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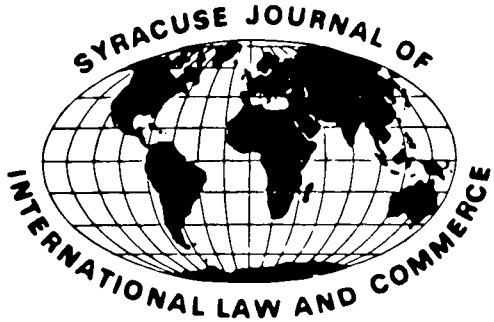
CONTENTS



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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

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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

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

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

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

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

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.C.J 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]
>
> . . . .
>
> [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

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,

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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.
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> . . . .
>
> 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

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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.
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> 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

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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

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' . . .

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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 ....
>
> ....
>
> 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.
>
> ....
>
> [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

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

197. *See* Editorial, *Testing the Rule of Law in the South China Sea*, 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

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

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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-idUSKBN18419O (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

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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

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

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

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

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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

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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

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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.

POWER, LAW AND IMAGES: INTERNATIONAL LAW AND MATERIAL CULTURE

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Time present and time past,
Are both perhaps present in time future,
And time future contained in time past.
T.S. Eliot, *Burnt Norton*[1]

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1. T.S. ELIOT, COLLECTED POEMS (1909–1935) (1936).

ABSTRACT

This article aims to investigate the complex relationship between international law and material culture, that is, objects made or modified by human beings. In addition to their material, aesthetic, cultural and sometimes iconic value, artefacts can have international legal relevance. They can be used as evidence for the study of international law. They can epitomize a significant event of international legal history, depicting the outbreak of a war, the making of a treaty or the consequences of war. They can also constitute evidence, or the object (*petitum*) or the reason underlying a claimant cause of action (*causa petendi*) of given international disputes.

The interplay between international law and material culture raises important epistemological and methodological questions about whether, and if so how, international lawyers might go about researching cultural artefacts that are relevant to their field. This article aims to open a discussion on the relevance of material culture in international law. It has an interdisciplinary character, aiming to improve communication across international law scholarship and material culture studies and among international lawyers, art historians, artists, and the public at large. The article shows that material culture constitutes an incredibly rich source of information, and a prism through which to think critically, and open a dialogue, about international law.

INTRODUCTION

Visitors at the Rijksmuseum in Amsterdam are often startled by the book chest of Hugo Grotius (1583–1645),[2] which is exhibited amidst the finest paintings of the Dutch Golden Age. Most visitors are not jurists let alone experts in international law or legal history. What they see is a rather simple wooden box, with iron locks and leather features, encased in glass and located at the centre of a large room. Yet, when international lawyers visit the museum, they inevitably gravitate toward the book chest. Once used for storing books, the large, solid box inexorably captures the imagination of international lawyers.[3]

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2. The Book Chest of Hugo Grotius is physically displayed in the Rijksmuseum, Amsterdam, and can be seen at HUGO DE GROOT, *available at* https://www.rijksmuseum.nl/en/rijksstudio/historical-figures/hugo-de-groot> (last visited Mar. 30, 2018).

3. When I visited the museum several years ago, the chest certainly captured my imagination. Admittedly, I did not speculate about the claustrophobic practical aspect of how one might have felt to have been shut up in it. Rather, I was captured by the adventurous dimension of Grotius' life and work and invested the trunk with special significance. The

Hugo Grotius is deemed to be one of the founders of international law.[4] Considered "the miracle of Holland," he wrote treatises that deeply influenced the development of international law as we know it.[5] Imprisoned for his religious beliefs — as he was considered too Catholic by the Reformers[6] and too Protestant by the Catholics[7] — he aptly escaped by hiding in a chest, which his wife used to send him books while he was serving his prison sentence.[8] Serving as the ambassador of Protestant Sweden in Catholic France, Grotius would later complete his major intellectual works, including the *De Jure Belli ac Pacis* (On the Law of War and Peace).[9]

