CASE WESTERN RES. J. INT'L L. 399, 400 (1991) (indicating that "China's sovereignty over the Xisha Islands and the Nansha Islands, which were called 'Spratly' Islands and "Paracel Islands" respectively, was challenged by France before World War II and by the Philippines and Vietnam after World War II.").

11. *See generally* Phil. v. China, Case No. 2013-19.

unsuccessful bilateral and multilateral negotiations over territorial claims in the South China Sea (SCS)."[12] Further, the decision has significant ramifications for international law, covering maritime rights in the SCS such as freedom of navigation and claims to resources in the Exclusive Economic Zone, the continental shelf and the territorial sea, but also reaching to international trade,[13] compliance with international law, and the use of force.[14]

The Philippines celebrated the decision in *Philippines v. China*, stating, "[i]t confirms that no one state can claim virtually an entire sea. The award is a historic win not only for the Philippines . . . it renews humanity's faith in a rules based global order."[15] But China doubled-down and stated that it would not abide by the decision,[16] and warned that its construction on reefs in the SCS would continue.[17] China also stated that it would construct tourist resorts on the disputed features,[18] "launch a series of offshore nuclear power platforms to promote development in the South China Sea,"[19] and continue to block Philippine fishermen from

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12. Emma Kingdon, *A Case for Arbitration: The Philippines' Solution for the South China Sea Dispute*, 38 BOS. C. INT'L & COMP. L. REV. 129, 129 (2015).

13. Jia Yu notes that South China Sea's "southwest section is connected to the Indian Sea by the Strait of Malacca, which is an important channel between Europe and Africa. In addition, the South China Sea is not only a principal channel to connect China, Japan, Korea and other Northeast Asian countries to Southeast Asia, South Asia, West Asia, Africa, and Europe." Yu, *supra* note 1, at 27.

14. *See* Baumert, *supra* note 2, at 154 (stating "South China Sea has become almost synonymous with conflict, particularly as states undertake a range of maritime activities—such as fishing, oil and gas exploration, commercial shipping, and military exercises—in contested waters, often provoking responses from rival claimants.").

15. Sue-Lin Wong & Terrence Edwards, *China Tells Japan to Stop Interfering in South China Sea*, REUTERS (July 14, 2016), *available at* http://www.reuters.com/article/us-southchinasea-ruling-idUSKCN0ZV06F (last visited Mar. 11, 2018). On the other hand, one scholar notes that "China never has claimed the entire water column of the South China Sea, but only the islands and their surrounding waters within the line." *See* Zhiguo Gao, *The South China Sea: From Conflict to Cooperation?*, 25 OCEAN DEV. & INT'L L. 345, 346 (1994).

16. Jane Perlez, *Tribunal Rejects Beijing's Claims in South China Sea,* N.Y. TIMES (July 12, 2016), *available at* https://nyti.ms/29SRIbp (last visited May 7, 2018).

17. Ben Blanchard, *Freedom of navigation patrols could end 'in disaster': China admiral*, REUTERS (July 18, 2016), *available at* http://www.reuters.com/article/us-southchinasea-ruling-idUSKCN0ZY0FJ (last visited Mar. 30, 2018).

18. Reuters Staff, *China eyes eight cruise ships to serve South China Sea*, REUTERS (July 20, 2016), *available at* http://www.reuters.com/article/us-southchinasea-ruling-shipping-idUSKCN10107I (last visited Mar. 30, 2018).

19. Reuters Staff, *China media again touts plans to float nuclear reactors in disputed South China Sea*, REUTERS (July 15, 2016), *available at* http://www.reuters.com/article/us-southchinasea-ruling-china-nuclear-idUSKCN0ZV0UH (last visited Mar. 30, 2018).

Scarborough Shoal.[20] China claimed that several countries (although, only Laos was explicitly mentioned) had expressed support for China in its reaction, and warned that the Chinese military would enforce Chinese interests in the SCS if necessary.[21] In response to these statements, a despondent Philippines appeared to be resigned to the fact that it could not defeat China through the courts or war.[22]

Despite the significance of the SCS dispute, there are very limited options for the parties involved – military or legal. China has at least three options. First, it can comply with the ruling in *Philippines v. China*. Second, it can use military force to cling to its claims in the SCS while completely ignoring the ruling in *Philippines v. China*. Third, it can seek a negotiated settlement that allows it to articulate its arguments while not ruling out the possibility of accepting at least some of the reasoning in *Philippines v. China*. Direct compliance with the award seems to have failed so far because China has left no doubt, despite the decision in *Philippines v. China* decision, about its intention and determination not to comply.[23] From a military standpoint, despite the U.S. firmly declaring its intention to conduct freedom of navigation exercises in the SCS,[24] actual military confrontation itself is quite unlikely. The Rand Corporation, for example, observed that "[p]remeditated war between the

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20. Manuel Mogato & Julian Elona, *Philippines says fishermen still blocked from Scarborough Shoal*, REUTERS (July 15, 2016), *available at* http://www.reuters.com/article/us-southchinasea-ruling-philippines-idUSKCN0ZV183 (last visited Mar. 30, 2018).

21. Reuters Staff, *China thanks countries for supporting it over South China Sea*, REUTERS (June 14, 2016), *available at* https://uk.reuters.com/article/uk-southchinasea-china/china-thanks-countries-for-supporting-it-over-south-china-sea-idUKKCN0Z016W (last visited Mar. 5, 2018); *see also* Wong & Edwards, *supra* note 15.

22. Steve Mollman, *The Philippines Is About to Give Up the South China Sea to China*, DEFENSE ONE (Oct. 13, 2016), *available at* http://www.defenseone.com/threats/2016/10/philippines-about-give-south-china-sea-china/132319/?oref=d-river (last visited Mar. 30, 2018) (Philippine President Duterte stated, "We cannot win that .... Even if we get angry, we'll just be putting on airs. We can't beat [China].").

23. *See generally* Phil. v. China, Case No. 2013-19.

24. *See* Idrees Ali & Phil Stewart, UPDATE 4-*In first under Trump, U.S. warship challenges Beijing's claims in South China Sea*, REUTERS (May 24, 2017), *available at* https://www.reuters.com/article/usa-southchinasea-navy/update-4-in-first-under-trump-u-s-warship-challenges-beijings-claims-in-south-china-sea-idUSL1N1IQ2FH (last visited Mar. 30, 2018) (The U.S. indicated that it is prepared to challenge China's maritime claims by conducting freedom of navigation exercises. For example, in May 2017, a "U.S. Navy warship sailed within 12 nautical miles of an artificial island built up by China in the South China Sea . . . the first such challenge to Beijing in the strategic waterway" and the "top U.S. commander in the Asia-Pacific region, Admiral Harry Harris, said the United States would likely carry out freedom of navigation operations in the South China Sea soon.").

United States and China is very unlikely, but the danger that a mishandled crisis could trigger hostilities *cannot be ignored*."[25] Scholars pointed out:

> [There is] a range of possible Chinese responses, from beginning negotiations with the Philippines and other states in the region to more aggressive military actions and exercises. At a minimum we can expect China simply to ignore the ruling and to carry on much as before. . . . [T]he last option is by far the most likely; and this course of action would represent failure for all concerned. The dangerous status quo will likely continue; the tribunal's decision and international law will go for naught . . . .[26]

Not even the threat of further litigation regarding the SCA appears to deter China. Several other littoral states in the SCS with a stake in the SCS disputes[27] – Malaysia, Vietnam, Brunei, Singapore, and Indonesia[28] – are likely to follow the Philippines and bring their own claims against China, if only to put more pressure on China to comply with the decision in *Philippines v. China* and renounce its claims, something that China has vowed not to do.[29] For example, Malaysia is "concerned about a report by its navy of Chinese movement that may indicate it may be preparing to undertake dredging in Luconia Shoal, where a Chinese coast guard ship

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25. DAVID C. GOMPERT ET AL., WAR WITH CHINA: THINKING THROUGH THE UNTHINKABLE, back cover (2016), *available at* https://www.rand.org/pubs/research_reports/RR1140.html (last visited Mar. 5, 2018) (emphasis added).

26. Schoenbaum, *supra* note 8, at 473.

27. *See* Wu Shicun & Hong Nong, *The Energy Security of China and Oil and Gas Exploitation In the South China Sea*, *in* RECENT DEVELOPMENTS IN THE LAW OF THE SEA AND CHINA 145, 149 (Myron H. Nordquist et al. eds., 2006). For example, from the standpoint of resources in SCS, these other countries are deeply interested. It is noted that:

> Ever since the 1970's, some Association of South East Asian Nations (ASEAN) countries, including Vietnam, the Philippines, Malaysia, Indonesia and Brunei, have made use of their geographic advantage and sped up exploitation of gas and oil in the South China Sea by means of introducing foreign oil companies, especially from Western countries. Vietnam used to be one of the poorest countries in Southeast Asia. Oil has helped this country to get rid of its poverty. *Id.*

"Oil and gas exploitation is the principle economic resource of the Brunei people." *Id.* at 151.

28. *Id.* at 149.

29. But it is not just the countries in this region that are interested in this ruling. For example, "Croatia and Slovenia have their own maritime dispute and are worried about setting precedents by coming out too strongly in favor or against the court in The Hague that ruled on the South China Sea case, the Permanent Court of Arbitration." *See* Robin Emmott, *EU's statement on South China Sea reflects divisions*, REUTERS (July 15, 2016), *available at* http://www.reuters.com/article/us-southchinasea-ruling-eu-idUSKCN0ZV1TS (last visited Mar. 5, 2018) (indicating that the South China Sea is important to other nations beyond the region because it supports trillions of trade internationally).

has had a presence for more than two years."[30] But if China's reaction to the decision in *Philippines v. China* provides any prediction as to its future stance, it is unlikely that these countries will follow through on their plans, which could have a chilling effect on the utility of international law.

This is where the U.S. comes in. Can the U.S. force China to have second thoughts about its stance on the SCS? If the U.S. refrains from enforcing international norms that are at issue in the SCS, there is possibly no other state or international organization, such as the U.N., that will be able to stand up to Chinese claims. The U.N. Security Council is not an option because China is a veto-wielding member of the Council. In addition, it is unlikely that the U.S. is willing to go to war with China, even as the most extreme way to register its opposition to China's claims in the SCS. In sum, it would be a severe blow to international law and international rule of law if no solutions are found to what is increasingly looking like a stalemate in the SCS situation.

China would not be the first country to refuse to comply with an international decision. At various times in the past, countries, especially militarily and politically powerful countries, either stated that they would not subject themselves to an arbitration process which they viewed as potentially unfavorable to them or announced after an adverse decision that they would not abide by the decision.[31] However, it is not the first time that a country has not participated in an international dispute process and refused to comply with the decision, only to later on find other ways to express their overall regard for international rule of law.[32] Nevertheless, the *Philippines v. China* case is different from other cases of non-compliance with international decisions because it is extremely important from an economic and geopolitical standpoint, making the impact on international law far-reaching. At issue in *Philippines v. China*, were China's claims to "more than 90 percent of the South China

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30. Vijay Joshi, *Consensus on how to deal with China elusive in ASEAN meeting*, FINDLAW (July 24, 2016), *available at* http://news.findlaw.com/apnews/76dbfe57fd3e482690d98771e5a9ab0e (last visited Apr. 1, 2018).

31. *See, e.g.*, MARK WESTON JANIS, AMERICA AND THE LAW OF NATIONS 1776-1939, at 131-34 (2010) (where Great Britain refused to comply with an international decision); Dogger Bank (Gr. Brit. v. Russ.), Hague Ct. Rep. (Scott) 403 (Perm. Ct. Arb. 1905) (where Russia refused to comply with an international decision).

32. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment 1986 I.C.J. Rep. 14, 29-38, 92-97, 115-16 (June 27). The U.S. refused to participate in the proceedings and to comply with the decision, and even withdrew its optional declaration accepting the compulsory jurisdiction of the ICJ. However, three years later, the U.S. was back before the ICJ, although by a different jurisdictional mechanism. *Id.* at 29-38.

Sea, an area which accounts for more than a tenth of global fisheries production."[33] Additionally, the SCS is one of the most important trade routes in the world,[34] has potential for vast natural resources,[35] and is also seen as representing "an important crossroads in China's rise as a global

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33. Farah Master, *South China Sea Ruling Won't Stop Plundering of Ecosystem, Experts Say*, REUTERS (July 13, 2016), *available* at http://www.reuters.com/article/us-southchinasea-ruling-environment-idUSKCN0Z T0XL (last visited Mar. 30, 2018).

34. "The South China Sea is an important shipping channel for East Asian trade to the rest of the world. Singapore and Hong Kong, two major world ports, are at the southern and northern entrances of the South China Sea." Melissa Castan, *Adrift in the South China Sea: International Dispute Resolution and the Spratly Islands Conflict*, 6 ASIA PAC. L. REV. 93, 99 (1998). It is also estimated that the energy-rich waters account for about $5 trillion in shipping trade every year. *See* David Brunnstrom & Jeff Mason, *U.S. Urges All Countries to Adhere to South China Sea Ruling*, REUTERS (July 12, 2016), *available at* http://www.reuters.com/article/us-southchinasea-ruling-usa-idUSKCN0ZS1HZ (last visited Apr. 1, 2018). It is reported, for instance, that "[t]here are rich fisheries in South China Sea, ranking fourth in terms of annual marine production . . . China's marine fishery production in the South China Sea in 2011 was more than 7 million tons . . . That accounted for more than 25 percent of the country's total catch production in 2011 . . . In addition, there are expanding prospects for the exploitation of oil and natural gas reserves in the seabed and subsoil." Talmon & Jia, *supra* note 8, at 2. Also, it is said that "China could use one or more of the land reclamation sites as refueling, resupply, and crew rest locations for fishing boats, coast guard cutters . . . Radars and aircraft (including unmanned aerial vehicles [UAVs]) stationed at these sites could increase China's ability to maintain maritime domain awareness (MDA) over surrounding waters and airspace," and "China could use one or more of the reclamation sites as locations for anti-access/area denial (A2/AD) systems, including radars, electronic listening equipment, surface-to-air missiles (SAMs), anti-ship cruise missiles (ASCMs), and manned and unmanned aircraft." *See* BEN DOLVEN ET AL., U.S. CONGRESSIONAL RESEARCH SERVICE, CHINESE LAND RECLAMATION IN THE SOUTH CHINA SEA: IMPLICATIONS AND POLICY OPTIONS 8 (2015). It is also argued that while the contested features in SCS are for the most part submerged, they remain "valuable to the contesting parties for three basic reasons. The first stems from contemporary international law regarding territorial seas, and the right to control economic resources in the Exclusive Economic Zones (EEZ); the second is, the control of shipping lines that traverse the area; and the third is the maintenance of prestige and political power, both at the domestic and international levels." *See* Castan, *supra* note 34, at 98.

35. "Geology of the South China Sea . . . is perceived to have great potential for commercial oil and gas reserves" and "[s]urveys in the 1960s and 1980s indicate strong possibilities of enormous hydrocarbon deposits in the seabed, and other mineral deposits such as tin, copper and manganese may also exist." Castan, *supra* note 34, at 99. "According to decades of research, there are 13 large and medium sediment bans, with a total area of 619.5 thousand km2, among which 417 thousand km2 is within China's U-shaped line [the area claimed by China in South China Sea]. This area is estimated to contain over 172 billion barrels worth of oil and 10 trillion stere of natural gas." Shicun & Nong, *supra* note 27, at 148. There are indications, however, that these estimates could be grossly exaggerated. *See* David B.H. Denoon & Steven J. Brams, *Fair Division: A New Approach to the Spratly Islands Controversy*, 2 INT'L NEGOT. 303, 311 (1997).

power,"[36] which brings it in direct confrontation with the U.S. as the only global superpower. The U.S. has stated that it firmly resists the Chinese claim and that its "military would continue to 'sail and fly and operate' in the South China Sea, despite a Chinese warning that such patrols could end 'in disaster.'"[37]

Moreover, the geopolitics of the SCS go beyond the interactions between China and the U.S. Unsurprisingly, what is happening in the SCS has resonated elsewhere in the world, for both ideological and strategical reasons. A situation that is analogous to the SCS is Crimea. Following Russia's annexation of Crimea from Ukraine, NATO (including the U.S.) deployed heavily in Eastern Europe and deployed anti-missile defense systems, while Russia deployed battalions close to its Western border and flew military aircraft westward; a standoff the likes of which has not been seen since the end of the Cold War.[38] Finding common ground with China in its confrontation with the U.S. (and NATO, by extension), Russia has forged a closer military and ideological alignment with China since the decision in *Philippines v. China*, engaging in joint military exercises[39] and articulating historical justifications for their resistance to norms of international law and international

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36. Jane Perlez, *supra* note 16. It is important to note also that SCS "connects with the Indian Ocean in the south through the Malacca-Singapore Straits, and it connects the East China Sea and the Sea of Japan in the north. It forms part of the route for ships travelling between the Indian Ocean and the Russian port at Vladivostok. The area surrounding the Spratlys also includes the path of oil tankers going to or from Japan and the Middle East. Moreover, all of the trading economies in East Asia depend on the South China Sea because it forms part of the shortest route to Southeast Asia, Africa, the Middle East, and Europe. By taking control of the Spratlys, the PRC could legally place many vital sea-lanes under its territorial control." Michael Bennett, *The People's Republic of China and the Use of International Law in the Spratly Islands Dispute*, 28 STAN. J. INT'L L. 425, 431-32 (1992) (internal quotation marks omitted). From a security standpoint, China "considers the South China Sea to be an area of great strategic importance for its efforts to secure maritime borders." *Id.* at 432.

37. Matt Spetalnick & David Brunnstrom, *Exclusive: Top Obama Aide to Take Call for South China Sea Calm to Beijing*, REUTERS (July 22, 2016), *available at* http://www.reuters.com/article/us-southchinasea-usa-exclusive-idUSKCN10210Z (last visited Apr. 1, 2018).

38. Mark Felsenthal, *Russia's buildup near Ukraine may reach 40,000 troops: U.S. sources*, REUTERS (Mar. 28, 2014), *available at* https://www.reuters.com/article/us-ukraine-crisis-usa-military/russias-buildup-near-ukraine-may-reach-40000-troops-u-s-sources-idUSBREA2R1U720140328 (last visited Mar. 12, 2018).

39. *See, e.g.*, Andrew Higgins, *China and Russia Hold First Joint Naval Drill in the Baltic Sea*, N.Y TIMES (July 25, 2017), *available at* https://www.nytimes.com/2017/07/25/world/europe/china-russia-baltic-navy-exercises.html?mcubz=2 (last visited Apr. 1, 2018).

adjudicatory processes.[40] The threat of a cataclysmic conflagration is real on several fronts, based on the two hotspots of Crimea (and, by extension, the alleged Russian support for "separatists" in Eastern Ukraine) and the SCS, which directly challenges the core premises of international law – with the real possibility of bringing to an end at least 70 years of peace under international law and the adjudicatory processes of the U.N. system. Even if the U.S. does not directly act in the SCS, China, as an increasingly militarily confident[41] and powerful global actor, is prepared to act forcibly.[42] This is especially likely if, seeking to take advantage of the ruling in *Philippines v. China*, other stakeholders such as the Philippines try to exploit the resources in the contested maritime spaces.[43]

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40. Vladimir Putin, President of the Russ. Fed'n, *Address to the State Duma Deputies, Federation Council members, heads of Russian regions and civil society representatives in the Kremlin*, (May 18, 2014), *available at* http://en.kremlin.ru/events/president/news/20603 (last visited Apr. 1, 2018) (ignoring relevant international norms but embracing the historical and nationalistic argument that to understand the "choice" of the people of Crimea to join the Russian Federation, it was "enough to know the history of Crimea and what Russia and Crimea have always meant for each other," adding, "[i]n people's hearts and minds, Crimea has always been an inseparable part of Russia," and that the 1954 "decision . . . to transfer Crimean Region to Ukraine . . . was the personal initiative of the Communist Party head Nikita Khrushchev . . . in clear violation of the constitutional norms that were in place even then."). The Russian President also "referenced the prominent place of Crimea in Russian military history and Russian sacrifices," in order to "establish a "historical" Russian right to ownership of the territory." *See* Peter M. Olson, *The Lawfulness of Russian Use of Force in Crimea*, 53 MIL. L. & L. WAR REV. 17, 23 (2014). China's historical claims to maritime features in the SCA are discussed in part II of this article.