Usually considered as the evidence and the tool of an incredible escape, and a reminder that no man is a prophet in his own land (*nemo propheta in patria*), Grotius' book chest also proves that he was an erudite and avid reader. The existing letters that Grotius wrote to his relatives indicate that he managed to purposefully read specific books for writing his masterpiece, the *De Jure Belli ac Pacis*.[10] Therefore, the book

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chest appeared as the promise of a new beginning, a symbol of resilience and success, and as an essential element in the history of international law. I now wonder whether the chest can also constitute a powerful metaphor of international lawyers' personal struggles, or the image of unveiling what is hidden, that is, truth.

4. *But see* JAMES BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE, 28 (1963) (noting that to consider Grotius as the founding father of international law is to exaggerate his originality and to do less than justice to the writers who preceded him).

5. Hedley Bull, *The Importance of Grotius in the Study of International Relations*, *in* HUGO GROTIUS AND INTERNATIONAL RELATIONS, 65, 67 (Hedley Bull et al. eds., 1990).

6. C.G. Roelofsen, *Grotius and the International Politics of the Seventeenth Century*, *in* HUGO GROTIUS AND INTERNATIONAL RELATIONS, 95, 130 (Hedley Bull, Benedict Kingsbury & Adam Roberts eds., 1990) (noting that the Reformers perceived him as sympathizing for the Catholics (*Grotius Papizans*)).

7. HENK JM NELLEN, HUGO GROTIUS: A LIFELONG STRUGGLE FOR PEACE IN CHURCH AND STATE 1583–1645 649, (2014) (noting that the Catholics considered Grotius as "not Catholic enough" (*non satis catholice*)).

8. *See* Bull, *supra* note 5, at 68; *see also Hugo Grotius*, STAN. ENCYCLOPEDIA OF PHILOSOPHY (2011), *available at* https://plato.stanford.edu/entries/grotius/ (last visited Apr. 18, 2018) ("Placing himself in a large trunk that Maria had shipped to him, Grotius escaped prison by having the trunk carried out on the pretence that it contained a number of books.").

9. HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES TRES (James Brown Scott ed., Francis W. Kelsey et al. trans., Oxford Univ. Press 1925) (1625).

10. Peter Haggenmacher, *Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture in* HUGO GROTIUS AND INTERNATIONAL RELATIONS 152 (Hedley Bull et al. eds., Clarendon Press 1990) (Grotius wrote in a letter to have read both *De Jure Belli* and the *Advocatio Hispanica* in prison); GESINA VAN DER MOLEN, ALBERICO GENTILI AND THE DEVELOPMENT OF INTERNATIONAL LAW: HIS LIFE, WORK AND TIMES 243 (1968) (noting that

chest constitutes a visual clue that can contribute to ongoing investigations on early modern international law. In particular, the chest confirms that Grotius read several treatises before writing his own and that the origins of international law may be more pluralist than one originally thought. The book chest also powerfully epitomizes a promise of freedom. Books have an emancipatory potential. They can improve our lives, by making us better human beings. In Grotius' case, reading books provided him inspiration, relief, and ultimately, a way to escape. More fundamentally, Grotius' book chest can constitute a meaningful tool of investigation and a useful key for unveiling the complex relationship between international law and material culture, that is, "objects made or modified" by human beings.[11] The chest is a specimen of the category of material culture, an incredibly rich source of information, and a thing through which to think about (and open a dialogue about) international law.