41. *See* Philip Wen & Ben Blanchard, *President Xi Says China Loves Peace But Won't Compromise on Sovereignty*," REUTERS (Aug. 1, 2017), *available at* http://www.reuters.com/article/us-china-defence-idUSKBN1AH2YE (last visited Apr. 1, 2018) (reporting that Chinese President Xi Jinping said that "[t]he Chinese people love peace"). We will never seek aggression or expansion, but we have the confidence to defeat all invasions. *Id.*

42. There is precedent that leads points in this direction. China has previously demonstrated that it can use force to protect its interests in SCS. For example, "[i]n 1974 and 1988, respectively, armed conflicts at sea broke out between China and Vietnam over the ownership of the Paracel and Spratly Islands." Yann-Huei Song, *Conflicting Outer Continental Shelf Claims in the East and South China Seas: Proposals for Cooperation and Peaceful Resolution*, 35 U. HAW. L. REV. 485, 494 (2013). Some scholars have argued that China's response to *Philippines v. China* amounts to a "China opposed to the rule of law and a rules-based international society" and a manifestation of a China that favors use of its "military and economic might' to resolve the dispute." STEFAN TALMON, *The South China Sea Arbitration: Is There a Case to Answer*, *in* THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE 63 (Stephan Talmon & Bing Bing Jia eds., 2014).

43. The Philippines appears to realize that the only explanation for the Chinese response is its capabilities and willingness to use force in SCS if necessary. *See* Steve Mollman, *The Philippines Is About to Give Up the South China Sea to China*, DEFENSE ONE (Oct. 13, 2016), *available at* http://www.defenseone.com/threats/2016/10/philippines-about-give-south-china-sea-china/132319/?oref=d-river (last visited Apr. 1, 2018) (reporting that Philippines

In China's and Russia's views, they are not the only ones that have been using force to assert their interests recently.[44]

One way to avoid or resolve the impasse would be to revise the provisions of Part V of UNCLOS, particularly the provisions that limit the extent of exclusive economic zones. To these ends, this Article will first critically review the reasoning in *Philippines v. China* and analyze relevant provisions of UNCLOS in Part II. It will analyze the implications of China's response for international rule of law in Part III. Part IV will discuss the response of the U.S. and its implications for peace. Part V will follow with a discussion of the possibility of a complementary duo-approach of negotiated settlement and adjudication.[45] The Article will conclude by making proposals for improvements to UNCLOS and the adjudicatory process in Part VI.

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president Duterte stated, "We cannot win that . . . Even if we get angry, we'll just be putting on airs. We can't beat [China].").

44. Alexei Anishchuk, *Putin Accuses United States of Damaging World Order*, REUTERS (Oct. 24, 2014), *available at* https://www.reuters.com/article/uk-russia-putin/putin-accuses-united-states-of-damaging-world-order-idUKKCN0ID1A120141024 (last visited Mar. 12, 2018). MOHAMED MOUSA MOHAMED ALI BIN HUWAIDIN, CHINA'S RELATIONS WITH ARABIA AND THE GULF 1949-1999 151 (2002) (China accusing the United States of "having no authorization by the UN Security Council and unilaterally using force against Iraq," citing the Chinese Communist Party's *Renmin Ribao* issue of Dec. 21, 1998).

45. One author has suggested that there is a dichotomy between adjudication on one hand and negotiated settlement on the other. *See* Ryan Mitchell, *An International Commission of Inquiry for the South China Sea?: Defining the Law of Sovereignty to Determine the Chance for Peace*, 49 VAND. J. TRANSNAT'L L. 749, 751-52 (2016) (arguing "[t]here are at present two prevailing and opposing views on the best means by which the intensifying territorial disputes over the South China Sea may ultimately be resolved. These are, on one side, the position of the U.S. and its regional allies that sovereignty claims should be shelved in favor of the adjudication . . . On the other side is the Chinese position that sovereignty claims—the idea that some state must own the territory in controversy and that this question is conceptually antecedent to any generalized international legal adjudication of rights or duties—should be resolved via bilateral negotiations"). This Article maintains that the two approaches are reconcilable and complementary to each other. A legitimate adjudicatory process, based on legitimate norms, can lead to a meaningful negotiated settlement. There are instances where rulings of international courts were rejected by one of the parties but which led to meaningful negotiated settlement. *See, e.g.*, United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep 3, 18 ¶ 33 (May 24) (Iran not participating, but subsequently accepting to resolve the 1979-81 crisis concerning Iran's seizure of U.S. diplomatic and consular personnel and the ensuing U.S. seizure of Iranian financial assets through Algerian mediation). Alabama Claims of the United States Against Great Britain (the arbitrators ordering the U.K. to pay the U.S. $15,500, 000 in what was an unassailable decision and Great Britain ultimately paying the sum on Sept. 9, 1873, even though prior to that the British foreign secretary (Lord Russell) refused to arbitrate, claiming that the British government were "sole guardians of their honor"). Fisheries Jurisdiction Case, (U.K. v. Ice.), Judgment, 1974 I.C.J. 3 ¶ 12 (Iceland not participating, rejecting the decision and engaging in armed clashes with Britain but ultimately reaching an agreement with the

II. REVIEW OF *PHILIPPINES V. CHINA*

A. Background

It is imperative to first review *Philippines v. China* in detail in terms of the Tribunal's reasoning, because any rejection of the decision by China that other countries can support must be rational. That depends, in turn, on the legitimacy or lack thereof of the decision itself. To begin, China chose not to participate in the arbitration process in *Philippines v. China*,[46] alleging lack of jurisdiction. It is unsurprising that China would not want to subject its geopolitical interests to the vicissitudes of the Tribunal's five experts at international law. For this reason, it is important to examine the composition of the Tribunal, since it may have affected the legitimacy of the decision. Even more important than the procedural issues is the manner in which the Tribunal disposed of the substantive issues in its merits decision. For the most part, the Tribunal's reasoning of substantive issues is impeccable and unimpeachable. However, there is room for improvement both in how the Tribunal used the text of UNCLOS and in the adjudicatory process itself.

A brief background to the dispute in *Philippines v. China* is imperative. Based on the factual background provided by the *Philippines v. China* case, the Philippines was mostly concerned with the southern portion of the SCS, which is also the location of the Spratly Islands, a constellation of small islands and coral reefs.[47] China claimed this portion of the SCS on the basis of historical title,[48] which would be in direct opposition to pertinent provisions of UNCLOS, unless UNCLOS excepted such historical claims. The historical claims of China on islands in the SCS were published in a position paper by the Ministry of Foreign Affairs of the People's Republic of China, stating in pertinent part:

> China has indisputable sovereignty over the South China Sea Islands (the Dongsha Islands, the Xisha Islands, the Zhongsha Islands and the Nansha Islands) and the adjacent waters. Chinese activities in the South

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U.K. allowing limited British fishing within a 200 mile zone); the advantage of this two-pronged approach (litigation followed by negotiated settlement) is that "[u]nlike [pure] a litigation . . . [the] outcome [is reached] via inquisitorial methods, of certain basic . . . with no specific damages awarded, blame sought, or penalty imposed—though the mere establishment of key facts" can result in compliance and resolution of the underlying dispute. Mitchell, *supra* note 45, at 784 -85.

46. Phil. v. China, Case No. 2013-19, at 4, ¶ 189

47. *Id.* at 4, ¶ 13.

48. It should be noted that "claims . . . based upon historical claims of discovery and occupancy" have also been made by other countries in the region such as Vietnam. *See* Castan, *supra* note 34, at 95.

> China Sea date back to over 2,000 years ago. China was the first country to discover, name, explore and exploit the resources of the South China Sea Islands and the first to continuously exercise sovereign powers over them. . . . In 1947, China renamed the maritime features of the South China Sea Islands and, in 1948, published an official map which displayed a dotted line in the South China Sea. Since the founding of the People's Republic of China on 1 October 1949, the Chinese Government has been consistently and actively maintaining its sovereignty over the South China Sea Islands. Both the Declaration of the Government of the People's Republic of China on the Territorial Sea of 1958 and the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone of 1992 expressly provide that the territory of the People's Republic of China includes, among others, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands and the Nansha Islands. All those acts affirm China's territorial sovereignty and relevant maritime rights and interests in the South China Sea.[49]

B. Jurisdiction

When the case first came before the Tribunal, China objected on the basis of a lack of jurisdiction.[50] China argued, *inter alia*, that the Tribunal lacked jurisdiction because the essence of the subject-matter of the arbitration was territorial sovereignty over the relevant maritime features in the SCS, which is excluded from UNCLOS subject matter jurisdiction.[51] The Tribunal responded to that argument by denying that its jurisdiction was based on territorial sovereignty, stating that because UNCLOS does not address the sovereignty of states over land territory, the Tribunal had not been asked to determine territorial claims between the Philippines and China regarding the SCS.[52] The Tribunal further argued that "the determination of the nature of and entitlements generated by the maritime features in the South China Sea does not require a decision on issues of territorial sovereignty."[53] That may be the case, but some courts and commentators have argued that the issues of territorial

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49. MINISTRY OF FOREIGN AFFAIRS OF CHINA, POSITION PAPER OF THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA ON THE MATTER OF JURISDICTION IN THE SOUTH CHINA SEA ARBITRATION INITIATED BY THE REPUBLIC OF THE PHILIPPINES (2014), *available at* http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml (last visited Mar. 7, 2018).

50. *Id.*

51. Phil. v. China, Case No. 2013-19, ¶ 13. It is submitted by some scholars that "several points in the 'Relief Sought' by the Philippines concern the questions of sovereignty and other rights over land territory, as well as historic titles and rights, both of which are not dealt with in the Convention and thus fall outside of the jurisdiction of the Tribunal." TALMON, *supra* note 42, at 31.

52. Phil. v. China, Case No. 2013-19, ¶ 5.

53. *Id.* ¶ 157.

sovereignty and maritime entitlements are so inextricably intertwined that the Tribunal could not logically consider one without considering the other.[54] If, in fact, the Tribunal lacked jurisdiction, it would taint the Tribunal's decision on maritime features in the SCS, where the determination of maritime features is dependent on the issue of territorial sovereignty. The International Court of Justice, based on the principle of "the land dominates the sea," has stated that the "territorial situation . . . must be taken as [the] starting point for the determination of the maritime rights of a coastal State."[55] The Tribunal is bound to determine territorial sovereignty and maritime entitlements, even if no claim has been made regarding the territorial issue,[56] but in this case the Tribunal did not address the sovereignty question.

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54. The issue of sovereignty remains relevant because "whichever state is entitled to the island is entitled to the adjacent maritime zones." Baumert, *supra* note 2, at 153. China claims that its territorial claims over parts of South China Sea extends back to the third century A.D and that the "involvement of other littoral States in the South China Sea has been much more recent." Talmon & Jia, *supra* note 8, at 2-3. China claims that while it established administrative offices to extent its jurisdiction over parts of the South China Sea, "[n]o protest was lodged against any of these measures by other States." *Id.*, at 5. It is submitted that China has never claimed to be a

> "sovereign over all of the waters, all of the seabed and all of the maritime features within the nine-dash line . . . What China did claim was sovereignty over the four groups of islands in the South China Sea enclosed by the nine-dash line depicted on the map . . . Based on the its territorial sovereignty over the archipelagos, China claims 'sovereignty' over their adjacent waters."

Michael Sheng-Ti Gau, *Issues of Jurisdiction in Cases of Default of Appearance*, *in* THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE, *supra* note 8, at 88. A proponent of this view claims that:

> "[w]hat China does claim in the South China Sea in terms of maritime areas are the zones under UNCLOS, namely, a territorial Sea, EEZ and continental shelf . . . There is thus no conflict, disagreement or dispute between China and Philippines with regard to the legal basis of their maritime zone claims."

Id. at 89.

55. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. Rep. 820, ¶ 185 (Mar. 16).

56. *See* Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. Rep. 928, ¶ 114 (Oct. 8). The Court observed that

> "[t]o plot that line [maritime boundary line] the Court would first have to determine which State has sovereignty over the islands and rocks in the disputed area. The Court is bound to do so whether or not a formal claim has been made in this respect. Thus the claim relating to sovereignty is implicit in and arises directly out of the question which is the subject-matter of Nicaragua's Application, namely the delimitation of the disputed areas of the territorial sea, continental shelf and exclusive economic zone."

Id.

Some scholars are of the view that *Philippines v. China* involved sovereignty and is an analogous situation to the *Island of Palmas*[57] case, which involved conflicting claims over the Palmas Island between the U.S. and the Netherlands.[58] The U.S. claimed title to the Island on the basis of the 1898 Treaty of Paris, by which Spain ceded title to the Island to the U.S., while the Netherlands claimed title due to historic display of title to the Island.[59] The Permanent Court of Arbitration held for the Netherlands.[60] This case, it is asserted, is similar to the *Philippines v. China* case at least to the extent that both cases concern distinct claims – either territorial sovereignty – over the feature or right to use maritime spaces generated by the features.[61]

Be that as it may, the Tribunal decided that the issue of sovereignty is separate from the issues presented by the Philippines.[62] The Philippines sought a declaration from the Tribunal that China's rights and entitlements in the SCS must be based on UNCLOS and not under any claim of historic rights (China's claim to rights within the 'nine-dash line' marked on Chinese maps)[63] to the extent that such historical rights

57. *See* Island of Palmas, (Neth. v. U.S.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928). In this case, the U.S. claimed sovereignty over Palmas Island based on Spain's historic rights. *Id.* These rights were pursuant to the 1898 Treaty Paris under which Spain gave up authority over the Philippines to the United States. *Id.* On the other hand, Spain claimed sovereignty over the island based on discovery going back to 1526. *Id.* But the Court observed that "discovery alone, without any subsequent act cannot . . . prove sovereignty . . . [A]n inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered." *Id.* at 846. In this case, while there was evidence of "[t]he acts of indirect or direct display of Netherlands sovereignty at Palmas[,]" there was "[c]omplete absence of evidence as to display of Spanish sovereignty over the Island of Palmas[.]" Island of Palmas, at 867, 852. *See also* Clipperton Island (Fr. v. Mex.), 2 R.I.A.A. 1105 (Perm. Ct. Arb. 1931) (the arbitrator holding that there was no evidence of Mexican occupation of the Island until "comparatively recent times," and that the French notice of occupation was sufficient to establish sovereignty over the Island); Minquiers and Ecrehos (Fr. v. U.K.), Judgment, 1953 I.C.J. Rep. 110 (Nov. 17) (holding that the United Kingdom had sovereignty over the Islands because it had "in several ways exercised ordinary local administration . . . during a long period of time").

58. Island of Palmas, 2 R.I.A.A. 829. China, however, asserts that the rights it enjoys over the South China Sea islands and "their adjacent waters are of a sovereignty nature, which also fall under the scope of historic rights." Zhang Linping, *A Review of the 4th Forum on Regional Cooperation in the South China Sea - The Symposium on Cross-Strait Cooperation in the South China Sea*, 2016 CHINA OCEANS L. REV. 280, 288 (2016).

59. Island of Palmas, 2 R.I.A.A. 829.

60. *Id.*

61. *Id.*

62. Phil. v. China, Case No. 2013-19, ¶ 267.

63. The Note Verbale sent by China to the Secretary General of the U.N. claimed sovereignty and sovereign rights to islands and adjacent waters in South China Sea and appended to it was a map depicting the nine-dash-line. Phil. v. China, Case No. 2013-19, ¶

exceeded the entitlements that China would be entitled to under UNCLOS.[64] Further, the Philippines sought a declaration that, based on UNCLOS, all of the features claimed by China in the Spratly Islands, as well as Scarborough Shoal, were incapable of generating an exclusive economic zone or entitlement to a continental shelf.[65] Accordingly, the Philippines sought a declaration that Chinese interference with the exercise of the Philippines' rights under UNCLOS, including with respect to fishing, oil exploration, navigation, and the construction of artificial islands and installations, was unlawful.[66] Additionally, the Philippines claimed that China had unlawfully engaged in large-scale construction of artificial islands and land reclamation on the Spratly Islands.[67]

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183. The Philippines argued, however, that Chinese claims had no basis under UNCLOS because "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." *Id.* ¶ 188. Could these claims have any support in customary international law? To the extent that such territorial claims have any relevance for the determination of maritime entitlements, proponents of the Chinese position rely on the proposition that even if UNCLOS does not refer to how historic titles are acquired, the "matter continues to be governed by general international law." Continental Shelf (Tunisia/Libya Arab Jamahiriya), Judgment, 1982, I.C.J. Rep 473, ¶ 100 (Feb. 24). *See* TALMON, *supra* note 42, at 53 (suggesting that "the question of historic titles continues to be governed by the rules and principles of customary international law"). However, as a matter of treaty law in general, UNCLOS convention would supersede such customary international law, "a treaty may sometimes reverse a rule of customary international law." *See* MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 136 (5th ed. 2014). In any case, the legal significance of the nine-dash line is in doubt. Some scholars have noted that "ambiguity still remains as to the geographical coordinates of the line. The nine-dash line would even seem to suggest that, at least in certain areas, China's EEZ should prevail over the EEZs of other countries." Florian Dupuy & Pierre-Marie Dupuy, *A Legal Analysis of China's Historic Rights Claim in The South China Sea*, 107 AM. J. INT'L L. 124, 128 (2013). Moreover, the "nine-dash line can hardly serve as the basis of a maritime delimitation since it does not have geographical coordinates . . . The line is drawn in a rather rough, approximate way and cannot be interpreted as the result of applying any standard method for delimiting maritime spaces." *Id.* at 132. The International Court of Justice noted that in frontier delimitations "maps merely constitute information" and "of themselves, and by virtue solely of their existence, they cannot constitute a territorial title." Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.CJ Rep. 525, ¶ 54 (Dec. 22). By the same logic, they cannot serve as a basis for asserting maritime claims. *Id.* Moreover, "the map itself reflects the biased view of the party seeking to rely on it and cannot, as such, be taken into account by an international court or tribunal seeking to establish objective facts." Dupuy & Dupuy, *supra* note 63, at 134.

64. Phil. v. China, Case No. 2013-19, ¶ 7.

65. UNCLOS provides that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." UNCLOS, *supra* note 6, at art. 121(3); Phil. v. China, Case No. 2013-19, ¶ 8.

66. Phil. v. China, Case No. 2013-19, ¶ 9.

67. Although not to the scale of China, reclamation has been conducted in the past by several countries. For example,

C. The Nine-Dash Line and Historical Title

Among the issues that stood out, the Tribunal observed that the dispute concerned entitlements to maritime zones.[68] As understood by the Tribunal, at the center of the dispute were China's claims of "rights to the living and non-living resources in the waters of the [SCS] within the 'nine-dash line.'"[69] The Tribunal held that:

> No article of the Convention expressly provides for or permits the continued existence of historic rights to the living or non-living resources of the exclusive economic zone. Similarly, nothing in the Convention expressly provides for or permits a State to maintain historic rights over the living and non-living resources of the continental shelf, the high seas, or the Area.[70]

In this connection, the Tribunal, in a reasoning that seems unassailable, articulated that:

> [T]he Convention is clear in according sovereign rights to the living and non-living resources of the exclusive economic zone to the coastal State alone. The notion of *sovereign* rights over living and non-living resources is generally incompatible with another State having historic rights to the same resources, in particular if such historic rights are considered exclusive, as China's claim to historic rights appears to be.[71]

> "[b]etween 1936 and 1964, the U.S. military employed land reclamation to enlarge the main island of Johnston Atoll, a U.S. territory in the North Pacific that is located several hundred miles southwest of Hawaii. The island's size was increased from an original area of 46 acres to a final area of 596 acres-an increase of more than 10 times. Reclamation work also increased the area of another island in the atoll, Sand Island, from 10 acres to 22 acres, and created two new islands in the atoll, called North and East, of 25 and 18 acres, respect."

DOLVEN ET AL., *supra* note 34, at 21. Also, "Vietnam has reclaimed a total of 200,000 square meters on features it occupies in the Spratlys." *Id.* at 20. Subject to limitations, UNCLOS allows the construction of artificial islands. *See* UNCLOS, *supra* note 6, at art. 60(1)(a) (providing, "[i]n the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of: (a) artificial islands"); *Id.* at art. 60(8) (providing, "[a]rtificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.").

68. Phil. v. China, Case No. 2013-19, at 59, ¶ 155.

69. *Id.* at 98, ¶ 232. The Tribunal agreed with Philippines core contention that "China's nine-dash line 'is, to put it plainly, illegal. It is arbitrary and bereft of any basis or validity under international law, specifically the United Nations Convention on the Law of the Sea or UNCLOS.'" Talmon & Jia, *supra* note 8, at 9.

70. Phil. v. China, Case No. 2013-19, at 100, ¶ 239.

71. *Id.* at 102, ¶ 243 (emphasis in original).

The Tribunal also reasoned that "[t]he same considerations apply with respect to the sovereign rights of the continental shelf, which are set out in Article 77 of the Convention,"[72] because "Article 81 [of the Convention] similarly states that '[t]he coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.'"[73] The Tribunal concluded that "[i]nsofar as China's relevant rights comprise a claim to historic rights to living and non-living resources within the 'nine-dash line', partially in areas that would otherwise comprise the exclusive economic zone or continental shelf of the Philippines, the Tribunal cannot agree with this position."[74] This is because "[t]he Convention does not include any express provisions preserving or protecting historic rights that are at variance with the Convention. On the contrary, the Convention supersedes earlier rights and agreements to the extent of any incompatibility."[75] To buttress its reasoning, the Tribunal recalled the *travaux préparatoires* (negotiating history) relating to historical claims which were eventually rejected by the drafters of UNCLOS.[76] For example, Japan and the Soviet Union wanted to preserve the status quo regarding distant fishing rights, which

72. *Id.* at 102, ¶ 244.
73. *Id.* at 103, ¶ 244.
74. *Id.* at 103, ¶ 246.
75. Phil. v. China, Case No. 2013-19, at 103, ¶ 246.
76. *Id.* at 105, ¶ 250. But historical claims are rejected because of the drafting history of UNCLOS. So what is the value of negotiating history under the Convention on the Law of Treaties? This is only good for interpretation purposes. But such historical claims may have some value from the perspective of customary international law. The issue would then be what supersedes the other: treaty law or customary international law? Most likely the argument would be that the treaty law supersedes. It should be noted that even if China's claims based on historic waters are conceded, under UNCLOS, they would not extend to the Exclusive Economic Zone or the Continental Shelf, because historic waters, by definition, refer to internal or territorial waters. UCLOS, Art. 15 provides: "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith." UNCLOS, *supra* note 6, at 403. UNCLOS also recognizes title to historic bays in Article 10(6). But this article clearly indicates that Article 10 applies "only to bays the coasts of which belong to a single State." *Id.* at 402. Beyond this, UNCLOS is silent on the issue of historic rights or titles. *See generally id.* China, which is a state party to UNCLOS like all other coastal states in the South China Sea, is bound by the provisions of UNCLOS and cannot assert rights that are not recognized in UNCLOS. *See id.*

they had at the time, but this proposal was rejected.[77] The Tribunal also noted that:

> In the course of these debates, China actively positioned itself as one of the foremost defenders of the rights of developing States and was resolutely opposed to any suggestion that coastal States could be obliged to share the resources of the exclusive economic zone with other powers that had historically fished in those waters.[78]
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> . . . .
>
> [which also meant that] China's position, as asserted during the negotiation of the Convention, is incompatible with a claim that China would be entitled to historic rights to living and non-living resources in the South China Sea that would take precedence over the exclusive economic zone rights of the other littoral States.[79]

The Tribunal augments its reasoning by referencing other persuasive cases in which historic rights, if any, have been superseded by a subsequent declaration of exclusive economic zones.[80] According to the

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77. Phil. v. China, Case No. 2013-19, at 103, ¶ 250.

78. *Id.* at 105, ¶ 251.

79. *Id.* at 106, ¶ 252.

80. *See id.* at 108, ¶ 256 (referencing Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Judgment, 1984 I.C.J. Rep. 246, 341-42, ¶ 235 (Oct. 12)). In other respects, however, UNCLOS does recognize historic rights, none of which applies in to Chinese claims. For example, UNCLOS recognizes "historic bays." *See* UNCLOS, *supra* note 6, at 403. Additionally, "UNCLOS Art. 15 provides that historic title may be taken into account in delimitation of the territorial seas between states with opposite or adjacent coasts." Schoenbaum, *supra* note 8, at 462. But, "the successful assertion of historic title requires the asserting state to prove open, effective, long-term, and continuous exercise of authority over the waters in question coupled with acquiescence by concerned foreign states. Considering these criteria, the nine-dash line does not qualify even remotely as an assertion of sovereignty; the South China Sea is not a bay; straight baselines and delimitation are not relevant." *Id.* Schoenbaum further argues, however, that China may have certain "historic rights" based on UNCLOS Article 62(3) which provides, in relevant part, that "a coastal state '[i]n giving access to other States to its exclusive economic zone . . . shall take into account . . . the need to minimize economic dislocation in States whose nationals have habitually fished in the zone.'" *Id.* at 462-463. Based on that, Schoenbaum asserts that "it would appear that China may assert historical/traditional fishing rights under UNCLOS Article 62(3) even in the EEZs of other states." *Id.* at 463. However, Schoenbaum appears to ignore the fact that there is a trigger in UNCLOS Article 62(2), which provides, "[t]he coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. *Where the coastal State does not have the capacity to harvest the entire allowable catch*, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein." UNCLOS, *supra* note 6, at 421. (emphasis added). It appears that, assuming Article 62(3) establishes any historic rights, those rights are meaningless unless and until it can be demonstrated that Article 62(2) has been satisfied.

Tribunal, "[h]istorical navigation and fishing, beyond the territorial sea, cannot therefore form the basis for the emergence of a historic right."[81] Thus, "[f]or much of history . . . China's navigation and trade in the South China Sea, as well as fishing beyond the territorial sea, represented the exercise of high seas freedoms."[82] In the view of the Tribunal, "to establish historic rights in the waters of the South China Sea, it would be necessary to show that China had engaged in activities that deviated from what was permitted under the freedom of the high seas and that other States acquiesced in such a right."[83] There does not seem to be evidence of acquiescence by the Philippines.[84] Indeed, the Tribunal was unable to identify any evidence that would suggest that China historically regulated or controlled fishing in the SCS, beyond the limits of the territorial sea.[85] Therefore, the Tribunal concluded 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."[86] In addition, the Tribunal concluded that "China's claims to historic rights . . . with respect to the maritime areas of the South China Sea encompassed by the relevant part of the 'nine-dash line' are contrary to the Convention . . . to the extent that they exceed the . . . limits of China's maritime entitlements under the Convention."[87]

It is not as if the Tribunal was alone in this conclusion. Scholarship predating this decision supports this reasoning. For example, one scholar notes that:

> The contemporary law must be applied to a Chinese claim to all of the South China Sea . . . . Any such claim beyond normal zones measured from the mainland must turn on sovereignty over the islands and other similar features and the normal maritime zones generated by them and

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81. Phil. v. China, Case No. 2013-19, at 114, ¶ 270.

82. *Id.* at 114, ¶ 269.

83. *Id.* at 114, ¶ 270.

84. YANN-HUEI SONG KEYUAN ZOU, MAJOR LAW AND POLICY ISSUES IN THE SOUTH CHINA SEA: EUROPEAN AND AMERICAN PERSPECTIVES 72 (2014). Although China has asserted authority over some of the maritime features in SCS, "they have hardly been exclusive, longstanding and continuous, or accepted or even acquiesced in by other states with claims or interests in these waters." *Id.*

85. Phil. v. China, Case No. 2013-19, at 114, ¶ 270.

86. *Id.* at 111, ¶¶ 261-62.

87. *Id.* at 117, ¶ 278.

the mainland, not on ancient closed-seas doctrines that have fallen into desuetude.[88]

D. Low-Tide Elevations

Secondly, the Tribunal considered the issue of whether any of the contested maritime features[89] in the SCS qualified as an island that can generate certain maritime zones.[90] This issue was necessary to determine because even if China's claims could not be based on historic title, the question remained whether there was any other basis for China to claim any of the contested maritime features in the SCS as well as the maritime zones they might generate. This presented the opportunity, for the first time, for an international adjudicatory body to distinguish between a low elevation and an island as well as between a mere rock[91] and an island that can generate maritime zones. Basing itself on Article 121(3) of UNCLOS,[92] the Tribunal maintained that a maritime feature that is "exposed at low tide but covered with water at high tide is . . . a 'low-tide elevation.' Features . . . above water at high tide are . . . 'islands.' . . . [T]he entitlements that an island can generate . . . depend upon . . . whether the island has the capacity to 'sustain human habitation or economic life of [its] own.'"[93] Because of the term "naturally formed" in the definition of an "island,"[94] the Tribunal reasoned that, "[a]s a matter of law, human modification cannot change the seabed into a low-tide elevation or a low-tide elevation into an island."[95] The implication was that "a low-tide . . . generates no territorial sea of its own," and because

88. Jonathan I. Charney, *Central East Asian Maritime Boundaries and the Law of the Sea*, 89 AM. J. INT'L L. 724, 736-37 (1995).

89. *See generally* Phil. v. China, Case No. 2013-19 (These features included Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef, McKennan Reef, and Hughes Reef, all of which were included in the nine-dash line.).

90. UNCLOS, *supra* note 6, at 442. An island can generate a territorial sea, a contiguous zone, an exclusive economic zone and continental shelf of an island, which are in turn "determined in accordance with the provisions of this Convention applicable to other land territory." *Id.*

91. *See* Reed & Wong, *supra* note 2, at 746.

92. *See* UNCLOS, *supra* note 6, at 442 (Providing that "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."). Article 121(3) of UNCLOS is important because it "does not disable all rocks from an exclusive economic zone or continental shelf, but only those that fail the test of sustaining human habitation or economic life of their own." Jonathan I. Charney, *Rocks that Cannot Sustain Human Habitation*, 93 AM. J. INT'L L. 863, 866 (1999).

93. Phil. v. China, Case No. 2013-19, at 119, ¶ 280.

94. UNCLOS, *supra* note 6, at 442 (defining an island as "a naturally formed area of land, surrounded by water, which is above water at high tide").

95. Phil. v. China, Case No. 2013-19, at 131, ¶ 305.

"Articles 57 and 76 [of UNCLOS] ... measure the breadth of the exclusive economic zone and continental shelf from the baseline for the territorial sea," "if a low-tide elevation is not entitled to a territorial sea, it is not entitled to an exclusive economic zone or continental shelf."[96] The Tribunal then held that, based on the evidence and the law, that "[t]he following features are, or in their natural condition were, exposed at low tide and submerged at high tide and are, accordingly low-tide elevations: (a) Hughes Reef, (b) Gaven Reef (South), (c) Subi Reef, (d) Mischief Reef, (e) Second Thomas Shoal."[97] The above reasoning of low-tide elevations is solidly supported by the jurisprudence of the ICJ. The ICJ had the opportunity to rule on low-tide elevations in *Territorial and Maritime Dispute* (Nicaragua v. Colombia).[98] In that case, the ICJ stated that international law defines an island by reference to whether it is "naturally formed" and "whether it is above water at high tide."[99]

E. High-Tide Rocks

In a related manner, the Tribunal had to determine whether certain features were mere rocks and not islands even if they were above water at high tide.[100] This is important because UNCLOS provides that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."[101] To answer this issue, the Tribunal articulated that, based on Article 121(3) of UNCLOS, "a rock would be disentitled from an exclusive economic zone and continental shelf only if it were to lack both the capacity to sustain human habitation and the capacity to sustain an economic life of its own."[102] But,

96. *Id.* at 132, ¶ 308.

97. *Id.* at 174, ¶ 383.

98. *See generally* Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 624 (Nov. 19).

99. *Id.* at 25, ¶ 37. The court referenced Maritime Delimitation and Territorial Questions between Qatar and Bahrain where "it found that Qit'at Jaradah was an island, notwithstanding that it was only 0.4 metres above water at high tide." *Id.*; *See also* Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. Rep. 99, ¶ 197 (Mar. 16). In this case, the ICJ held that low-tide elevations do not constitute territory that can be acquired or appropriated, unless they lie within the territorial sea of the coastal state. Indeed, UNCLOS specifically states that "[w]here a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own." UNCLOS, *supra* note 6, at 403.

100. Phil. v. China, Case No. 2013-19, at 174, ¶ 382 (Those features included Scarborough Shoal, (b) Cuarteron Reef, (c) Fiery Cross Reef, (d) Johnson Reef, (e) McKennan Reef, and (f) Gaven Reef (North)).

101. UNCLOS, *supra* note 6, at 66.

102. Phil. v. China, Case No. 2013-19, at 210, ¶ 496.

UNCLOS does not specifically define benchmarks for establishing human habitation.[103] In a groundbreaking definition, the Tribunal articulated the following general criteria:

> The Tribunal considers that the principal factors that contribute to the natural capacity of a feature . . . include the presence of water, food, and shelter in sufficient quantities to enable a group of persons to live on the feature for an indeterminate period of time.
>
> . . . .
>
> On the one hand, the requirement in Article 121(3) that the feature itself sustain human habitation or economic life clearly excludes a dependence on external supply. A feature that is only capable of sustaining habitation through the continued delivery of supplies from outside does not meet the requirements of Article 121(3).[104]

The Tribunal also propounded that, because Article 121(3) provides that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf,"[105] those attributes cannot be derived from artificial intervention, because:

> If States were allowed to convert any rock incapable of sustaining human habitation or an economic life into a fully entitled island simply by the introduction of technology and extraneous materials, then the purpose of Article 121(3) as a provision of limitation would be frustrated. It could no longer be used as a practical restraint to prevent States from claiming for themselves potentially immense maritime space. . . . "[A] contrary rule would create perverse incentives for States to undertake such actions to extend their maritime zones to the detriment of other coastal States and/or the common heritage of mankind."[106]

Based on the evidence and the law, the Tribunal held that "none of the high-tide features . . . is capable of sustaining human habitation or an economic life of their own, the effect of Article 121(3) is that such features shall have no exclusive economic zone or continental shelf."[107] In sum, the Tribunal found most maritime features to be mere high-tide elevations, rocks, or low-tide elevations that do not qualify as islands

103. *See* Mitchell, *supra* note 45, at 762 (noting, "[T]he island/rock distinction leaves in doubt the exact method of ascertaining the question of "habitability," with the result that any state believing itself to be in possession of a given maritime feature is incentivized to attempt to characterize it as an "island," while states opposing such claims may develop various lines of argumentation for why the feature should be considered a "rock.").

104. Phil. v. China, Case No. 2013-19, at 229, ¶¶ 546-547.

105. Phil. v. China, Case No. 2013-19, at 2, ¶ 8

106. *Id.* at 214, ¶ 509.

107. *Id.* at 254, ¶ 626.

within the meaning of Article 121(3) of UNCLOS. Thus, they were legally considered "to generate no exclusive economic zone or continental shelf."[108] Accordingly, there was no "legal basis for entitlement by China to maritime zones."[109]

This finding was challenged by a group of Chinese scholars who, at a symposium, argued:

> [I]n the award of Sino-Philippine SCS Arbitration, all the maritime features of the Nansha Islands that are above water at high tide, including Taiping Island, are considered as "rocks" which have no EEZ or continental shelf by the arbitrators. This ruling is inconsistent with the definition of "island" under the UNCLOS. In fact, the UNCLOS only states that the islands themselves must be naturally formed, but does not expressly provide that the condition of "sustaining human habitation or economic life of their own" must also be "naturally formed." Due to science and technology advances, a rock, which was previously considered unsustainable for human habitation or economic life of its own, may now have the chance to satisfy the requirements and standards of an island under the UNCLOS, not to mention the Taiping Island that has fresh water on itself.[110]

It seems, however, that the reasoning of the Tribunal is valid and legitimate because it is consistent with the negotiating history of UNCLOS, which expressed concerns over the possibility of denying other countries' access to the exclusive economic zone if coastal states can transform rocks into "islands" by artificial means. It is clear that the negotiators of UNCLOS wanted "uninhabited rocks . . . in the middle of the seas and oceans . . . to be treated differently."[111] The raison d'être for denying every feature that looked like an island the status of "island" was that the common heritage of mankind would be significantly diminished.[112] This is because the economic zone of a barren rock could

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108. *Id.* at 256, ¶ 632.

109. *Id.* at 256, ¶ 633.

110. Linping, *supra* note 58, at 289.

111. Third United Nations Conference on the Law of the Sea, 1973-82, (Vol. II), Summary Records of the Second Committee, Second Session: 39th meeting A/CONF.62/C.2/SR.39, at 281.

112. Denmark, for instance, stated, "[i]f the Conference decided to grant coastal States extensive rights in the form of broad exclusive economic zones, then consideration should be given to what extent, if at all, those zones could be claimed on the basis of the possession of islets and rocks which offered no real possibility for economic life and were situated far from the continental land mass. If such islets and rocks were to be given full ocean space, it might mean that the access of other countries to the exploitation of the living resources in what was at present the open sea would be curtailed, and that the area of the sea-bed falling under the proposed International Sea-Bed Authority would also be reduced." *See id.* at 279. Pointedly, Nicaragua argued that "islands situated within the 200-mile territorial sea or economic zone

be "larger than the land territory of many States and larger than the economic zones of many coastal States."[113] In fact, it was explicitly noted that, with regard to rocks, UNCLOS was not any different from the 1958 Convention on the Law of the Sea, with one State representative stating that UNCLOS was the same in "denying marine space to rocks and low-tide elevations."[114] In fact, it was ultimately decided that "another article dealing with areas . . . such as rocks and islets, would be added later to preclude States with such possessions far from their main territory from benefiting from the provisions of the economic zone in respect of such rocks and islets."[115]

Additionally, the Tribunal notes that China previously accepted a similar interpretation of Article 121(3) of UNCLOS. The Tribunal specifically references China's Note Verbale to the Secretary of the U.N. opposing Japan's claims to Oki-no-Tori-Shima, which China regarded as incapable of generating maritime zones because of being mere rocks as opposed to islands within the meaning of UNCLOS. China had argued:

> [T]hat the so-called Oki-no-Tori Shima Island is in fact a rock as referred to in Article 121(3) of the Convention. Therefore, the Chinese Government wishes to draw . . . attention . . . to the inconformity with the Convention with regard to the inclusion of the rock of Oki-no-Tori in Japan's Submission.
>
> Article 121(3) of the Convention stipulates that, "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." Available scientific data fully reveal that the rock of Oki-no-Tori, on its natural conditions, obviously cannot sustain human habitation or economic life of its own, and therefore shall have no exclusive economic zone or continental shelf. Even less shall it have the right to the extended continental shelf beyond 200 nautical miles.[116]

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of a coastal State should be regarded as coastal State waters. Any disturbance of that logical order would be detrimental to the concept of the inherent rights of coastal States and must be rejected . . . Occupation of such islands by a State other than the coastal State of which they were a natural part or of whose economic zone they were an integral part gave rise to special difficulties which must be dealt with in a spirit of equality and justice." *Id.* at 283. More specifically, Romania referred to the fact that "[w]ith regard to the definitions in article 1 of the draft, the two criteria of economic and social viability should suffice to exclude certain elevations of land from the category of island." UNCLOS, *supra* note 6, at 281.

113. *Id.* at 285.

114. *Id.* at 284.

115. Third United Nations Conference on the Law of the Sea, *Summary records of meetings of the Second Committee 44th meeting,* ¶ 16, A/CONF.62/C.2/SR.44 (Dec. 10, 1982).

116. Phil. v. China, Case No. 2013-19, at 197, ¶ 452 (referencing: The People's Republic of China, Note Verbale dated Feb. 6, 2009 from the People's Republic of China to

The Tribunal also notes China's statement, which argued:

> [T]here is also some case in which the Convention is not abided by, for example, claims on the continental shelf within and beyond 200 nautical miles with an isolated rock in the ocean as base point. Recognition of such claim will set a precedent which may lead to encroachment upon the high seas and the Area on a larger scale. Therefore, the international community should express serious concerns on this issue.[117]

F. Chinese Activities Impacting Philippines Sovereignty

Thirdly, the Tribunal dealt with the issue of Chinese activities in the SCS. With respect to those activities, the Philippines argued that China had "unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines."[118] Specifically, the Philippines alleged that "China ha[d] acted to prevent the Philippines from exploiting the non-living and living resources."[119] Its reasoning was that China had "objected to or acted to prevent petroleum exploration by the Philippines in the South China Sea, within 200 nautical miles of the Philippines' baselines,"[120] and banned or interfered with Philippine fishing activities in most of the SCS areas that the Philippines claimed to fall within its Exclusive Economic Zone and Continental Shelf. The Philippines submitted that:

> "[T]he waters, seabed and subsoil of the South China Sea within 200 M of the Philippine coast, but beyond 12 M from any high-tide feature within the South China Sea, constitute the EEZ and continental shelf of the Philippines under Articles 57 and 76 of the Convention because none of the maritime features claimed by China generates entitlement to an EEZ or continental shelf."[121]

The Philippines argued that "[b]ecause the sovereign rights and jurisdiction of the coastal State in both the continental shelf and EEZ are

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the Secretary-General of the United Nations, CML/2/2009 (Feb. 6, 2009)); The People's Republic of China, Note Verbale dated Apr. 12, 2009 from the People's Republic of China to the Secretary-General of the United Nations, CML/12/2009 (Apr. 13, 2009)). China clarified its claims over features in South China Sea with its Note Verbale addressed "to the United Nations Secretary-General dated 7 May 2009." Talmon & Jia, *supra* note 8, at 4. In that document, China claimed that it "has indisputable sovereignty over the islands in the South China Sea and the adjacent waters . . . as well as the seabed and subsoil thereof." *Id.* China attached its nine-dash mile map to the note, which would later become the backbone of the Philippines' claims. *Id.*

117. Phil. v. China, Case No. 2013-19, at 198, ¶ 454.

118. *Id.* at 261, ¶ 649.