Material culture is a broad concept, inclusive of "objects made or modified" by human beings[12] as diverse as a chest, a vase, a painting, a house or a city.[13] Artworks, such as paintings, sculptures, crafts, photographs, films, literature, and architecture, "constitute a large and special category within artifacts because their ... aesthetic and ... (iconic) dimensions make them direct and often ... intentional expressions of cultural belief."[14] The study of material culture represents a "new cross-disciplinary field of enquiry" to which archaeology, anthropology and other disciplines contribute.[15]

Why should one investigate material culture in the study and/or making of international law? Is there anything to be discovered in objects that differ from, complement, supplement, or contradict what can be learned from more traditional written sources? In addition to their material, aesthetic, cultural and sometimes iconic value, artifacts can have international legal relevance. They can constitute evidence for the study of international law. They can epitomize a significant event of international legal history, depicting the outbreak of a war, the making of

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"during his captivity at Loevestein from 1619–1621, [Grotius] occupied himself by studying Gentili's *De iure belli* and the *Advocatio Hispanica*").

11. Jules David Prown, *Mind in Matter—an Introduction to Material Culture Theory and Method*, 17 WINTERTHUR PORTFOLIO 1, 1 (1982).

12. *Id.*

13. *Id.* at 2.

14. *Id.*

15. Dan Hicks & Mary C. Beaudry, *Introduction–Material Culture Studies: A Reactionary View*, *in* THE OXFORD HANDBOOK OF MATERIAL CULTURE STUDIES 1, 2 (2010).

a treaty or the consequences of war. They can also constitute the object (*petitum*) or the reason underlying a claimant cause of action (*causa petendi*) of given international disputes.[16]

The interplay between international law and material culture raises "important epistemological and methodological questions" about whether, and if so how, international lawyers might go about researching cultural artifacts that are relevant to their field.[17] This article aims to open a discussion on the relevance of material culture in international law, bridge a gap between international law scholarship and material culture studies, and facilitate communication among different stakeholders including international lawyers, art historians, artists, and the public at large. It has an interdisciplinary nature, relying on international law, art history, and material culture sources.

The article proceeds as follows. First, it illustrates the promises of using material culture for studying, researching and critically assessing international law. Second, it examines the pitfalls of such approach. Lastly, after a critical evaluation, it concludes that the traditional lack of reflection on the role of material culture in international law does not necessarily correspond to a lack of relevance; on the contrary, international lawyers have engaged in material culture in a variety of ways.

I. INTERNATIONAL LAW AND MATERIAL CULTURE

Material culture is an inclusive notion that includes "objects made or modified by" human beings.[18] Material culture is a broad concept, inclusive of artifacts as diverse as objects, buildings, and even

16. *See generally* BEAT SCHÖNENBERGER, THE RESTITUTION OF CULTURAL ASSETS (Caroline Thonger, trans., Eleven Int'l Pub. 2009) (2009) (examining the potential grounds for claiming the restitution of a cultural asset, including the obstacles preventing such restitution); SARAH DROMGOOLE, UNDERWATER CULTURAL HERITAGE AND INTERNATIONAL LAW (2013) (discussing the recovery and salvage of underwater cultural heritage); ANN M. NICGORSKI ET AL., CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE (James AR Nafziger & Ann M. Nicgorski eds., 2009) (discussing, inter alia, the return of cultural artifacts removed during colonial times and postcolonial disputes over cultural heritage); JEANNETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES (Cambridge University Press 2d ed. 1996) (1989) (discussing the return of antiquities and international law governing the same).

17. Sophie Woodward, '*Object Interviews, Material Imaginings and 'Unsettling' Methods: Interdisciplinary Approaches to Understanding Materials and Material Culture*,' 16 QUALITATIVE RESEARCH 359, 360 (2016).

18. Prown, *supra* note 11, at 1.

landscapes.[19] It has material, aesthetic, cultural, and sometimes iconic value. Artworks, such as paintings, sculptures, crafts, photographs, films, literary works, and architecture, are a special type of material culture because of their artistic, aesthetic, and iconic value.[20]

In certain cases, material culture can also have international legal value. "International cultural law has emerged as the new frontier of international law[,] [g]overning cultural phenomena," including material culture, in their diverse forms.[21] The return of cultural artifacts to the legitimate owners,[22] the recovery of underwater riches,[23] the governance of sites of outstanding and universal value,[24] and the protection of cultural sites in times of war[25] are just some of the issues governed by such field of study. Nowadays, "a tapestry of national, regional, and international law instruments imposes extensive obligations on states to respect and protect cultural heritage."[26] The protection of cultural heritage is a

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19. *Id.* at 2.