119. *Id.* ¶ 650.

120. *Id.* ¶ 651.

121. *Id.* at 275, ¶ 683.

exclusive, no other State may interfere with their use or enjoyment."[122] Accordingly, "China's interference with oil and gas exploration and exploitation, and the measures adopted to prevent fishing in the Philippines' EEZ and continental shelf, constitute . . . continuing violations of . . . Articles 56, 58, 61, 62, 73, 77 and 81 of the Convention."[123] The Tribunal held that "China's actions amount[ed] to a breach of Article 77 of the Convention, which accords sovereign rights to the Philippines with respect to its continental shelf."[124] The Tribunal further held that the Chinese "assertion of jurisdiction amount[ed] to a breach of Article 56 of the Convention, which accords sovereign rights to the Philippines with respect to the living resources of its exclusive economic zone."[125] The Tribunal also held that to the extent that Chinese vessels had "been engaged in fishing at Mischief Reef and Second Thomas Shoal in May 2013, the Tribunal considers that China has failed to show the due regard called for by Article 58(3) of the Convention to the Philippines' sovereign rights with respect to fisheries within its exclusive economic zone."[126] With regard to the Philippines' allegation of China's unlawful prevention of the Philippine nationals' traditional fishing activities at Scarborough Shoal, the Tribunal held that it was "satisfied that the complete prevention by China of fishing by Filipinos at Scarborough Shoal over significant periods of time after May 2012 is not compatible with the respect due under international law to the traditional fishing rights of Filipino fishermen."[127] The resolution of this issue is as impeccable as the reasoning of the Tribunal on the maritime zones, which the Chinese nine-dash line is incapable of generating.

G. Environmental Issues

The fourth issue that the Tribunal dealt with and that is pertinent for the purposes of this Article was the Philippines' complaint about China's environmental violations relating to "harmful fishing practices and harmful construction activities."[128] Specifically, "[t]he activities complained of included the use of cyanide and explosives and the harvesting of endangered giant clams and sea turtles . . . land reclamation and construction by China on a number of features in the Spratly Islands,"

122. Phil. v. China, Case No. 2013-19, at 275, ¶ 684.
123. *Id.*
124. *Id.* at 282, ¶ 708.
125. *Id.* at 284, ¶ 712.
126. *Id.* at 296, ¶ 753.
127. Phil. v. China, Case No. 2013-19, at 317, ¶ 812.
128. *Id.* at 319, ¶ 817.

and island-construction activities at other features.[129] The Tribunal accepted the evidence that "[t]he marine environment around Scarborough Shoal and the Spratly Islands has an extremely high level of biodiversity of species, including fishes, corals, echinoderms, mangroves, seagrasses, giant clams, and marine turtles, some of which are recognized as vulnerable or endangered,"[130] and that "[t]hreats to coral reefs include overfishing, destructive fishing, pollution, human habitation, and construction."[131] The Tribunal held that China had, "through its toleration and protection of, and failure to prevent Chinese fishing vessels engaging in harmful harvesting activities of endangered species at Scarborough Shoal, Second Thomas Shoal and other features in the Spratly Islands, breached Articles 192 and 194(5) of the Convention,"[132] and "through its island-building activities at Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, Subi Reef and Mischief Reef, breached Articles 192, 194(1), 194(5), 197, 123, and 206 of the Convention."[133]

With regard to the Mischief Reef – possibly the most important feature to China in light of the construction of an airstrip on it – the Philippines alleged that "China's occupation of and construction activities on Mischief Reef (a) violate the provisions of the Convention concerning artificial islands, installations and structures; . . . (c) constitute unlawful acts of attempted appropriation in violation of the Convention."[134] The Philippines argued that, although "under Article 60 [of UNCLOS], coastal States enjoy the 'exclusive right' to authori[z]e or regulate the construction of structures, a principle that is extended to the continental shelf by virtue of Article 80 [of the UNCLOS],"[135] the Mischief Reef is "not within 200 M of any other feature claimed by China that is capable of generating an EEZ or a continental shelf."[136] However, the Mischief Reef "'is located within 200 M' of Palawan," which means, to the Philippines, that the "Philippines remains the only possible beneficiary of the effects of Articles 60 and 80 of the Convention with respect to Mischief Reef."[137] The Tribunal agreed with these submissions, holding that the "Mischief Reef lies within the exclusive

129. *Id.* ¶ 818.
130. *Id.* at 321, ¶ 823.
131. *Id.* at 322, ¶ 824.
132. Phil. v. China, Case No. 2013-19, at 397, ¶ 992.
133. *Id.* at 397, ¶ 993.
134. *Id.* at 399, ¶ 994.
135. *Id.* at 407, ¶ 1015.
136. *Id.* at 408, ¶ 1016.
137. Phil. v. China, Case No. 2013-19, at 408, ¶ 1016.

economic zone and continental shelf of the Philippines,"[138] and that relevant provisions of UNCLOS "endow the coastal State – which in this case is necessarily the Philippines – with exclusive decision-making and regulatory power over the construction and operation of artificial islands, and of installations and structures covered by Article 60(1), on Mischief Reef."[139]

While the reasoning of the Tribunal and the holding on the issues are almost unimpeachable, the same cannot be said of the process and some of the provisions of UNCLOS that permit that process. The next section is a critical evaluation of the process of constituting the arbitral tribunal and the effect it may have on the legitimacy of the decision.

H. Process and Legitimacy

1. Composition of the Tribunal

To a certain extent, the composition of an international adjudication body does matter for the perceived legitimacy of a judicial decision. This is one of reasons for the refusal of some states to participate in compulsory jurisdiction mechanisms of international tribunals, especially when the decisions of those bodies are final and without appeal.[140] In the past, the composition of arbitral panels has been such as would render the result more likely to promote compliance.[141]

UNCLOS Annex VII provides rules for the composition of an Annex VII arbitral tribunal like the Tribunal in the *Philippines v. China* case. Annex VII provides that "the arbitral tribunal shall consist of five members."[142] To ensure fairness, UNCLOS provides:

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138. *Id.* at 413, ¶ 1031.

139. *Id.* at 414, ¶ 1035.

140. One of the reasons for the U.S. refusing to join the International Criminal Court is that it would have no control over judges of the ICC, some of whom may come from countries with a clear antipathy towards the U.S. It is one of the reasons that the U.S. withdrew from the compulsory jurisdiction of the International Court of Justice after it lost the United States v. Nicaragua case. *See* Paul C. Szasz, *The United States Should Join the International Criminal Court*, 9 U.S. A.F. ACAD. J. LEGAL STUD. 1, 21 (1998-1999) (expressing the fear of the U.S. that its citizens would be subjected to "exposed to malicious or frivolous international prosecution").

141. For illustration of state compliance, see The Dogger Bank Case (Gr. Brit. v. Russ.) I.C.I. Report (26 Feb. 1905) (Russia complying with an unfavorable arbitral award thanks in part to tribunal composed of five admirals from Britain, Russia, the U.S., France, and Austria) and the Alabama Claims of the U.S. against Gr. Brit. (U.S. v. Gr. Brit.) 29 RIAA 125 (1872) (where Great Britain complied with the award thanks in part to the tribunal composed of five judges named each by U.S., Great Britain, Italy, Switzerland, and Brazil).

142. UNCLOS, *supra* note 6, at annex VII, art. 3(a).

> A list of arbitrators shall be drawn up and maintained by the Secretary-General of the United Nations. Every State Party shall be entitled to nominate four arbitrators, each of whom shall be a person experienced in maritime affairs and enjoying the highest reputation for fairness, competence and integrity. The names of the persons so nominated shall constitute the list.[143]

The party instituting the proceedings is entitled to appoint one arbitrator "chosen preferably from the list referred to in article 2" of Annex VII of UNCLOS, who may be its national, and the other party is entitled to do likewise.[144] They shall be chosen preferably from the list and shall be nationals of third States unless the parties otherwise agree."[145] If the parties fail to appoint the other three parties, then the "President of the International Tribunal for the Law of the Sea shall make the necessary appointments."[146] It is noteworthy that "[t]he appointments referred to in this subparagraph shall be made from the list referred to in article 2 of this Annex."[147] This system of appointing arbitrators is fraught with risks of perceived bias or lack of familiarity with local issues. It is important that "justice should not only be done, but should manifestly and undoubtedly be seen to be done."[148]

When China failed to nominate arbitrators, the President of the International Tribunal on the Law of the Sea (ITLOS) nominated the four remaining arbitrators, one of whom should have been nominated by China and the others by agreement between the Philippines and China.[149] It is also important that the list referred to above puts emphasis on "person[s] experienced in maritime affairs and enjoying the highest reputation for fairness, competence and integrity" and there is no indication as to geographical diversity.[150] A view of international law exists which holds that international law is dominated by the developed countries such as the U.S. and, more broadly, the West.[151] If the "list" is not diverse enough, it only feeds into the narrative that decisions rendered

143. *Id.* at annex VII, art. 2(1).

144. *Id.* at annex VII, art. 3(b), 3(c).

145. *Id.* at 572.

146. UNCLOS, *supra* note 6, at 572.

147. *Id.*

148. In re Chavez, 130 S.W.3d 107, 115 (Tex. App. 2003), *citing* R v. Sussex Justices, Ex parte McCarthy [1924] 1 KB 256, [1923] All ER Rep 233.

149. Phil. v. China, Case No. 2013-19, at 12, ¶ 30.

150. UNCLOS, *supra* note 6, at 571.

151. Third World theorists focus on how International Law developed so as to support the interests of powerful, mostly European, colonizing states, whose interests lay largely in promoting the "values" of the developed world. *See* SEAN MURPHY, PRINCIPLES OF INTERNATIONAL LAW 16-17 (2d ed. 2006).

by an arbitral body, constituted of members on that list, can only be in the interest of the U.S. or the West, which affects its legitimacy. This would only embolden the losing party, in this case China, to refuse to comply with the decision.

It is also noteworthy that there is no indication as to when the "list" may be constituted. This may allow a party that is instituting proceedings to ask a friendly nation to nominate an arbitrator to the "list." For example, after the first president of the Tribunal resigned due to a perceived conflict of interest:

> [T]he ITLOS President filled the vacancy by appointing Thomas A Mensah (Ghana) to serve as a member and President of the Arbitral Tribunal. It is of interest to note in this context that President Mensah was nominated to the list of arbitrators by Ghana only a couple of days before his appointment on 30 May 2013, which suggests that this might have been a 'nomination with a view' of being appointed to the Tribunal.[152]

In the wake of the decision, China complained that none of the panelists were from Asia and thus those arbitrators were not in a position to understand the SCS issues.[153] Indeed, one commentator has argued that the Philippines could have benefited from the composition of the panel, observing:

> A second advantage that the Philippines derived from China's non-participation was the make-up of the tribunal itself. . . . China, had it participated, would have had a voice in choosing four out of five members of the tribunal, including the presiding arbitrator. . . . [T]he tribunal was constituted . . . without any Chinese input and consisted of four Europeans and a West African. All have outstanding credentials, but the circumstances in the case still give one pause.[154]

Regardless of whether the reasoning on the merits is in conformity with the black letter law, the perception that there could have been a different result had the composition of the panel been different cannot be

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152. Talmon & Jia, *supra* note 8, at 12.

153. *See, e.g.*, Greg Torode & Manuel Mogato, *Caught Between a Reef and a Hard place, Manila's South China Sea Victory Runs Aground*, REUTERS (July 14, 2016), *available at* https://www.reuters.com/article/us-southchinasea-ruling-mischief-insight/caught-between-a-reef-and-a-hard-place-manilas-south-china-sea-victory-runs-aground-idUSKCN0ZV0CS (last visited Apr. 1, 2018) (reporting that in China "[t]here is surprise at the extent of the sheer arrogance of these judges sitting (in Europe) deciding what is a rock and what is an island").

154. Schoenbaum, *supra* note 8, at 453-54. The Tribunal was composed of Judge Thomas A. Mensah (Presiding Arbitrator) (from Ghana), Judge Jean-Pierre Cot, Judge Stanislaw Pawlak, Professor Alfred H.A. Soons, and Judge Rüdiger Wolfrum. *Id.*

avoided.[155] This perception can be a blemish on the legitimacy of the result, which in turn could affect compliance. It is also noteworthy that most of the experts relied on by the Tribunal were from outside the Asian region as well.[156] Unsurprisingly, in reaction to the composition of the Tribunal and the lineup of experts, China argued that "a panel of four Europeans presided over by a Ghanaian, does not adequately reflect the diversity of the world's legal system, implying that it might be biased against China."[157] Additionally, a symposium of mostly Chinese scholars concluded that the tribunal's award was "a ridiculous political farce staged under euro-centrism."[158] This composition of the Tribunal only feeds into the broader Chinese critique of the "current western-sourced legal status quo on territorial matters."[159]

2. China's Non-Participation in Proceedings

Apart from the composition of the Tribunal, China's non-participation is also equally problematic. China refused to participate in the arbitration, arguing that it had the legal right to do so.[160] The Tribunal's response to the non-participation was simply that UNCLOS "expressly acknowledges the possibility of non-participation by one of the parties to a dispute and confirms that such non-participation does not

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155. This argument finds support in the theory of international realism. For the "realist focusing on rules that are "out there," waiting to be discovered, is misguided, for it ignores important aspects of process that permeate the international legal system. The realist is impatient with the idea that black-letter rules govern international society, that judges and decision makers are mechanically applying such rules free of their own biases, and that international law is devoid of significant gaps, ambiguities, and uncertainties." MURPHY, *supra* note 151, at 15.

156. Captain Gurpreet Singh Singhota, an expert on navigational safety issues, was a national of the United Kingdom and Dr. Sebastian Ferse, as an expert on coral reef issues, was a national of Germany. Phil. v. China, Case No. 2013-19, at 30, ¶ 85. However, Mr. Grant Boyes, a national of Australia and an expert hydrographer, could be said to be from the Asian region. *Id.* at 19, ¶ 58. The same could be said of Professor Peter Mumby (a national of the United Kingdom and Australia) and Dr. Selina Ward (a national of Australia), both coral reefs experts. *Id.* at 31, ¶ 90. The Philippines also relied on Professor Allen Craig, "a Professor of Law and Adjunct Professor of Marine Affairs at the University of Washington in Seattle, and served for 21 years with the United States Coast Guard." *Id.* at 423, ¶ 1067.

157. Reuters Staff, *Factbox: Why the Philippines' South China Sea Legal case matters*, REUTERS, (July 11, 2016), *available at* https://www.reuters.com/article/us-southchinasea-ruling-factbox/factbox-why-the-philippines-south-china-sea-legal-case-matters-idUSKCN0ZR283 (last visited Apr. 1, 2018).

158. Linping, *supra* note 58, at 283.

159. Gary Lilienthal & Nehaluddin Ahmad, *The South China Sea Islands Arbitration: Making China's Position Visible in Hostile Waters*, 18 ASIAN PAC. L. & POL'Y J. 83, 95 (2017).

160. Phil. v. China, Case No. 2013-19, at 45, ¶ 114.

constitute a bar to the proceedings."[161] The Tribunal could also point to *Arctic Sunrise Arbitration (Kingdom of the Netherlands v. Russian Federation)* for additional support of its position.[162] The Tribunal dispelled any doubt as to whether China would be bound by the award, stating that "China remains a party to the arbitration, with the ensuing rights and obligations, including that it will be bound under international law by any decision of the Tribunal."[163] The argument is that, although China was given a chance to present a response, given that the Tribunal's conclusions have not received much negative commentary, China likely would have lost even if it participated in the proceedings.[164] Indeed, the Tribunal remarked that "China has been free to represent itself in these proceedings in the manner it considered most appropriate, including by refraining from any formal appearance, as it has in fact done."[165] However, that is not where the discussion should end. Could the Tribunal

161. *Id.* at 45, ¶ 117 (citing Article 9 of Annex VII to UNCLOS which provides that "[i]f one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.").

162. *See generally* The Arctic Sunrise Arbitration (Neth. v. Russ.), Case No. 2014-02; On October 4, 2013, the Kingdom of the Netherlands instituted arbitral proceedings against the Russian Federation under Annex VII to the United Nations Convention on the Law of the Sea. *Id.* at 2, ¶ 7. Russia refused to appoint agents or representatives in the proceedings. *Id.* at 3, ¶ 13. In that case, Russia argued that it was not subject to compulsory jurisdiction based on its declaration upon the ratification of the Convention, in which Russia stated that "it did not accept binding dispute resolution under the Convention with regard to disputes 'concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction.'" *Id.* at 2, ¶ 5 (quoting Russian declaration upon ratification. Third U.N. Conference on the Law of the Sea, *11th Meeting*, 28, ¶ 2, U.N. Doc. A/CONF.62/121 (Dec. 10, 1982); However, the Tribunal held "The Declaration of Russia upon ratification of the Convention does not have the effect of excluding the dispute from the procedures of Section 2 of Part XV of the Convention and, therefore, did not exclude the dispute from the jurisdiction of the tribunal." *Id.* at 16, ¶ 79.

163. *Id.* at 45, ¶ 118 (citing to Convention, art. 296(1) (providing that any decision rendered by a tribunal having jurisdiction under Section 2 of Part XV "shall be final and shall be complied with by all the parties to the dispute"); Nicar. v. U.S., 1986 I.C.J. at 25, ¶ 28; The Arctic Sunrise Case (Neth. v. Russ.), Provisional Measures, Case No. 22, 242, ¶ 51; The Arctic Sunrise Arbitration (Neth. v. Russ.), Award on Jurisdiction, Case No. 2014-02, 10, ¶ 60; The Arctic Sunrise Arbitration (Neth. v. Russ.), Award on the Merits, Case No. 2014-02, 3, ¶ 10.

164. This conclusion is based on the fact that UNCLOS supersedes so-called historic rights/titles and under UNCLOS "China's nine dash marks cut deeply into the EEZs that have been declared by Vietnam and the Philippines." *See* ZOU, *supra* note 84, at 52.

165. Phil. v. China, Case No. 2013-19, at 464, ¶ 1180.

have done more to encourage compliance even if the decision is binding? China would probably refuse to comply, among other things, because it perceives that its arguments are foreclosed from the moment the Tribunal rendered its decision – not subject to appeal – without leaving the possibility of a negotiated settlement based, among other things, on the reasoning in *Philippines v. China*.

The Tribunal was not oblivious to the disadvantages or risks of non-participation by China. UNCLOS establishes a high bar for the Tribunal in circumstances of non-participation by one of the parties. Accordingly, the Tribunal noted that under "Article 9 of Annex VII, the Tribunal 'must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law' before making any award."[166] The Tribunal acknowledged that "China's non-appearance might deprive it of 'an opportunity to address any specific issues that the Arbitral Tribunal considers not to have been canvassed, or to have been canvassed inadequately.'"[167] The Tribunal appears to take some comfort in its ability to remedy the effects of non-participation. For example, the Tribunal referenced China's Position Paper, which the Chinese Ambassador described as having "comprehensively explain[ed] why the Arbitral Tribunal . . . manifestly has no jurisdiction over the case."[168] Nevertheless, that was a statement from a political official and could not be taken to be a suggestion that the position paper comprehensively canvassed every possible legal argument that China could make in a counter-memorial,[169] let alone additional arguments that China could raise in the course of oral presentations before the Tribunals. One can only imagine that China might argue that if it had actually participated in the proceedings, it would have presented a more vigorous defense in a counter-memorial than it presented in its position paper and presentations to the media - that no amount of work done by experts, whose assertions remained unchallenged by China, would compensate for China's refusal to participate in the proceedings.[170] However, the Tribunal did take into

166. *Id.* at 49, ¶ 129.

167. *Id.* at 47, ¶ 124 (citing concerns of the Philippines).

168. *Id.* at 56, ¶ 146.

169. For example, UNCLOS does not define "rock" vis-a-vis an Island and commentators have argued that such distinctions "may be resolved by resort to the dispute settlement system of the LOS Convention or by a consensus of state practice derived from application of the rule." Charney, *supra* note 92, at 733. But China did not express its views on every issue that arose before the Tribunal. Unsurprisingly, China expressed exception to the "sheer arrogance of these judges sitting (in Europe) deciding what is a rock and what is an island." Torode & Mogato, *supra* note 153.

170. *See* Talmon & Jia, *supra* note 8, at 16 (remarking that "the absence of a State cannot be taken as . . . showing that the absent party has no, or no convincing,

consideration arguments raised by China in various communications and settings.[171] Additionally, the Tribunal tried to minimize these risks using independent experts.

Another remedy crafted by the Tribunal was to "invite written arguments from the appearing party on, or pose questions regarding, specific issues which the Arbitral Tribunal considers have not been canvassed, or have been inadequately canvassed, in the pleadings submitted by the appearing Party."[172] This remedy is an imperfect solution because it is impossible to anticipate every plausible question or argument that the non-appearing party might have posed. As one commentator noted, the non-participation:

> [C]reated the task on the part of the tribunal itself to "make up" what arguments China could be presumed to make regarding the matter. Then, the tribunal, having formulated these putative Chinese arguments, had the task of evaluating these same arguments against the arguments made by the lawyers for the Philippines, whose legal team was, of course, outstanding. The outcome in such a case is not hard to guess.[173]

The Tribunal is not the first international adjudication body to be faced with a situation of this kind.[174] Non-participation prompted the ICJ

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counterarguments to the applicant's case." Nicar. v. U.S., 1986 I.C.J. at 25, ¶ 30 (observing that it would be "an oversimplification to conclude that the only detrimental consequence of the absence of a party is the lack of opportunity to submit argument and evidence in support of its own case. Proceedings before the Court call for vigilance by all. The absent party also forfeits the opportunity to counter the factual allegations of its opponent.").

171. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, at 48, ¶ 127 (Tribunal noting that, "Concerns about the Philippines 'having to guess what China's arguments might be' were to some extent alleviated, at least with respect to jurisdiction, by China's decision to make public its Position Paper in December 2014. The Position Paper was followed by two letters from the former Chinese Ambassador, addressed to the members of the Tribunal, and four more-recent letters from the current Chinese Ambassador.").

172. *Id.* at 47, ¶ 124.

173. Schoenbaum, *supra* note 8, at 453.

174. *See* TALMON, *supra* note 42, at 15-16 (observing, [d]efault of appearance is nothing unusual in international adjudication . . . Default of appearance will usually make the task of the arbitral tribunal more difficult and thus may cause some inconvenience to the tribunal and the other party"). There are several examples in which there has been default appearance: *see generally* Denunciation of the Treaty of Nov. 2, 1865, between China and Belgium (Belg. v. China), P.C.I.J. (ser. A) No. 8, 14, 16, 18; Denunciation of the Treaty of Nov. 2, 1865, between China and Belgium (Belg. v. China), P.C.I.J. (ser. C) No. 16-1 (China not participating in the proceedings, even though both China and Belgium had made the declarations under Article 36(2) of the Statute of the Permanent Court of International Justice recognizing as compulsory *ipso facto* and without special agreement the jurisdiction of the court); Fisheries Jurisdiction Case (U.K. v. Ice.), Jurisdiction, 1973 I.C.J. No. 55, 7-8, ¶ 12; Fisheries Jurisdiction Case (U.K. v. Ice.) Merits, 1974 I.C.J. No. 55, 8-9, ¶¶ 13-14 (Iceland not taking part in the

to remark in one case that "the Court cannot by its own enquiries entirely make up for the absence of one of the Parties."[175] In cases where one of the parties is absent, the tribunal is in the precarious situation of settling for the less-than-perfect solution of having to "satisfy itself that it is in possession of all the available facts."[176] However, the Tribunal is given wide latitude to craft remedies in disposing of the matter that is presented to it. It is not as if the non-participation of China would have limited that scope. Nonetheless, the Tribunal did not recommend that the Philippines seek a negotiated settlement, which would compel it to seek further engagement with China. "[A] major weakness of the [T]ribunal's judgment is how it addressed the issue of 'future conduct of the parties.'"[177] The Tribunal did not recommend negotiations, although some commentators think that it should have.[178] The Tribunal could have done this, especially considering the fact the Tribunal left several related issues, particularly that of sovereignty, unaddressed.[179]

III. AFTERMATH: CHINA'S RESPONSE AND CHALLENGE TO RULE OF LAW

The issues around the SCS were not resolved by the issuance of the decision in *Philippines v. China*. On the contrary, in the aftermath of the decision, and in the absence of any reasonable prospect of a negotiated settlement, tensions in the region rose astronomically. China has threatened to use force to protect its interests against any challenger.[180] This was a direct challenge to the international rule of law because China was effectively ignoring UNCLOS, to which it is a party, and the

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proceedings); Aegean Sea Continental Shelf Case (Greece v. Turk.), Jurisdiction, 1978 I.C.J. No. 62, 7, ¶¶ 14-15 (Turkey not participating in the proceedings); Nicar. v. U.S., Judgment 1986 I.C.J. Rep. 14, at 29-38, 92-97, 115-16 (U.S. not participating); United States Diplomatic and Consular Staff in Tehran (U.S. v Iran), Merits, 1980 I.C.J. No. 64, at 18, ¶ 33 (Iran not participating). Jai & Talmon, *supra* note 8.

175. Nicar. v. U.S., 1986 I.C.J., at 25, ¶ 30.

176. Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. No. 58, at 263, ¶ 31.

177. Schoenbaum, *supra* note 8, at 452.

178. *See id.* at 455 (noting "[T]he tribunal should have made an effort to craft an Award that would both call upon the parties to negotiate their differences and also provide incentives to begin such a negotiation. This critical aspect is missing from the Award").

179. Mitchell, *supra* note 45, at 754-55 (observing that "this ruling leaves unaddressed though it may well affect, the underlying basis for the entire dispute between the parties").

180. David Brunnstrom, *China installs weapons systems on artificial islands: U.S. think tank*, REUTERS (Dec. 14, 2016), *available at* https://www.reuters.com/article/us-southchinasea-china-arms/china-installs-weapons-systems-on-artificial-islands-u-s-think-tank-idUSKBN1431OK (last visited on Apr. 1, 2018) (reporting that "Beijing is serious about defense of its artificial islands").

Tribunal's decision. China's threats to use force have to be taken seriously. It has been observed that the situation in the SCS, if "not well handled, . . . could constitute a threat to the peace and security of the East Asian region and of the world."[181] In fact, there is precedent for use of force regarding claims in the SCS. For example, "in March 1988 . . . China sank three Vietnamese vessels and killed at least 75 Vietnamese soldiers and sailors in the process of seizing Fiery Reef."[182]

There was a time when China "emphasize[d] the beneficial role of international law in facilitating cooperation among states and in regulating their mutual intercourse."[183] But that was before China's rise to status of a global player with a military that must be reckoned with.[184] Now, even before the award in the *Philippines v. China* case was made, China was indicating that it was willing and prepared to use military means to hold on to the SCS.[185] It seemed as if the Philippines' hopes of resolving the dispute through recourse to international law had come to naught. The Philippines expressed the hope that "a determination that the features were only rocks would reduce the incentive to 'flex muscles' . . .

181. Zou Keyuan, *The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands*, 14 INT'L J. MARINE & COASTAL L. 27, 30 (1999).

182. Denoon & Brams, *supra* note 35, at 305.

183. Bennett, *supra* note 36, at 443.

184. Note, however, that some scholars discredit the theory that China is unwilling to negotiate meaningfully or respect the rule of law because of its increasing military strength. Steve Chan claims, "Beijing's foreign policy was much more bellicose when it was weaker in the 1950s and 1960s, and it has become more conciliatory and cooperative when it has become stronger in the recent past. STEVE CHAN, CHINA'S TROUBLED WATERS: MARITIME DISPUTES IN THEORETICAL PERSPECTIVE ix (2016). Moreover, when Beijing has resorted to force in the past, it has fought the strongest adversaries (e.g. the US, the USSR, India, Vietnam), but has often settled its border disputes with those neighbors who were much weaker neighbors (e.g., Afghanistan, Burma, Laos, Nepal) . . . Therefore, when the Peoples' Republic has enjoyed relative power in a dispute, it has been less inclined to use force—a tendency that clearly contradicts the expectation of those who worry that a stronger China will be a more aggressive China." *Id.* Steve Chan adds that China is "rather patient and inclined to shelve these disputes unless it believes that the other side is trying to change the status quo . . . ." *Id.* at 27. Recent statements by President Jinping of China seem to go further than Steve Chan's postulations. *See* Wen & Blanchard, *supra* note 41 (reporting that Chinese President Xi Jinping said that "[t]he Chinese people love peace. We will never seek aggression or expansion, but we have the confidence to defeat all invasions . . . .").

185. In fact, China has been considering the use of force in South China Sea for a long time. Bennett, *supra* note 36, at 428 (stating that since 1988, "there have been indications that the PRC (People's Republic of China) is willing to consider military means to settle the Spratly Islands dispute.").

and thus contribute to the 'legal order and the maintenance of peace in the South China Sea.'"[186] The Philippines:

> [A]ppealed to the Tribunal's mandate to "promote the maintenance of legal order in respect of the relevant maritime areas, and the avoidance or reduction of threats to international peace and security that inevitably would emanate from a situation of such legal uncertainty," in accordance with the UN Charter and the Preamble of the Convention.[187]

China, on the contrary, appears to be operating from the premise that force, rather than law, will resolve the dispute or at least create a "frozen" conflict over time. For example, the Tribunal quotes one Chinese military official (Major General Zhang Zhaozhong) who said the following on Chinese State Television:

> [W]e have begun to take measures to seal and control the areas around the Huangyan Island [Scarborough Shoal], seal and control continuously up till now. . . . In the area around the island, fishing administration ships and marine surveillance ships are conducting normal patrols while in the outer ring there are navy warships. The island is thus wrapped layer by layer like a cabbage. . . . If the Philippines wants to go in, in the outermost area, it has first to ask whether our navy will allow it. . . . We should do more such things in the future.[188]

After the ruling was delivered in *Philippines v. China*, it was reported:

> [S]ome elements within China's increasingly confident military are pushing for a stronger - potentially armed - response aimed at the United States and its regional allies . . . .
>
> . . . .
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> But the hardened response to The Hague ruling from some elements of the military increases the risk that any provocative or inadvertent incidents in the [SCS] could escalate into a more serious clash.
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> . . . .
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> [R]egular air patrols over the region showed it was seeking to deny the U.S. air superiority afforded by aircraft carriers . . . and drive the U.S. out . . . .[189]

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186. Phil. v. China, Case No. 2013-19, at 185 ¶ 421.

187. *Id.* at 185-86, ¶ 421.

188. *Id.* at 440, ¶ 1120.

189. Ben Blanchard & Benjamin Kang Lim, *Give them a bloody nose': Xi pressed for stronger South China Sea response,* REUTERS (July 31, 2016), *available at* https://www.reuters.com/article/us-southchinasea-ruling-china-insight/give-them-a-bloody-nose-xi-pressed-for-stronger-south-china-sea-response-idUSKCN10B10G (last visited Mar. 23, 2018).

To demonstrate its determination to hold on to its claims in the SCS, "two Chinese civilian aircraft conducted test landings at two new military-length airstrips on reefs controlled by China in the Spratly Islands shortly after the arbitration ruling."[190] Further, "China's air force sent bombers and fighter jets on 'combat patrols' near contested islands in the South China Sea,"[191] and Russia and China began to hold joint military drills in the SCS.[192] Currently, China has "seven reclaimed reefs, three of which have runways, missile batteries, radars, and, according to some experts, the capability to accommodate fighter jets."[193] These actions constitute a clear threat to the international rule of law. Indeed, it is also possible that a regional war could erupt if China continues to ignore the interests of not only Philippines, but also those of Vietnam, Brunei, Malaysia, and all other countries with a stake in the SCS.[194] However, China might argue that, because it has territorial sovereignty over the features of the SCS – a matter that has not been adjudicated – it can legally exercise force regarding those features. As some commentators have argued, China might claim that use of force is legitimate as a matter of self-defense, which is allowed under the U.N. Charter.[195] But that self-defense excuse only works if, in fact, China has indisputably established territorial sovereignty over the contested maritime features

So far, however, beyond the "sharp rhetoric" and muscle-flexing, there has been no "precipitous action" by China.[196] Some commentators argued that "[g]iven China's stake in peaceful trade with the rest of the world, it would be foolish for President Xi Jinping to take provocative actions that could inflame regional tensions and conceivably lead to a

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190. Spetalnick & Brunnstrom, *supra* note 37.

191. Michael Martina, *China Conducts 'Combat patrols' Over Contested Islands*, REUTERS (Aug. 9, 2016), *available at* http://www.reuters.com/article/us-southchinasea-china-patrols-idUSKCN10H091 (last visited Mar. 15, 2018).

192. Ben Blanchard, *China Says to Hold Drills With Russia in South China Sea*, REUTERS (July 28, 2016), *available at* http://www.reuters.com/article/us-southchinasea-china-drills-idUSKCN1080O8 (last visited Mar. 23, 2018).

193. Martin Petty & Manuel Mogato, *ASEAN Overcomes Communique Impasse, Urges Non-militarisation in South China Sea*, REUTERS (Aug. 6, 2017), *available at* https://www.reuters.com/article/us-asean-philippines-southchinasea-state/asean-overcomes-communique-impasse-urges-non-militarisation-in-south-china-sea-idUSKBN1AM0IR (last visited Mar. 23, 2018).

194. *See* Castan, *supra* note 34, at 93 ("One dispute that has ongoing potential for political and military conflict is that over the South China Sea, and in particular, the Spratly Islands."); Charney, *supra* note 88, at 727.

195. *See, e.g.*, Charney, *supra* note 88, at 728; *see also* U.N. Charter art. 51.

196. Spetalnick & Brunnstrom, *supra* note 37.

military confrontation with its neighbors or the United States."[197] But even in the absence of war, China's uses of military means to maintain a "frozen" situation in the SCS amounts to disregard for international rule of law, not very different than the situation in Crimea.

The use of military force in blatant disregard of international law, even if only aimed at creating a "frozen" situation, has been on the increase in recent years – from Russia's use of force in Crimea, followed by historical claims on the territory,[198] the contested use of force in Iraq by the U.S.[199] and its allies and by NATO in the Baltics, to the current use of force in the SCS. In all of these cases, international law was not completely successful in resolving the disputes because of pragmatic reasons.[200] In the case of the Baltics, there were cases brought to the ICJ but were dismissed on technicalities for lack of jurisdiction.[201] In the case

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197. *See* Editorial, *Testing the Rule of Law in the South China S*ea, N.Y. TIMES (July 13, 2016), *available at* http://www.nytimes.com/2016/07/13/opinion/testing-the-rule-of-law-in-the-south-china-sea.html?_r=0 (last visited Apr. 10, 2018).

198. *See supra* text accompanying note 38.

199. The United States and its allies invaded Iraq in 2003 and toppled Saddam Hussein. The principle justification offered for this action is U.N Security Council Resolution 1441, read in conjunction with U.N. Security Council Resolutions 678 and 687. *See* MARK WESTON JANIS & JOHN E. NOYES, INTERNATIONAL LAW, CASES AND COMMENTARY 774 (2014). The controversy is whether the U.S. and its allies should have sought express authorization for the use of force in 2003 because Resolution 1441 merely recalls Resolutions 678 and 687 (which explicitly grant authority to use force against Iraq following its invasion and annexation Kuwait), but it does not explicitly grant such authorization. *Id.*

200. *See* HUWAIDIN, supra note 44.

201. *See, e.g.*, Legality of Use of Force (Serb. and Montenegro v. U.K.), Preliminary Objections, 2004 I.C.J. Rep. at 1307, 1338 (Dec. 15) (holding that the ICJ had no jurisdiction because "Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application"); *see also* Legality of Use of Force (Yugoslavia v. U.S.), Order, 1999 I.C.J. 916, at 923 (June. 2) (finding that the ICJ had no jurisdiction because the United States' reservation to the Genocide Convention provided that with reference to Article IX, before any dispute to which the U.S. is a party may be submitted to the jurisdiction of the Court, "the specific consent of the U.S. is required in each case" and Yugoslavia had not objected to that reservation and the U.S. had indicated that it had not given specific consent and that it would not do so to this particular application).

of Ukraine,[202] as in the case of Georgia,[203] Russia would probably not comply with a decision of the ICJ and enforcement would be unlikely because Russia is a veto-wielding member of U.N. Security Council.[204] However, there is precedent for the proposition that it is in the interest of veto-wielding nations to respect international law and international decisions if those countries want to continue to be respected members of the global community and to influence the course and resolution of

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202. Ukraine has already filed several interstate claims filed to the European Court of Human Rights. *See European Court of Human Rights, Inter-state Applications, available at* https://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf (last visited on Apr. 20, 2018). It is also preparing for file a claim to the International Court of Justice on the basis of the international conventions on the suppression of the financing of terrorism and on the elimination of racial discrimination. *See International Court of Justice, Pending Cases, available at* http://www.icj-cij.org/en/pending-cases (last visited on Apr. 20, 2018). Russia accepted the jurisdiction of the ICJ with regard to these conventions. G.A. Res. 109, International Convention for the Suppression of the Financing of Terrorism art. 24, (1999); International Convention for the Suppression of the Financing of Terrorism art. 24, Jan 10, 2000, 39 I.L.M. 270 (providing that "disputes between two or more States Parties concerning the interpretation or application of the Convention that cannot be settled through negotiation within a reasonable time shall, be submitted at the request of one of them to ad hoc arbitration, or, failing agreement on the organization of such arbitration, to the International Court of Justice."). *See also* G.A. res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination art 22, at 47 (providing that "[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred").

203. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, I.C.J. Reports 2011, at 70, 81 (concerning alleged acts of cleansing committed by Russia in the territory of Abkhazia and South Ossetia, provinces of Georgia). In this case, Georgia relied on Article 22 of CERD to found the jurisdiction of the Court. Article 22 of the Convention on the Elimination of Racial Discrimination which states that "[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement". *Id* The ICJ rejected the application on the ground that Georgia had failed to demonstrate that genuine negotiations to resolve the dispute—as a mechanism to trigger the jurisdiction of the ICJ—had failed. *Id.*

204. *See* U.N. Charter art. 94 (providing, "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment"); *see also* U.N. Charter art. 27(2)(3)(providing ". . . [d]ecisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.").

several other international or global issues. The U.S. presents an example of a veto-wielding nation that found it could not ignore international law. The U.S. refused to comply with the decision in the *Nicaragua* case, vetoed the U.N Security Council resolution, and then withdrew its declaration accepting the optional compulsory jurisdiction of the ICJ.[205] One of the reasons for its criticism of the ICJ was the political bias of the judges who issued the decision in the *Nicaragua* case.[206] However, the U.S. went on to participate in an ICJ case where it could have a say in the choice of judges,[207] even though it risked losing the case.[208]

As stated earlier, China has at least three options. First, it can comply with the ruling in *Philippines v. China* ruling. Second, it can use military force to cling to its claims in the SCS while completely ignoring the ruling in *Philippines v. China.* Third, it can seek a negotiated settlement that allows it to articulate its arguments while not ruling out the possibility of accepting at least some of the reasoning in *Philippines v. China.* The second and third options would give China a chance to continue to respect international rule of law and would be consistent with the role that international law has traditionally played in resolving international disputes. Arbitration decisions have historically resolved many international crises. Examples of that are the *Dogger Bank* case[209]

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205. *See Charter of the United Nations and Statute of the International Court of Justice,* U.N. TREATY COLLECTION, n. 9, *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1&clang=_en#9 (last visited on Mar.23, 2018) (indicating that "a notification received by the Secretary-General on 7 October 1985, the Government of the United States of America gave notice of the termination of its declaration of 26 August 1946, which was registered on 7 October."). Ved P. Nanda, *United States Intervention in Nicaragua: Reflections in Light of the Decision of the International Court of Justice in Nicaragua v. United States,* 9 U. HAW. L. REV. 553, 553 (1987). For the original documents indicating the U.S. vetoes of resolutions sponsored by the Nicaragua, *see* U.N. Docs. S/18250, 31 July 1986; S/PV.2704, 31 July 1986, *available at* http://research.un.org/en/docs/sc/quick/veto, (last visited on April 20, 2018).

206. *See* Sean D. Murphy, *The ELSI Case: An Investment Dispute at the International Court of Justice,* 16 YALE J. INT'L L. 391, 448-49 (1991), *referencing* U.S. Dep't St., Statement: U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, Jan. 18, 1985, 24 I.L.M. 246.

207. *See* Statute of the International Court of Justice art. 26(2), June 26, 1945, 59 Stat. 1031 (providing, "[t]he number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties").

208. *United States v. Italy* (The *Elsi* Case) was heard by a chamber of the ICJ. That would be the case for China, which is still seeking global influence as well as regional influence in the Asia-Pacific area.