20. *Id.* (clarifying that "all tangible works of art are part of material culture, but not all the material of material culture is art").

21. Valentina Vadi, *The Cultural Wealth of Nations in International Law*, 21 TUL. J. OF INT'L & COMP. L. 87, 87 (2012) (defining international cultural law as an emerging field of study and mapping its current contours); Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT'L L. 1209, 1213 (2004) (discussing the protection of cultural heritage under international law).

22. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 7(b)(ii), Nov. 14, 1970, 823 U.N.T.S. 231; *see generally* ANA FILIPA VRDOLJAK, INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS (2006) xiv (discussing the restitution of cultural artifacts to their community of origin).

23. *See generally* Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40; CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE (2010) (examining the protection of cultural heritage under international law); SARAH DROMGOOLE, UNDERWATER CULTURAL HERITAGE AND INTERNATIONAL LAW (2013)(examining and critically assessing the safeguarding of underwater cultural heritage under international law); James A.R. Nafziger, *The Evolving Role of Admiralty Courts in Litigation of Historic Wreck*, 44 HARV. INT'L L. J. 251, 252 (2003)(investigating the role of admiralty courts in the adjudication of underwater cultural heritage-related disputes).

24. *See* Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. 151; THE 1972 WORLD HERITAGE CONVENTION—A COMMENTARY (Francesco Francioni ed., 2008).

25. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240; ROGER O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT (James Crawford & John S. Bell, eds., 2011); PROTECTING CULTURAL PROPERTY IN ARMED CONFLICT (Nout van Woudenberg & Liesbeth Lijnzaad eds., 2010); Micaela Frulli, *The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 EUR. J. INT'L L. 203 (2011).

26. Vadi, *supra* note 21, at 120.

fundamental public interest that is closely connected to fundamental human rights and is deemed to be among the best guarantees of international peace and security.[27] This protection "can be thought of as a public interest" in terms of state interest, but it also reflects the common interest of the international community as a whole.[28] Courts have even hypothesized the existence of a cultural public order (*ordre public culturel*).[29] Therefore, not only can the destruction of cultural heritage in times of armed conflict constitute a violation of international humanitarian law,[30] but lack of protection or even destruction of cultural heritage in times of peace can constitute a violation of international cultural law.[31]

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27. Valentina Vadi, *Global Cultural Governance by Investment Arbitral Tribunals: The Making of a Lex Administrativa Culturalis*, 33 B.U. INT'L L. J. 457, 458 (2015).

28. *Id.* at 461.

29. *See generally* Pierre Lalive, *Réflexions sur un ordre public culturel*, *in* L'EXTRANÉITÉ OU LE DÉPASSEMENT DE L'ORDRE JURIDIQUE ÉTATIQUE: ACTES DU COLLOQUE DES 27 ET 28 NOVEMBRE 1997 ORGANISÉ PAR L'INSTITUT D'ÉTUDES DE DROIT INTERNATIONAL DE LA FACULTÉ DE DROIT DE L'UNIVERSITÉ DE LAUSANNE 155, 155 (Eric Wyler & Alain Papaux eds., 1999) (discussing emerging jurisprudence and hypothesizing the existence of a cultural public order); Valentina Vadi, CULTURAL HERITAGE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 259 (2014) (discussing the Swiss case that referred to a public interest concerning cultural goods).