209. Dogger Bank (Gr. Brit. v. Russ.), Hague Ct. Rep. (Scott) 403 (Perm. Ct. Arb. 1905) (James Brown Scott ed. 1916) (which resolved a potential armed conflict between Russia and

and the *Alabama Arbitration*.[210] In these cases, the arbitration helped great nations like Russia and Great Britain avoid political embarrassment both internationally and domestically because respectable panels heard the matter whose independence was unimpeachable. Unfortunately, in the case of *Philippines v. China*, China did not participate and claimed that the arbitrators were partial.[211] In those circumstances, the best option for China is the third one, if it wants to save face while continuing to project itself as a nation that respects international law and the rule of law. China might have other incentives to engage in a negotiated settlement because, to the extent that China's aims include gaining access to resources in SCS, a military campaign is not the best way to go about it.[212] The judgment in *Philippines v. China* may not need to be directly enforced. There can be some face-saving arrangements that can be forged. A lesson can be taken from the *U.S. v. Iran* decision,[213] which gave an overwhelming victory to the U.S. Iran was unwilling to comply with the decision and of course the Soviet Union would have resisted enforcement through its veto at the U.N. Security Council. However, most of the ruling was enforced through the Algiers mediation, a face-saving mechanism.[214] Each country has an internal audience that it wants to satisfy as well as an international image that it wants protected in face of potential humiliation, when dealing with situations such as these.[215]

This would not be the first time that a great nation failed to comply with an international decision in a direct manner, but went on to find ways to settle the dispute. *New Zealand v. France (Nuclear Test)*[216] and

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Great Britain through the appointment of an arbitral panel composed of five admirals from Britain, Russia, the U.S., France, and Austria).

210. Alabama Claims (U.S. v. Gr. Brit.) 29 R.I.A.A. 125 (Trib. Arb. 1871). The arbitrators ordering the United Kingdom to pay the U.S. $15,500, 000 and Great Britain ultimately paying the sum on Sept. 9, 1873). *Id.*

211. *Factbox*, *supra* note 157.

212. *See* Bennett, *supra* note 36, at 428-29 (suggesting that "economic interest in the islands' natural resources would be seriously lessened if it had to finance a lengthy military campaign far from its borders before it could begin to exploit those resources.")

213. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980, I.C.J. Rep. 3, 3 (May 24).

214. Torode & Mogato, *supra* note 153 (reporting that a Philippine navy officer had said that "We should find ways to allow some face-saving actions because China could face tremendous domestic pressure.")

215. It has been noted that regarding *Philippines v. China* case, "nationalism and pride are also considerations in this conflict. Therefore, aside from the international political power to be gained from control of the economic and strategic factors outlined above, there is the importance of meeting domestic political needs, and satisfying national pride." Castan, *supra* note 34, at 100.

216. Nuclear Tests Case (N.Z. v. Fr.), 1973 I.C.J. 457, 475.

Rainbow Warrior[217] are examples of such situations. France apologized to New Zealand and refrained from further nuclear tests in the South Pacific, but at the same time ensured that their citizens were repatriated to France before the imprisonment term was over.[218] In the *Nuclear Tests* case, while the case was going on, the French President went on television and announced that France would end its nuclear testing in the Pacific, without conceding that France was doing this out of a sense of legal obligation.[219] Yet this was sufficient to end the dispute. China would not need to announce that it is complying with the result in *Philippines v. China*. But the perception would be that China is, in substance, complying with international law, if there is a negotiated settlement that has some semblance to *Philippines v. China*.

IV. UNITED STATES VERSUS CHINA IN THE SCS

Does the presence of the U.S. in the SCS help or hurt efforts to resolve the dispute? Does it compel China toward a negotiated settlement? The U.S. fully endorsed the decision of the Tribunal, and it sent a clear signal that the SCS matter was not for the Philippines alone, but that it was a global issue with particular implications for U.S., which is the only global power with the capability and will to stand up against China's claims in case China did not comply with the decision in *Philippines v. China*.[220] In the aftermath of the arbitral award, a conference of Chinese scholars observed, "[i]t can be expected that in the future, the U.S. would deploy more advanced military forces to the western Pacific region, so as to put pressure on Chinese Mainland with respect to the SCS issue."[221] The U.S. has done exactly that. It has conducted freedom of navigation operations in direct challenge to China's claims. This was a clear message to China that its claims were

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217. The Rainbow Warrior Affair (Fr. v. N.Z.), 19 R.I.A.A. 199 (U.N. Secretary-General 1986).

218. MARK WESTON JANIS & JOHN E. NOYES, INTERNATIONAL LAW, CASES AND COMMENTARY 348 (2014).

219. *Id.* at 348.

220. The U.S. is involved in China's maritime claims perhaps more than any other challengers to China's SCS claims. Thus, while the arbitral award was about the Philippines, it must be noted that no "Asian country will be able to militarily out muscle China in its maritime disputes . . . The US is the only country that currently enjoys a military superiority over China . . . the extent of and manner in which the US may become involved in China's maritime disputes are pertinent to this line of inquiry." CHAN, *supra* note 184, at 193. *See also id.* at 120 (observing, "[t]here is relatively little doubt that US armed forces have a commanding military advantage over China, even though Beijing has managed to develop some important capabilities recently.").

221. Linping, *supra* note 58, at 296.

being challenged by the U.S. To explain, "[t]welve nautical miles marks the territorial limits recognized internationally. Sailing within those 12 miles is meant to show that the United States does not recognize territorial claims there."[222] Each time, China has made it clear that the U.S. is "violating" Chinese maritime rights. For example, on "one occasion [the U.S] flew a low-altitude surveillance aircraft over some of China's land reclamation projects, during which Chinese radio controllers told U.S. Navy pilots they were violating Chinese airspace."[223] The next step in this process will probably be for China to declare an air defense zone in the SCS.[224]

But the U.S. is not seeking to act unilaterally. It has been "suggested that the U.S. and Japanese militaries conduct combined air patrols in the South China Sea, and that countries in ASEAN form a combined maritime patrol in the South China Sea."[225] In fact:

> [T]he United States is taking steps to increase its security cooperation with Japan, the Philippines, Vietnam, and Malaysia, and to increase Manila and Hanoi's maritime capabilities. This has included providing equipment and infrastructure support to the Vietnamese coast guard, helping the Philippines build a National Coast Watch System to improve its maritime domain awareness, and conducting sea surveillance exercises with Indonesia.[226]

What could the interests of the U.S. in the SCS be if the U.S. is not merely acting as the world's policeman? The first reason for the U.S. to get involved would be to defend its allies based on treaty obligation. But whether the U.S. is willing to honor its mutual defense treaties in the region is yet to be determined. That determination must be made on a case-by-case basis.[227] Pursuant to the Mutual Defense Treaty Between

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222. Yeganeh Torbati & David Brunnstrom, *U.S. Warship Sails Near Disputed Island in South China Sea*, REUTERS (Aug. 6, 2017), *available at* https://www.reuters.com/article/us-usa-southchinasea-navy/u-s-warship-sails-near-disputed-island-in-south-china-sea-idUSKBN19N0O0 (last visited Apr. 1, 2018).

223. Kristina Daugirdas & Julian Davis Mortenson, *U.S. Navy Continues Freedom Of Navigation And Overflight Missions in The South China Sea Despite China's "Island-Building" Campaign*, 109 AM. J. INT'L L. 667, 670 (2015).

224. *See South China Sea: China 'has right to set up air defence zone,'* BBC (July 18, 2016), *available at* http://www.bbc.com/news/world-asia-china-36781138 (last visited Apr. 1, 2018) (reporting that China had said that they would establish an Air Defence Identification Zone (ADIZ) over the South China Sea "if our security is being threatened").

225. DOLVEN ET AL, *supra* note 34, at 22.

226. *Id.*

227. One example of a case in which the U.S. sent a strong signal of its willingness to defend is the dispute between China and Japan. Although the U.S. declared that it took no position regarding the competing sovereignty claims by Japan and China over the Senkaku/

the United States and the Republic of the Philippines,[228] the U.S. is obligated to come to the defense of the Philippines if it is attacked by China. But it ultimately all depends on whether U.S. interests are sufficiently affected in the SCS. If China senses that the U.S. won't come to the aid of its allies, it is likely to be more belligerent and insistent on its claims. For example, "China attacked South Vietnamese forces in the Crescent group of Islands in the Paracels in 1974 when the US was unlikely to intervene."[229] China is probably hopeful that the U.S. will not be able to present consistent and persistent pressure in the SCS because some of the regional stakeholders are not particularly aligned with U.S. interests. A symposium of Chinese scholars noted:

> With the respect to the Philippines, after Rodrigo Duterte took office as the Philippines' 16th president, he changed the pro-America and anti-China policy adopted by his predecessor Benigno Aquino III, and strives to foster cordial relations with China. Sino-Philippine relations were strained when the ruling on the SCS Arbitration was delivered in July 2016, however the relations suddenly became improving and promising .... Duterte repeatedly criticized the U.S.... and announc[ed] that an upcoming military joint exercise with the U.S. would be the last military exercise between the two States.... If China holds to its established national strategy and will not easily give up its strategy when challenged by other States, China would ultimately win an edge over its competitors.[230]

Even if the U.S. does not launch an attack on China, it understands that its credibility in the region may be at stake. It has been observed that the way the U.S. "handles the aftermath of the ruling [*Philippines v. China*] is widely seen as a test of U.S. credibility in a region."[231] It is unlikely that the U.S. will launch a military attack on China given that China has

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Diaoyu Islands in East China Sea, China's declaration of an air defense identification zone in late November 2013, prompted the U.S. to strongly and unambiguously state that it would intervene to support Japan should there be an armed conflict. The mutual defense treaty between Japan and the U.S. was the basis for this policy. CHAN, *supra* note 184, at 174.

228. Art. IV provides that "[e]ach Party recognizes that an armed attack in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes," and art. V which provides that "[f]or the purpose of Article IV, an armed attack on either of the Parties is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific." Mutual Defense Treaty, Phil.-U.S., art. IV-V, Aug. 30, 1951, U.S.T. 3947-3952.

229. CHAN, *supra* note 184, at 79.

230. Linping, *supra* note 58, at 300.

231. Spetalnick & Brunnstrom, *supra* note 37.

been holding joint-military drills with the Russians in the SCS.[232] The U.S. was unlikely to rally the European Union towards a united front because the European Union nations have been unwilling to antagonize China, their important investment partner.[233]

Secondly, the U.S. may want to intervene out of the need to protect freedom of navigation rights and freedom of overflight, among other high seas rights guaranteed under UNCLOS.[234] The U.S., the world's most dominant naval power, is obviously interested in unimpeded passage through the SCS.[235] The U.S. has asserted that, along with other nations, it has the right to ensure that freedom of navigation and overflight continue to be respected in the SCS and that China's claims to about 90 percent of this sea put those interests in jeopardy.[236] Freedom of navigation concerns are not unfounded because China has sought to limit those freedoms.[237] Chinese claims amount to the creation of several zones of territorial sea in the SCS with potentially negative ramifications for freedom of navigation and freedom of overflight, and these

232. *See* Blanchard, *supra* note 192.

233. Robin Emmott, *EU's statement on South China Sea reflects divisions*, REUTERS (July 15, 2016) *available at* https://www.reuters.com/article/us-southchinasea-ruling-eu/eus-statement-on-south-china-sea-reflects-divisions-idUSKCN0ZV1TS (last visited on Mar. 9, 2018) (noting that "speaking with one European voice has become difficult as some smaller governments, including Hungary and Greece, rely on Chinese investment and are unwilling to criticize Beijing despite its militarization of South China Sea islands.")

234. UNCLOS, *supra* note 6 at 57.

235. It is argued that "[t]he strategic location of the South China Sea . . . is far more important to the United States than even the energy resources that might be available under its waters." ZOU, *supra* note 84, at 63. This is because South China Sea's strategic location linking two oceans and three continents.

236. "[T]he United States will continue to protect freedom of navigation and overflight—principles that have ensured security and prosperity in this region for decades. There should be no mistake: the United States will fly, sail, and operate wherever international law allows, as U.S. forces do all over the world. America, alongside its allies and partners in the regional architecture, will not be deterred from exercising these rights—the rights of all nations. After all, turning an underwater rock into an airfield simply does not afford the rights of sovereignty or permit restrictions on international air or maritime transit." Ashton Carter, Secretary of Defense, Statement at the IISS Shangri-La Dialogue: "A Regional Security Architecture Where Everyone Rises" (May 30, 2015).

237. For example, "Foreign military aircraft. This is Chinese navy. You are approaching our military alert zone. Leave immediately," a radio operator told the aircraft, later bluntly warning: 'Go, go.'" Consistent with United States assertion of freedom of navigation, "[a]fter each warning, the U.S. pilots responded calmly that the P-8A was flying through international airspace. . .". Simon Denyer, *Chinese Warnings to U.S. Plane Hint of Rising Stakes Over Disputed Islands*, WASH. POST (May 21, 2015), *available at* https://www.washingtonpost.com/world/asia_pacific/chinese-warnings-to-us-plane-hint-of-rising-stakes-over-disputed-islands/2015/05/21/381fffd6-8671-420b-b863-57d092ccac2d_story.html?utm_term=.f523a2d5fa75 (last visited Apr. 1, 2018).

restrictions would impact U.S. strategic and military interests in the region.[238] It is therefore unsurprising that maritime powers, such as the U.S., would refuse to recognize China's claim's and base the legality for their actions on the findings of the Tribunal. China lacks the level of economic and military might sufficient to challenge the U.S. It is unlikely that the U.S. will launch an armed attack on China beyond actions aimed at signaling refusal to recognize China's claims in the SCS. At the same time, it does not appear that China is going to yield to any pressure or pull back from what it considers its rightful territorial and maritime claims.[239] The result would be a frozen situation where China clings to the islands while not being able to stop any alleged violation of its territorial sea and other maritime rights.

Thirdly, it is plausible that U.S. intervention in the SCS is aimed at containment of a militarily and economically rising China.[240] From a

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238. Song, *supra* note 42, at 492 (observing that "[b]ecause the shipping routes in these two East Asian seas are so important to the global trade, even countries outside the area, such as the United States, India, and Australia have expressed increasing concerns about shipping and maritime security, freedom of navigation, and, in general, peace and stability in the area."). *See also* Hossain, *supra* note 8, at 2 (observing, "[f]or the US, the SCS, because of its maritime route connecting the Pacific Ocean in the east and Indian Ocean in the south, also promotes strategic cooperation - both military and economic – with the nations in the region"). UNCLOS, *supra* note 6, at 405 (providing, "[i]n the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag.").

239. Steve Chan explains this in terms of reputation stating that China "cares more about its reputation for being resolute and "not allowing itself to be pushed around." CHAN, *supra* note 184, at 179. One explanation for insisting on its reputation is that China "hopes to discourage other subsequent challengers" of its maritime claims. *Id.* at 183. The Philippines appears to have picked a fight with China with the filing of the claim against China and thus taken a step that no other challenger has. Additionally, the Philippines' "deployment of its largest naval vessel to arrest Chinese fishermen in the Scarborough Shoal/ Huangyan Island incident was a provocation." *Id.* at 184. So, while China may not want to use force and wants to compromise, in the case of Philippines it appears to be China's position that it will respond forcefully. In other words, "China doesn't pick fights, but . . . if some picks a fight with China it will offer a forceful response." *Id.* at 183. On the other hand, Steve Chan argues that China's "past practice in settling its land borders has been generally accommodative when dealing with smaller and weaker neighbors, and it has typically taken a tougher stance when dealing with its bigger and stronger counterparts. If this pattern continues, we can expect Beijing to be more inclined to settle its South China Sea disputes on an equitable basis and even on terms more favorable to the other claimant states." *Id.* at 189.

240. China's maritime claims must be seen in the "broader security context of Beijing seeking to break out of a seaward confinement" with, as China sees it, the U.S. trying to stop it. *Id.* at 191. China's security predicament is predominantly sea-based. China is "heavily dependent on foreign commerce and an overwhelming portion of its imports and exports travel by the shipping lanes of the South and East China Seas," which could be "subjected to naval interdiction and an economic blockade." *Id.* at 190. Thus, "[i]n the event of a crisis or war, the United States and its partners could seize or sink Chinese commercial vessels at critical chokepoints or on the high seas, and there is very little that Beijing could do about it."

geopolitical perspective, the SCS has been cast as important because the China-Philippine "dispute has intensified political and military rivalry across the region between the rising power of China and the long-dominant player, the United States."[241] A symposium of Chinese scholars theorized that "[t]he U.S. has strategic interests behind the dramatic SCS Arbitration. It intends to fuel regional disputes by stoking the conflicts between China and Southeast Asian countries."[242] China views the activities of the U.S. and like-minded nations like Japan as having one purpose - "contain China."[243] According to a symposium of Chinese scholars, the Chinese perspective appears to be:

> The overall international strategy of the U.S. follows the concept of "balance of power" developed by the European powers, which pushes the EU to compete with Russia in the continent of Europe, and China with Japan in the Far East. The U.S., resembling the U.K. in the 19th century, assists one party in a competition as an offshore balancer, which would help that party become the winner or have an edge on its competitors. Viewed from this concept, the U.S. developed its Asia-Pacific rebalance strategy primarily with two aims: one is to end China's "period of strategic opportunity," to inhibit China's continued development, and at the same time to stoke tension between China and its neighbors in the hope of diffusing China's power; the second is to benefit from the competition or fight between China and Japan.[244]

These scholars also note that the United States' strategy would be to "deploy more troops to the Asia-Pacific region; to strengthen relationships with Japan and other U.S. alliances in the region; and to

Id. at 183, citing AARON FRIEDERG, A CONTEST FORE SUPREMACY: CHINA, AMERICA, AND THE STRUGGLE FOR MASTERY IN ASIA 228 (2011). Thus, quite unsurprisingly, China has tried to limit U.S. claims to freedom of navigation in SCS. *See* reporting the "United States has criticized China's construction of man-made islands and build-up of military facilities in the sea, and expressed concern they could be used to restrict free movement." Himani Sarkar, *No change to U.S. Navy Freedom of Navigation Patrols: Commander*, REUTERS (May 8, 2017), *available at* https://www.reuters.com/article/us-southchinasea-usa/no-change-to-u-s-navy-freedom-of-navigation-patrols-commander-idUSKBN184190 (last visited Jan. 29, 2018). There is some reason to worry because there have been incidents in the past when China and U.S. clashed in SCS. For example, China was "concerned US aerial surveillance (with the collision between the US surveillance plane and a Chinese fighter jet in April 2001), U.S. maritime surveillance (in the Impeccable Incident of March 8, 2009), and US hydrographic surveying (China challenged the surveying of the USNS Bowditch in September 2002) in the South China Sea." *See* ZOU, *supra* note 84, at 23.

241. Torode & Mogato, *supra* note 153.

242. Linping, *supra* note 58, at 300.

243. *Id.* at 297.

244. *Id.* at 299-300.

broaden American trading partners in the Asia-Pacific region."[245] More specifically, they observed that "Japan is developing a sea-based missile defense system, with the purpose of joining the U.S. in creating its global missile defense system."[246] If true, this could be a reason for China to yield much in any negotiated settlement if it begins to appear like a U.S.-win.

China is probably motivated to claim almost all of the SCS because UNCLOS "gives coastal states the right to regulate not only economic activities, but also foreign military activities"[247] in their exclusive economic zones (EEZ). However, as James W. Houck and Nicole M. Anderson argue, there is no "express UNCLOS prohibition against military activities in the EEZ . . . when compared to language regulating military activities in other zones . . . suggesting that had the UNCLOS drafters wanted to similarly restrict military activities in the EEZ, they would have done so."[248] Moreover, "State practice has generally supported military activities in the EEZ."[249] The negotiating history of UNCLOS also suggests that the drafters intended to allow regulation of military activities by the coastal state in its territorial waters. For example, the delegate from Yemen stated, "[i]t was the duty of a coastal State not only to facilitate international trade, but also to protect itself against any attack on or threat to its national security and sovereignty. It was therefore essential for warships and military aircraft to obtain authorization to pass through territorial waters."[250] Moreover, the ICJ has upheld this positivistic approach.[251]

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245. *Id.* at 296.

246. *Id.* at 297.

247. *See* James W. Houck & Nicole M. Anderson, *The United States, China, and Freedom of Navigation in the South China Sea*, 13 WASH. U. GLOBAL STUD. L. REV. 441, 444-45 (2014).

248. *See id.* at 444.

249. *Id.*

250. Third United Nations Conference on the Law of the Sea, *Summary Records of Meetings of the Second Committee 13th Meeting*, ¶ 52, U.N. DOC. A/CONF.62/C.2/SR.13 (July 23, 1974).

251. *See* S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, ¶¶ 65-66 (Sept. 7) ("[T]here is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent . . . This conclusion could only be overcome if it were shown that there was a rule of customary international law which, going further than the principle stated above, established the exclusive jurisdiction of the State whose flag was flown."); *See also* Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 72 (July 8) ("[T]here was no specific rule of customary law which prohibited the use of nuclear weapons; if such a rule had existed, the General Assembly could simply have referred to it and would not have needed to

If military means will not work, can the U.S. sue China over its claims in the SCS? Some scholars suggest that, "given the failure of the United States to ratify the Convention, the U.S. calls upon China to comply with the award cannot carry much weight."[252] However, that ignores the fact that the U.S. acknowledges that most (except for provisions on deep-sea mining) of UNCLOS is customary international law.[253] Nevertheless, it would help the U.S. if it could contest Chinese claims on the basis of treaty law rather than customary international law, which is imprecise, malleable, and more cumbersome to prove.[254] However, it is unlikely that China would participate in any legal proceedings involving the U.S.