30. For instance, in the *Genocide* case, Bosnia and Herzegovina alleged, *inter alia*, that Serbian forces' attempt "to eradicate all traces of the culture of the protected group through the destruction of historical, religious and cultural property" inflicted on the Bosnian Muslim conditions of life calculated to bring about their physical destruction. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 320 (Feb. 26). The Court considered that there was "conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group." *Id.* ¶ 344. However, in the Court's view, "the destruction of historical, cultural and religious heritage c[ould] not be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group" and thus "it d[id] not fall within the categories of acts of genocide set out in Article II of the Convention." *Id.*; *see also* Partial Award: Central Front - Eritrea's Claims 2, 4, 6, 7, 8 & 22 (Eri v. Eth., 26 R.I.A.A. 115-153 (Eri.-Eth. Claims Comm'n 2004). The Commission held that "the felling of the [S]tela [of Matara] was a violation of customary humanitarian law." *Id.* ¶ 113. The Commission also found Ethiopia "liable for the unlawful damage inflicted upon the Stela of Matara in May 2000." *Id.* ¶ 114.

31. *See generally Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works*, UNESCO, Nov. 19, 1968; Sabine von Schorlemer, *Compliance with the UNESCO World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschlösschen Bridge*, 51 GERMAN Y.B. INT'L L. 321, 321 (2008) (discussing the deletion of the Elbe Valley from the World Heritage List); Diana Zacharias, *Cologne Cathedral versus Skyscrapers – World Cultural Heritage Protection as Archetype of a Multilevel System*, 10 MAX PLANCK Y.B. OF U.N. L. 273, 273 (2006) (discussing how the Cologne Cathedral remained inscribed in the World Heritage List).

While cultural heritage has received increased protection under international law, and therefore increased attention by international law scholars, much less attention has been paid to the broader category of material culture and its interplay with international law. This article aims at addressing this gap in international legal scholarship. Rather than focusing on cultural heritage and its regulation under international law, the article focuses on the broader category of material culture and its interaction with international law. This approach complements previous research by exploring an under researched topic.

Objects can be "'alternative sources' that can complement documentary materials in answering . . . questions."[32] For instance, photographs can be and have been used as evidence before international courts and tribunals.[33] Material culture can epitomize a significant event of international legal history, depicting the outbreak of a war or the making of a treaty or other events of international relevance. Material culture can constitute the object (*petitum*) or the reason underlying a claimant cause of action (*causa petendi*) of given international law disputes.[34] It can also prevent international disputes, becoming the object of diplomatic relations.[35] In extreme circumstances, cultural artifacts have also been considered as bargaining chips, that is, as items to be sold

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32. THE OXFORD HANDBOOK OF MATERIAL CULTURE STUDIES 3 (Dan Hicks & Mary C. Beaudry eds., 2010).

33. *See* Daniel Joyce, *Photography and the Image-Making of International Justice*, 4 L. AND HUMAN. 229, 229-30 (2010).

34. *See* Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6, 34, 37 (June 15) (holding that the Temple of Preah Vihear was situated in territory under the sovereignty of Cambodia and, in consequence, that Thailand was under an obligation to withdraw any military or police forces, that it had stationed at the Temple and to restore to Cambodia any objects which had been removed from the Temple by Thai authorities); Request for Interpretation of Judgment of 15 June 1962 in Temple of Preah Vihear (Cambodia *v.* Thai.), Judgment, 2013 I.C.J. 281, 318 (Nov. 11) para. 107 (concluding that "the first operative paragraph of the 1962 Judgment determined that Cambodia had sovereignty over the whole territory of the promontory of Preah Vihear, as defined in paragraph 98 of the present Judgment, and that, in consequence, the second operative paragraph required Thailand to withdraw from that territory the Thai military or police forces, or other guards or keepers, that were stationed there"); *Certain Property* (Liech. v. Ger.), Judgment, 2005 I.C.J. 6, para. 54 (10 Feb. 10) (concerning cultural goods confiscated after WWII in the former Czechoslovakia, the Court declined jurisdiction *ratione temporis*); *see generally* ALESSANDRO CHECHI, THE SETTLEMENT OF INTERNATIONAL CULTURAL HERITAGE DISPUTES: TOWARDS A LEX CULTURALIS (2014).