Ultimately, if the U.S. does not directly confront China's militarily or using the instrument of law, it can at least use its political, economic, and military clout to force China towards a negotiated and diplomatic settlement. If the U.S. can do this, then its presence in the SCS may ultimately help rather than hurt the case for rule of law. The U.S. is definitely interested in promoting the rule of law in the SCS because that helps the U.S. to achieve its interests without recourse to military means. In fact, leading up the announcement of the decision in *Philippines v. China* case, "United States officials talked about rallying a coalition to impose 'terrible' costs to Beijing's international reputation if flouted the court's decision," and the need to be "'very loud and vocal, in harmony together ... to say that this is international law, this is incredibly

undertake such an exercise of legal qualification."); *see also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 269 (June 27) ("[I]n international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise.")

252. Reed & Wong, *supra* note 2, at 760.

253. *See* SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 340 (2d ed. 2012); *see also Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention: Hearing Before the S. Comm. on Foreign Relations.*, 112th Cong. 8 (2012) (written testimony of Hillary R. Clinton, Sec'y U.S. Dep't of State).

254. To prove that a norm of customary international law exists, it is necessary to establish two elements, general state practice and *opinio juris*, that states engage in the practice with a sense of legal obligation with both elements requiring a large amount of evidence to be established. *See* Statute of the I.C.J. art. 38(1), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993; *see* Nadia H. Dahab & Spencer G. Scharff, *Lost Opportunity: Why Ratifying the Law of the Sea Treaty Still Has Merit*, 6 ARIZ. J. ENVTL. L. & POL'Y 582, 583-84 (2016) (stating that the failure of the U.S. to ratify UNCLOS has "implications on issues of the environment, the economy, national security, and international territorial and maritime dispute resolution" and that while "addressing the rise of territorial and maritime disputes between China, the Philippines, and Vietnam on claims of ownership to the South China Sea, President Obama called for ratification, noting that 'we cannot exempt ourselves from the rules that apply to everyone.'").

important, it is binding on all parties.'"[255] Self-help on the part of the Philippines, acting alone, is simply not a viable option. However, acting in conjunction with other littoral states in the SCS region, and allies such as the U.S., Japan, and Australia, provides options such as direct countermeasures.[256] Those countermeasures could include marshaling shame or impugning the Chinese reputation regarding its relationship to international law, which would not preclude the possibility of nations in the region bringing more proceedings against China.[257] China has shown signs that it may not want to earn a reputation for flouting international law.[258] Gregory Poling of the Asia Maritime Transparency Initiative may have predicted well when he said that the *Philippines v. China* ruling

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255. David Brunnstrom & Matt Spetalnick, *U.S. Diplomatic Strategy on South China Sea Appears to Founder,* REUTERS (July 28, 2016), *available at* http://www.reuters.com/article/us-southchinasea-usa-diplomacy-analysis-idUSKCN1072WS (last visited Mar. 10, 2018).

256. *See, e.g.*, Air Serv. Agreement (Fr. v. U.S.), 18 R.I.A.A. 417, 447 (1978) (holding that U.S.'s refusal to permit a French carrier to fly from Paris to Los Angeles was a valid countermeasure after France rejected a U.S. carrier's right under the U.S.-France Air Sevices Agreement to fly first to London and then Paris, instead of directly to Paris).

257. *See* Editorial Board, *Testing the Rule of Law in the South China Sea*, N.Y. TIMES (July 12, 2016), *available at* http://www.nytimes.com/2016/07/13/opinion/testing-the-rule-of-law-in-the-south-china-sea.html?_r=0 (last visited Mar. 10, 2018) ("[D]espite competing interests of their own, they [nations in the region] need to join the Philippines in endorsing the tribunal decision and then proceed, if necessary, with their own arbitration cases."); *see also* Anthony Deutsch & Toby Sterling, *China's Legal Setback Could Spur More South China Sea Claims*, REUTERS (July 14, 2016), *available at* http://www.reuters.com/article/us-southchinasea-ruling-legal-idUSKCN0ZU0JV (last visited Mar. 10, 2018) ("China's resounding defeat in a legal battle with the Philippines over territorial claims in the South China Sea could embolden other states to file lawsuits if Beijing refuses to compromise on access to the resource-rich region."). The most credible threats could come from Vietnam and Indonesia. *See* Reuters Staff, *China, Vietnam Meeting Canceled Amid South China Sea Tensions*, REUTERS (Aug. 7, 2017), *available at* https://www.reuters.com/article/us-asean-philippines-china-vietnam/china-vietnam-meeting-canceled-amid-south-china-sea-tensionidUSKBN1AO07K?feedType=nl&feedName=ustopnewsEarly (last visited Mar. 10, 2018) ("Vietnam has emerged as the most vocal opponent of China's claims in the waterway."); *see* Fergus Jensen, *Indonesia Hopes Fishermen Can Net its South China Sea Claims*, REUTERS (July 13, 2016), *available at* https://www.reuters.com/article/us-southchinasea-ruling-indonesia/indonesia-hopes-fishermen-can-net-its-south-china-sea-claims-idUSKCN0ZT14M (last visited Mar. 10, 2018) ("Indonesia wants to send hundreds of fishermen to the Natuna Islands to assert its sovereignty over nearby areas of the South China Sea to which China says it also has claims.").

258. *See, e.g.*, Torode & Mogato, *supra* note 153 (reporting that "[s]ome among leadership elites had been 'stung' by its [ruling's] comprehensive stance against China," and that "[o]ther Chinese experts, speaking privately, said the ruling was being closely scrutinized, despite official statements dismissing its relevance"); *see also* Wong & Edwards, *supra* note 15.

"will have enormous impact on future jurisprudence and on the perceived legitimacy of other claims in the [SCS] and around the world."[259]

In sum, there should be a variety of steps, short of military confrontation, that can be taken. It has been noted that, in all of this:

> The United States has a pivotal role – not in confronting China, but in supporting the principles of freedom of navigation and peaceful dispute resolution. The goal of diplomacy should not be to achieve a definitive one-off settlement, which is highly unlikely. It should instead be to manage the dispute responsibly and provide political space and incentives for the leaders of China, Vietnam, and other claimants to invest in cooperative measures and avoid embroiling the region in conflict.[260]

V. TOWARDS A NEGOTIATED SETTLEMENT

There are several reasons why a negotiated settlement appears to be the only way to resolve the dispute in the SCS, and to ultimately salvage respect for international rule of law. At this time, international law is at a crossroads because of the willingness of powerful states to use force to create "frozen" situations. Firstly, the U.S. is not likely to force China to relinquish its claims in the SCS beyond merely challenging its maritime claims by occasional freedom of navigation and overflight operations. The only way for the U.S. to maintain credibility is to continue those exercises, and to create economic and political incentives for China to move towards a negotiated settlement. There is much at stake for China in terms of its economic interests.[261] China cannot afford to engage in activities that may push actors such as the U.S. to impose economic sanctions on it either regionally or globally; China certainly wants trade relations with its regional neighbors to continue. For example, in the aftermath of the *Philippines v. China* ruling, the Chinese government rejected calls for a trade ban on products from the Philippines, well aware that the "[t]otal two-way trade between China and the Philippines rose

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259. Deutsch & Sterling, *supra* note 257.

260. John D. Ciociari & Jessica Chen Weiss, *The Sino-Vietnamese Standoff in the South China Sea*, 13 GEO. J. INT'L AFF. 61, 68 (2012).

261. It is noted, for example by Steve Chan, that "China has become the largest trade and investment partner for practically all of the major contestants involved in its maritime claims . . . States with significant commercial and financial ties have been known to go to war . . . We also know, however, that these economic relationships have tended to be one of the strongest forces promoting interstate peace." CHAN, *supra* note 184, at 57.

5.7 percent in the first six months of the year to $22.3 billion, according to Chinese customs figures."[262]

Secondly, China and the Philippines can save face if they use mechanisms that are guaranteed by UNCLOS to resolve disputes in narrow and semi-enclosed areas, such as the SCS, which often give rise to competing claims over maritime features.[263] Where there are shared resources, a negotiated settlement is the best option because of the possibility of a win-win result.[264]

Thirdly, a negotiated settlement is the only way for China to avoid the negative consequences that a "frozen" situation might give rise to, including economic and technological blockades. Some analysts think:

> China [is] caught in something of a bind. On the one hand, Beijing places a high premium on preserving its autonomy and avoiding concessions that will limit its future actions. On the other hand, China's

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262. Reuters Staff, *China Brushes Off Calls for Philippines Boycott After South China Sea Ruling*, REUTERS (July 19, 2016), *available at* http://www.reuters.com/article/us-southchinasea-ruling-business-idUSKCN0ZZ0BU (last viewed Mar. 10, 2018). But China would be concerned if there was some collective boycott of trade relations by more countries. *See* Reuters Staff, *Vietnam TV Station Drops Chinese Drama Over South China Sea Dispute*, REUTERS (July 18, 2016), *available at* http://www.reuters.com/article/us-southchinasea-ruling-vietnam-drama-idUSKCN0ZY0VU (last visited Apr. 10, 2018) (stating that Vietnam dropped a Chinese drama in the wake of the ruling when the actors in the drama voiced support for China's rejection of the ruling); *see* Ben Blanchard, *China Irked by 'wrong' Australia Remarks, Philippine Leader Eyes Talks*, REUTERS (July 14, 2016), *available at* http://www.reuters.com/article/us-southchinasea-ruling-idUSKCN0ZU0VW (last visited Mar. 10, 2018) (stating that Australia, which has close business ties with China, declared that it would continue to keep exercising its right to freedom of navigation and support the right of others to do the same); *see* Sue-Lin Wong & Terrence Edwards, *Discord Over South China Sea Clouds Asia-Europe Summit*, REUTERS (July 16, 2016), *available at* http://www.reuters.com/article/us-southchinasea-ruling-idUSKCN0ZW0ET (last visited Mar. 10, 2018) (stating that in the aftermath of the ruling, Japan met with the Philippines, Vietnam, and several other countries and told them Japan would cooperate with the enforcement of the decision).

263. Some scholars have observed that "[n]o land area of the South China Sea, Spratlys included, lies more than 200 nautical miles ('nm') from the nearest national baseline. Hence no outer limit of any Exclusive Economic Zone can be delineated without infringing upon a possible claim raised by the respective adjoining or opposite neighbor." Michael Strupp, *Spratly Islands*, OXFORD PUB. INT'L L. (Mar. 2008), *available at* http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1357 (last visited Mar. 10, 2018).

264. China has previously floated the idea of "joint development" overlapping contested maritime areas and "governments of the claimant states all have accepted the idea of joint development;" however, this was in the 1990s, but perhaps this idea can be revived. *See* Gao, *supra* note 15, at 352. The problem is that the "concept of joint development has been around for many years and has been well discussed at various workshops, but little progress has been achieved." *Id.* at 355.

need for foreign capital and technology require adhering to international norms. Attempts at maintaining this balance may explain the oscillation between a confrontational style and a more diplomatic one.[265]

It is noteworthy that China has always sought a negotiated settlement, except when it wanted those negotiations to take place on its terms. China rejected the offer of the Philippines to engage in multilateral – as opposed to bilateral – negotiations with other stakeholders and littoral states in the SCS that had objected to its nine-dash-line claims.[266] The Philippines favored multilateral negotiations because it is weary of China, the superior military, demographic, and economic power in the region,[267] wielding greater bargaining power to the Philippines' detriment.[268] Other countries in the region have also viewed bilateral negotiations with China as being an unacceptable coercive tactic.[269] Bilateral negotiations mean little because the smaller countries in the region "know that with military and economic leverage China will have the upper hand in negotiations."[270] China has always favored bilateral negotiations over multilateral ones, but it is not as if bilateral talks would necessarily be more successful.[271] Ultimately, what matters is whether China has the requisite good faith going into such negotiations. A multilateral platform just gives more confidence to smaller countries like the Philippines and other littoral (or coastal) states that the bargaining process is fair. Such countries like the Philippines are weary of China's

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265. Denoon & Brams, *supra* note 35, at 307.

266. Phil. v. China, Case No. 2013-19, ¶ 160.

267. Ciociari & Weiss, *supra* note 260, at 65 (noting, for example, that "China accounts for roughly $20 billion in two-way trade . . . These concerns may explain why Vietnam has recently returned to bilateral talks with China.").

268. China "sees multiparty talks as a way for its smaller neighbors to gang up on China, with the United States, Japan, India, and others hovering behind them. China instead seeks to keep the dispute in bilateral channels, where it can use its superior military and economic might to extract concessions." *See id.* at 64. Steve Chan, however, believes that "[c]ollective action by China's counterparts in Southeast Asia is complicated by the fact that these countries are also involved in their own territorial disputes, such as between Malaysia and the Philippines, or other kinds of competition." CHAN, *supra* note 184, at 34.

269. *See* Smith, *supra* note 8, at 30 ("Bilateral negotiations unfairly benefit China and undermine the centrality of ASEAN in regional affairs").

270. *Id.* at 36.

271. *See* Castan, *supra* note 34, at 103. It must be noted that this would not be the first time that China engaged in bilateral negotiations that led nowhere. For example, one scholar points to a time when:

> the Philippines struggled to get the issue of China's continued intrusions into its claimed areas onto the ASEAN agenda in 1995. China had resisted this strenuously. Subsequently the two disputants held bilateral talks which did not produce agreement, as China continued further to occupy Filipino-claimed atolls even up to the day before the negotiations began. *Id.*

"'divide and conquer' strategy" which makes it difficult for regional actors to "form a united front against a common adversary."[272] All the smaller nations are keenly aware that if they "negotiate[] bilaterally with China, they put themselves at a disadvantage, for China is clearly the stronger party in a two-way contest."[273]

Yet, the Association of South East Asian Nations (ASEAN) has done little to promote multilateral negotiations. It is observed that, "the [*Philippines v. China*] ruling should have emboldened the grouping to challenge [China] more forcibly."[274] ASEAN has real potential for helping resolve the dispute, which is why China has tried to prevent efforts to "'internationalise' the South China Sea issue" through ASEAN. [275] But no role ASEAN can play in promoting a negotiated settlement is guaranteed,[276] because the regional organization operates on the basis of consent and not every member country may consent. China has been able to divide ASEAN because it has reliable and steady regional allies like Laos and Cambodia on its side.[277] But in order for ASEAN to pull its act together, it still needs the support of international actors like the U.S. to raise the stakes on China to cooperate. This is because China – towering above the ASEAN even in its collective sense both militarily and economically – has, in the past, simply ignored declarations by ASEAN as a regional platform.[278] Yet, China understands that ultimately it needs

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272. *Id.* at 102.

273. *Id.* at 103.

274. Joshi, *supra* note 30.

275. Greg Torode, *China Leaning on Singapore to Keep ASEAN Calm Over South China Sea: Sources*, REUTERS (Aug. 8, 2017), *available at* http://www.reuters.com/article/us-asean-china-singapore-analysis-idUSKBN1AO17D (last visited Mar. 10, 2018).

276. *See* CHAN, *supra* note 184, at 52. In fact, Steve Chan notes:

Beijing has sought bilateral talks to settle its maritime disagreements, and it has shunned involvement by international organizations. This position is understandable in that China would clearly enjoy a stronger bargaining position when matched against each of the other parties in these disputes separately in comparison to a situation whereby a third party also becomes involved. *Id.*

277. *See id.* at 175-76. Chan observes:

Many ASEAN members do not have a direct stake in the Spratlys disputes, and some of them have views that are more aligned with Beijing's than with those of their fellow ASEAN members. For example, Cambodia declined to issue a joint communique on these disputes following its role as the host of the 2012 meeting of ASEAN leaders, thus aligning itself with Beijing's preference not to "internationalize" its disputes with other countries such as the Philippines." But, what is less clear is whether, despite the show of force in SCA, the U.S would be willing to invoke the defense treaty with the Philippines. *Id.*

278. *See* Castan, *supra* note 34, at 102. Castan states:

The1992 the ASEAN Foreign Ministers Meeting saw the Spratlys issue reach the ASEAN agenda . . . . the growing unease of the South-East Asian nations resulted in

to work with ASEAN on a whole range of issues, particularly trade,[279] which would be disrupted by any significant standoff with ASEAN, supported by other international actors like the U.S.

ASEAN is suited for resolving this conflict because it would help China "save face," while preventing the "frozen" situation that is contrary to international rule of law. China would be more comfortable using an Asian – as opposed to a Western – platform in reaching an agreement on the contested maritime features in the SCS. A negotiated settlement is also suited to the delimitation of maritime spaces in this case because most ASEAN's states border the SCS states,[280] with adjacent or opposite coasts.[281] According to one scholar:

> There is no greater opportunity for ASEAN to accomplish this than by paving the way for smooth relations and facilitating the settlement of long-held disputes in the South China Sea. Principles of peaceful dispute settlement, enhanced consultations on common interests, upholding international law, and the centrality of the organization guide ASEAN operations.[282]

Such negotiations would be fully consistent with UNCLOS. The UNCLOS dispute resolution mechanism provides that, prior to engaging the compulsory dispute resolution mechanisms in Part XV of UNCLOS,

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an ASEAN Declaration the South China Sea. This urged all claimants to settle their sovereignty and jurisdictional disputes peacefully, and resolved to explore avenues for cooperation on issues such as environmental controls, marine navigation and criminal activities such as drug trafficking and piracy in the South China Sea. China and Vietnam, whilst not then members of ASEAN, were asked to declare their support for the declaration. Vietnam did so, while China did not. *Id.*

279. *See* Shicun & Nong, *supra* note 27, at 153 (". . . . China and ASEAN have expanded economic development through the establishment of a free trade zone.").

280. Those countries are Brunei, Cambodia, China, Indonesia, Malaysia, the Philippines, Singapore, Taiwan (most countries do not recognize Taiwan as a sovereign state), Thailand and Vietnam. *See South China Sea,* ENCYCLOPEDIA BRITTANICA, *available at* https://www.britannica.com/place/South-China-Sea (last visited Apr. 20, 2018)

281. *See* Maritime Delimitation in the Black Sea (Rom. v. Ukr.), Judgment, 2009 I.C.J. Rep. 950, ¶ 31 (Feb. 3). The ICJ noted:

> Articles 74 and 83 of UNCLOS are relevant for the delimitation of the exclusive economic zone and the continental shelf, respectively. Their texts are identical, the only difference being that Article 74 refers to the exclusive economic zone and Article 83 to the continental shelf. These Articles provide as follows: '1. The delimitation of the exclusive economic zone [the continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution. 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV. *Id.*

282. Smith, *supra* note 8, at 34.

parties need to engage in friendly consultations and negotiation. In addition, the U.N. Charter provides for various mechanisms of dispute resolution, including "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[283]

Accordingly, it is submitted that the friendly mechanisms under the auspices of ASEAN or under the Treaty of Amity and Cooperation in Southeast Asia would not be inconsistent with UNCLOS. The ASEAN Charter provides that "[m]ember States shall endeavor to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation."[284] Further, it states that "ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation"[285] and that "[d]isputes which do not concern the interpretation or application of any ASEAN instrument shall be resolved peacefully in accordance with the Treaty of Amity and Cooperation in Southeast Asia and its rules of procedure."[286] The Treaty of Amity and Cooperation in Southeast Asia, to which China is a state party, provides for "[s]ettlement of differences or disputes by peaceful means."[287] More specifically, this treaty provides that "High Contracting Parties shall have the . . . good faith to prevent disputes from arising. In case disputes . . . arise, especially disputes likely to disturb regional peace and harmony, they shall refrain from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations."[288] Thus, it behooves China to live up to its regional obligations by cooperating with ASEAN in amicably resolving the SCS conflict. This approach appears particularly compelling because it is "[t]he only way for ASEAN nations to be self-reliant *vis-a-vis* China in collective negotiation, as individually these countries hold no leverage over China."[289] Renewed and vigorous intervention by ASEAN is necessary because, despite the fact that in 2002 China and ASEAN agreed to the Declaration on the Conduct of Parties in the South China Sea (DOC), tensions have only

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283. U.N. Charter art. 33, ¶ 1.

284. Charter of the Association of Southeast Asian Nations, art. 22, ¶ 1, Nov. 20, 2007, 2624 U.N.T.S. 223 [hereinafter ASEAN Charter].

285. *Id.* at art. 22 para. 2.

286. *Id.* at art. 24 para. 2.

287. Treaty of Amity and Cooperation in Southeast Asia art. 2(d), Feb. 24, 1976, 1025 U.N.T.S. 317 [hereinafter Treaty of Amity and Cooperation].

288. *Id.* at art. 13.

289. Smith, *supra* note 8, at 35.

increased and, in any case, this declaration was non-binding.[290] Those renewed efforts must result in the adoption of a legally binding Code of Conduct or a treaty.[291] Any negotiations should be aimed at the "[c]onclusion of a multilateral agreement among all concerned states for the management of the living and non-living resources and protection of the environment of the South China Sea."[292] This could mean that the parties institute "joint ventures and profit-sharing arrangements."[293] It should be noted, however, that the role of ASEAN should not be overemphasized. It appears that China sees ASEAN "as an 'alliance of US stooges . . . directed specifically against China.'"[294]

VI. RECOMMENDATIONS AND CONCLUSION:

A. Amending UNCLOS

The preceding section discussed the pros and cons of a negotiated settlement. If executed, it should result in "cooperative arrangements such as those relating to law enforcement activities or the joint development of resources,"[295] which appear to be supported by China as well.[296] There has to be a win-win situation to resolve the impasse. Along those lines, the negotiated settlement could provide that Filipino fishermen have access to the disputed maritime spaces such as the

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290. *Association of the Southeast Asian Nations Declarations on the Conduct of Parties in the South China Sea*, ASS'N OF SOUTHEAST ASIAN NATIONS (May 14, 2012), *available at* http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2 (last visited Apr. 20, 2018). For the most part, declarations are non-binding. *See* MARK JANIS & JOHN NOYES, INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 52-53 (2017).

291. Multilateral negotiations would produce the best result, possibly in the form of a multilateral treaty regarding South China Sea. *See* ZOU, *supra* note 84, at 53 (proposing that "[i]f China is not forthcoming, ASEAN members themselves should draw up a Treaty on a Code of Conduct in the South China Sea, and after ratification, open it to accession by nonmember states along the lines of the ASEAN Treaty of Amity and Cooperation and the Southeast Asian Nuclear-Free Weapons Zone Treaty").

292. Schoenbaum, *supra* note 8, at 474.

293. CHAN, *supra* note 184, at 101.

294. Lilienthal & Ahmad, *supra* note 159, at 95 (citing *Round the World - Puny Counter-Revolutionary Alliance*, 10 PEKING REV., no. 34, Aug. 18, 1967, at 39, 40).

295. Lucy Reed & Kenneth Wong, *Marine Entitlements in the South China Sea: The Arbitration Between the Philippines and China*, 110 AM. J. INT'L L. 746, 759 (2016).

296. *Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in South China Sea*, XINHUA (July 12, 2016), *available at* http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379493.htm (last visited Mar. 11, 2018) (emphasizing commitment "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").

Scarborough Shoal,[297] while China freezes its made-made constructions in the region.

But even if the SCS dispute is resolved through a negotiated settlement, there is the need to craft solutions for weaknesses exposed in UNCLOS by this dispute. UNCLOS provides that, "[a]fter the expiry of a period of 10 years from the date of entry into force of this Convention, a State Party may . . . propose specific amendments to this Convention . . . and request the convening of a conference to consider such proposed amendments."[298] In fact, UNCLOS provides for a simplified amendment procedure in which, "[i]f, 12 months from the date of the circulation of the communication, no State Party has objected . . . the proposed amendment shall be considered adopted."[299] Faced with a seemingly intractable situation like the SCS, it may be worth looking at some UNCLOS provides that could have given rise to that situation. One of the reasons for the SCS dispute is the struggle over resources in a semi-enclosed sea.[300]

UNCLOS envisages that, for semi-enclosed seas, negotiations should be held to delimit maritime spaces.[301] But what happens if negotiations fail and the compulsory dispute settlement mechanisms produce results which are rejected by one of the parties, like in the case of *Philippines v. China*? Instead of leaving indeterminate delimitation questions, UNCLOS needs to be amended to work towards a more precise formula for delimitation of the EEZ in semi-enclosed areas like the SCS. If the equidistance principle that is used with regard to territorial sea[302] does not work equally well with the EEZ, then the proportionality principle can be employed,[303] or another formula created that produces fair results. The negotiators of UNCLOS envisaged such a possibility, especially with regard to narrow seas. For example, Belgium noted that "[t]he concept of a 200-mile economic zone appeared attractive at first

297. Benjamin Kang Lim & Ben Blanchard, *Exclusive: China May Give Filipino Fishermen Access to Scarborough – Sources,* REUTERS (Oct. 18, 2016), *available at* https://www.reuters.com/article/us-china-philippines-exclusive/exclusive-china-may-give-filipino-fishermen-access-to-scarborough-sources-idUSKCN12I19I (last visited Apr. 10, 2018).

298. UNCLOS, *supra* note 6, at art. 312.

299. *Id.* at art. 313.

300. South China Sea fits into the category of semi-enclosed seas that are "surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting." *Id.* at art. 122.

301. *Id.* at arts. 74, 123, 298.

302. *Id.* at art. 15.

303. *See* North Sea Continental Shelf (Ger. v Den.) Judgment, 1969 I.C.J. Rep. 3 (Feb. 20) (upholding the proportionality principle).

sight, because of its simplicity. However, such a formula did not take account of the interests of all States, and it was therefore unreasonable to try to apply it universally."[304] Another possibility in the case of narrow seas like the SCS is to follow the median line.[305] Some UNCLOS negotiators spoke specifically about the situation of narrow seas. For example, Cyprus said "in the case of narrow seas, where the national jurisdiction – including that of the economic zone – of opposite or adjacent States overlapped, the line of delimitation, failing agreement freely concluded on the basis of equality between the States concerned, should be the median line."[306] This proposition is especially pertinent because, even at the time UNCLOS was negotiated, the problematic nature of semi-enclosed seas—especially with regard to management of common resources—was noted but no global solution was articulated. One country noted in this regard:

> There were a great number of enclosed or semi-enclosed seas ... throughout the world ... such as the Sea of Okhotsk, the East China Sea, the [SCS], the Mediterranean, the Celebes Sea, the Persian Gulf, the Red Sea, the Black Sea and the Baltic Sea ... surrounded by two or more States. It was that latter category of enclosed and semi-enclosed seas, and particularly the smaller ones bordered by several States, that presented the most acute problems; and those problems could not be solved by global norms only. About one-half of the countries participating in the Conference bordered on or were located in one or more enclosed or semi-enclosed seas. Many of those seas faced serious problems, among which were pollution and the management of living resources. Those problems could not be resolved by general rules

304. Third U.N. Conference on the Law of the Sea, *26th Meeting*, ¶ 45, U.N. Doc. A/CONF.62/C.2/SR.26 (Dec. 10, 1982).

305. *See* Maritime Delimitation in the Black Sea (Rom. v. Ukr.) Judgment, 2009 I.C.J. Rep. 61 ¶¶ 116, 119, 120, 122 (Feb. 3) (stating that in cases of enclosed sea bodies, where countries cannot mutually agree on how to delimit the extent of their respective exclusive economic zones and continental shelf, the court begins "by drawing a provisional equidistance line between the adjacent coasts," and the "provisional delimitation line will consist of a median line between the two coasts..." and "the final line should result in an equitable solution (Articles 74 and 83 of UNCLOS) . . . the Court will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result," and "A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.").

306. Third U.N. Conference on the Law of the Sea, *22nd Meeting*, ¶ 88, U.N. Doc. A/CONF.62/C.2/SR.22 (Dec. 10, 1982) [hereinafter UNCLOS, *22nd Meeting*].

applicable to open oceans; instead, a special legal regime should be recognized for those seas.[307]

UNCLOS needs to be amended to clarify the distinction between a rock and an island. Specifically, whether, beyond an island being naturally formed, the conditions of "human habitation" or ability to sustain "economic life of their own" must also be "naturally formed." One of the failures of the negotiators of UNCLOS was when they defined an island as one that is both naturally formed and capable of human habitation and an economic life of its own and never made the clarification on whether the natural formation applied to the latter part of the definition. Also, the negotiators of UNCLOS did not clarify whether, if a rock is above sea level at high tide, it also needs to sustain a human habitation and have an economic life of its own without artificial means. The addition of "without artificial intervention" to Article 121 would help a lot in the avoidance of future disputes like those over several maritime features in the SCS. Another area where UNCLOS would need to be amended is historic title. Apart from bays, UNCLOS is silent as to whether it abrogated historic titles over other maritime features.[308] It would be very helpful if UNCLOS clarified that no title arises to maritime features by way of historic title, except with regard to: bays;[309] delimitation of territorial waters;[310] and archipelagic waters.[311] Another area that calls for amendment is the composition of the arbitral tribunal, especially in cases where one of the parties refuses to participate. UNCLOS Annex VII needs to be amended to provide that: where one of the parties does not attend proceedings, the composition of the arbitral panel must take into account geographical diversity and that members chosen from the list maintained by the Secretary-General of the U.N. must be not have been added to the list after the commencement arbitral proceedings.[312]

Perhaps more controversial, but worth considering, is the proposal that, in other areas of the sea that are not narrow or semi-enclosed, the EEZ be extended beyond 200 nautical miles. This proposal needs to take

307. Third U.N. Conference on the Law of the Sea, *43rd Meeting*, ¶ 32, U.N. Doc. A/CONF.62/C.2/SR.43 (Dec. 10, 1982).

308. UNCLOS provides that it does not apply "historic" bays. *See* UNCLOS, *supra* note 6, at art. 10(6). With regard to the delimitation of territorial sea between states with opposite or adjacent coasts, UNCLOS also excludes "historic" titles. *See id.* at art. 15. Beyond these specific references, UNCLOS is silent.

309. *Id.* at art. 10.

310. *Id.* at art. 15.

311. *Id.* at art. 46(b).

312. *See* UNCLOS, *supra* note 6, at Annex VII.

into account the fact that landlocked countries have interests in the global commons that would be affected by this extension. Even during the negotiations leading to adoption of UNCLOS, those concerns were raised.[313] There was resistance to expansion of the EEZ because, as the Trinidad and Tobago representative put it, "[a]doption of such a zone, by conferring on States exclusive rights to explore and exploit both living and non-living resources, would deprive other States in certain regions or subregions of rights to living resources to which they had had traditional access under existing law."[314] Israel added that, "[i]f an economic zone was to be established beyond the territorial sea, infringement of the high seas character of the waters of the zone and the superjacent air space must be kept to an absolute minimum."[315] Switzerland maintained, "that if there was to be an exclusive economic zone adjacent to the territorial sea, it must be so established as to create the least possible inequality between advantageously positioned coastal States and landlocked or geographically disadvantaged countries."[316] The German Democratic Republic stated, "[t]he coastal State's exercise of sovereign rights over its living and mineral resources should not extend beyond an economic zone of 200 nautical miles. Concessions . . . would widen unjustifiably the already broad gap between geographically privileged and geographically disadvantaged States."[317] The Upper Volta (Burkina Faso) argued in this regard that an extensive EEZ "would take away a considerable part of the international area of the high seas and place it

313. For example, Bolivia indicated that its position as "a land-locked country, with regard to the law of the sea could be summarized in two basic points . . . free access to and from the sea and participation in the exploitation of the resources of the sea which were to be found beyond the limits of the territorial sea." Third U.N. Conference on the Law of the Sea, *26th Plenary Meeting*, ¶ 26, U.N. Doc. A/CONF.62/SR.28 (Dec. 10, 1982). Or, as Sri Lanka put it: "a geographically disadvantaged country should have "equal rights with other States and without discrimination", in relation to resources found in an exclusive economic zone." *Id.* ¶ 8. Meanwhile, Congo argued that "that concept would make it possible to grant non-coastal States or States with a limited coastline the right to participate on an equal footing in the exploitation of the living resources of the economic zones of neighboring coastal States. That right would be given to non-coastal States for the purpose of maintaining the economic development of their fishing industries and of meeting the food needs of their peoples. Through the exclusive zone, developed countries could strengthen bilateral or regional economic co-operation." *Id.* ¶ 53. Congo argued further that "The right to exploit the living resources of the economic zone, which was recognized for land-locked countries, went hand in hand with the right of free access to the sea." *Id.* ¶ 54.

314. UNCLOS, *22nd Meeting*, *supra* note 306, at 179, ¶ 123.

315. *Id.* at 179, ¶ 120.

316. *Id.* at 180, ¶ 135.

317. *Id.* at 173, ¶ 31.

under national jurisdiction."[318] Madagascar stated, "[t]he economic zone should not extend for more than 200 nautical miles; the acceptance of such a breadth was a compromise which represented a major concession on the part of countries that wanted to retain the high seas as an international area."[319] Paraguay too "maintained its position that the zone should not extend beyond 200 miles."[320] As Colombia put it, the last thing that an international treaty on the law of the sea needs to do is go back to "notions of the high seas and freedom of fishing . . . designed to permit the big dominating Powers to extract the wealth that was to be found close to the coast."[321] The Democratic Republic of Congo, formerly called Zaire, argued that "land-locked and geographically disadvantaged States should not be excluded from exploiting the living resources of the economic zone, especially in view of the fact that the zone would cover an area that was previously high seas."[322] Indeed, Zaire categorically stated that it "would not therefore subscribe to the concept of an exclusive economic zone that did not clearly guarantee the rights of the land-locked and geographically disadvantaged States to participate in exploiting the resources therein."[323] Japan opposed an EEZ which extended beyond 200 nautical miles because "that would reserve a disproportionate amount of the resources for the coastal States and reduce the revenue of the International Sea-Bed Authority to the detriment of the developing countries."[324] Several other countries raised similar concerns.[325]

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318. *Id.* at 174, ¶ 41. Upper Volta (Burkina Faso) would go to say that the Exclusive Economic Zone "should lie within the national maritime zone; in other words, it should not extend beyond 200 miles from the applicable baselines" and that "[t]he delimitation of economic zones between opposite States should, in the absence of agreement, be submitted to peaceful settlement procedures: disputes should be settled on an equitable basis, since the principle of equidistance could no longer be considered the only criterion for delimiting the zone. That principle was based on a legal fiction—the theoretical equality of States—and it should not, for example, be used for the purposes of delimitation between a developed and a developing country." UNCLOS, *22nd Meeting, supra* note 306, at 174, ¶¶ 49, 50.

319. *Id.* at 174, ¶ 49.

320. *Id.* at 175, ¶ 63.

321. Third U.N. Conference on the Law of the Sea, *28th Meeting*, at 104, ¶ 13, U.N. Doc. A/CONF.62/SR.28 (Dec. 10, 1982) [hereinafter UNCLOS, *28th Meeting*].

322. UNCLOS, *22nd Meeting, supra* note 306, at 175, ¶ 72.

323. *Id.* at 176, ¶ 74.

324. Third U.N. Conference on the Law of the Sea, *17th Meeting*, at 148, ¶ 24, U.N. Doc. A/CONF.62/C.2/SR.17 (Dec. 10, 1982).

325. *See* UNCLOS, *22nd Meeting, supra* note 306, at 174, ¶ 35 (Yugoslavia stated that it "favoured a breadth of 200 nautical miles"). Indeed, "Africa supported an exclusive economic zone extending no further than 200 miles from the coast." *Id.* at 176, ¶ 82. The non-aligned states too supported "an exclusive economic zone with a maximum breadth of

On the other hand, the negotiators also envisioned the possibility of having a more expansive EZZ. Congo, for instance, argued that while the "[e]xperience and practice in the Latin American countries showed that a zone of 200 miles, under national sovereignty, would be a reasonable way of protecting the resources of a developing coastal State," it "reserved the right to extend the sea space under its sovereignty as long as there was no agreement on measures favourable to its vital interests and its economic security."[326]

However, considering the objections to expansive EEZs by non-coastal states, why would no suggestions of extending the EEZ beyond 200 nautical miles be objected to as it was then? First, if the EEZ is extended to 200 nautical miles, there is the possibility of reducing or even avoiding disputes between states because of EEZ-based resources, especially where a state – like China appears to be doing in the SCS – artificially upgrades rocks or islands to human habitability to bring them within the definition of UNCLOS, and then generate expansive EEZs for itself based off those features. The Tribunal did a commendable job in *Philippines v. China*, because it "squarely ruled that human modification cannot change the status of a maritime feature; rather, the natural condition of the maritime feature is determinative . . . a much needed legal rule that will have repercussions all over the world."[327] But this rule is part of a judicial decision and it is not binding except as between the two states involved in this case: the Philippines and China.[328]

Second, technological advances are another reason for revisiting the extent of the EEZ. Despite the concerns expressed earlier, perhaps the time has come to use current technology to delimit the EEZ among nations, just like the exhaustible geostationary orbit was delimited: each country could be allotted at least a certain amount of the sea for exploitation of natural resources. There is technology that would allow this to happen – the global positioning systems (GPS), for example. One of the reasons for the existence of high seas – of which the EEZ is a part – was that part of the seas was incapable of precise delimitation and appropriation,[329] unlike land. The development of new technologies

200 sea miles." *Id.* at 177, ¶ 100. *See also* Third U.N. Conference on the Law of the Sea, *27th Meeting*, at 211, ¶ 8, U.N. Doc. A/CONF.62/C.2/SR.27 (Dec. 10, 1982).

326. UNCLOS, *22nd Meeting*, *supra* note 306, at 176, ¶ 83.

327. Schoenbaum, *supra* note 8, at 467.

328. *See* Statute of the International Court of Justice, ch. III, art. 59 (June 26, 1945) (providing, "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case").

329. JANIS & NOYES, *supra* note 290, at 816 (observing that "[t]he nature of the sea . . . differs from that of the shore, because the sea, except for a very restricted space, cannot easily

makes such precise delimitation possible. Principles of law are not so sacrosanct as to be inviolable, but can be modified depending on whether state parties to UNCLOS see the justification and consider the proposed solution legitimate.[330] Even at the time UNCLOS was negotiated, the drafters were aware of the need to take technological advances into account. For example, Egypt stated in connection with the continental shelf that, "with the progress of technology, it became possible to exploit the continental shelf beyond a depth of 200 metres."[331] Bhutan noted too that "the 1958 Geneva Convention on the Continental Shelf had become obsolete because of technological advances."[332]

B. Conclusion

International law is useful only if nations – big or small – are willing to abide by its rules. *Philippines v. China*, should serve as a reminder that international law is as effective as the community of nations allows it to be in a polarized world where, if a great power on the Security Council does not support a particular result (whether in connection with itself or an ally), the international norm comes to naught. But, at the end of the day, if international norms are disregarded, even strong nations risk losing credibility and the very clout they seek to preserve by ignoring international decisions. That situation cannot be tolerated because it makes every nation a loser. Respect for international rule of law makes every nation a winner. But situations do arise where direct compliance with international decisions is not possible or easy, either because of a perceived lack of legitimacy of the decision or because there is so much national interest at stake. This Article has argued that the *Philippines v. China* decision, for the most part, is impeccable and groundbreaking on substance – ranging from its decision on nonexistence of historical title, to maritime features claimed by China, to its declaration that China's claims are not founded to the extent that certain maritime features in the SCS do not constitute islands or rocks that can naturally sustain human

be built upon, nor enclosed; if the contrary were true yet this could hardly happen without hindrance to the general use").

330. *See, e.g.*, Madagascar arguing, "[s]ome principles of law were not sacrosanct but could well be modified. In that connexion, it should be emphasized that the innovative proposals made by the Latin American States 16 years earlier, which at that time had either been treated as ludicrous or aroused indignation, today constituted the essence of the debate." UNCLOS, *28th Meeting, supra* note 321, at 106 ¶ 34.

331. Third U.N. Conference on the Law of the Sea, *18th Meeting*, ¶ 77, U.N. Doc. A/CONF.62/C.2/SR.18 (Dec. 10, 1982).

332. Third U.N. Conference on the Law of the Sea, *25th Meeting*, at 86, ¶ 85, U.N. Doc. A/CONF.62/C.2/SR.25 (Dec. 10, 1982).

habitation or economic life on their own. Yet, from the procedural standpoint, the decision could have derived more legitimacy if its composition was more geographically diverse or if it gave greater space to the discussion of China's claims regarding territorial sovereignty. These legitimacy concerns, however, cannot provide cover for China to create a "frozen" situation, because the status-quo is not sustainable in the long term, given Chinese economic and geopolitical ambitions that often pit it against its arch-rival – the U.S. – which has declared that it will challenge and resist China on every turn with regard to its claims in the SCS. Still there is a way out of what looks like a cul-de-sac situation: China and other stakeholders in the region can seek to settle their outstanding disputes in the SCS through face-saving platforms like ASEAN. Meanwhile, from a global standpoint, to avoid a repeat of situations like that in the SCS, it is imperative to amend UNCLOS to clarify the meaning of an island versus a rock, and to more expressly proclaim that historic title does not cover maritime features and spaces other than bays, archipelagic waters, and the delimitation of territorial waters in specific instances. These steps will enable *Philippines v. China* to be enforced, albeit indirectly, and engender continued respect for international rule of law. The case of the SCS is testing the resolve of nations – in a way not seen since the end of the Second World War – to abide by rules of international law in order to avoid the catastrophic wars of the past. The clock cannot be turned back, because the results of a war between an increasingly nuclear-armed world would be absolutely devastating, mind-boggling and unimaginable.