35. *See generally* Alessandro Chechi, *The Return of Cultural Objects Removed in Times of Colonial Domination and International Law: The Case of the Venus of Cyrene*, 18 ITALIAN Y.B. INT'L L. 159, 159 (2008) (discussing the return of the Venus of Cyrene to Libya).

or bartered in difficult economic or political crisis.[36] They may also be used as a blue chip, that is, as a form of reliable investment, expected to hold or increase its economic value regardless of economic trends.[37] More fundamentally, material culture can "shape international legal narratives and responses."[38]

II. THE PROMISES OF USING MATERIAL CULTURE

There are several benefits to using material culture for investigating and/or making international law. First, material culture can make international law more accessible to a wider range of audiences through presenting complexity in a way that is easy for the public to understand. A picture is worth a thousand words; for instance, photographer Nick Ut's photograph of a Vietnamese girl running amid other fleeing villagers, after a napalm attack, became one of the most haunting images of the Vietnam War.[39] Analogously, journalist Steve McCurry's photographic portrait of an Afghan Girl in a red headscarf became emblematic of the suffering of the civilian population during the time of Soviet occupation of Afghanistan.[40] Material culture can promote transparency, accountability, and even an opportunity for self-reflection of international

36. *See* Simon Shuster, *Greece May Have to Sell Islands and Ruins Under Its Bailout Deal*, TIME (July 13, 2015), *available at* http://time.com/3956017/greece-bailout-selloff/ (last visited Mar. 5, 2018); *see* Geoffrey Robertson, *Let's do a Brexit Deal with the Parthenon Marbles*, GUARDIAN (Apr. 4, 2017), *available at* https://www.theguardian.com/commentisfree/2017/apr/04/brexit-deal-parthenon-marbles (last visited Mar. 30, 2018).

37. *See, e.g.*, Jennifer Rankin, *How Monet became Blue Chip: the Language of Wealthy Art Buyers*, THE GUARDIAN (Jan. 30, 2015), *available at* https://www.theguardian.com/artanddesign/2015/jan/30/how-monet-became-blue-chip (last visited Feb. 8, 2018) (noting that "In terms the art world has borrowed from finance, Monet is blue chip, a guaranteed sell. Last year Sotheby's sold a Monet water lilies painting for £31.7m, the second-highest price paid for his work. The masterpiece was sold in 10 minutes, with the bidding rising in increments of £250,000.").

38. Joyce, *supra* note 33, at 231.

39. *Girl, 9, Survives Napalm Burns*, N.Y. TIMES (June 11, 1972), *available at* http://www.nytimes.com/1972/06/11/archives/girl-9-survives-napalm-burns.html (last visited Feb. 2, 2018).

40. Kathy Newman, *A Life Revealed*, NAT'L GEOGRAPHIC, (2002), *available at* https://www.nationalgeographic.com/magazine/2002/04/afghan-girl-revealed/ (last visited Mar. 3, 2018). (discussing the cover of the National Geographic, June 1985); Wendy S. Hesford & Wendy Kozol, JUST ADVOCACY?: WOMEN'S HUMAN RIGHTS, TRANSNATIONAL FEMINISMS, AND THE POLITICS OF REPRESENTATION 1 (Wendy S. Hesford & Wendy Kozol eds., 2005) (arguing that "the highly publicized 1985 cover has come to stand for the plight of Afghan women and refugees worldwide . . . this portrait has functioned as . . . Mona Lisa . . . onto whom the discourse of human rights has been placed.").

organizations, thus promoting the perceived legitimacy of the same.[41] At the same time, material culture also opens new perspectives and raises new research questions, enabling international lawyers to consider international law from a different angle.

Second, the use of material culture can also have a pedagogical value, becoming a tool for building and sharing ideas.[42] International law is "a text-based discipline,"[43] with some reservations about images.[44] While law students are used to black letter textbooks, inserting some visual aids in legal treatises and in teaching materials such as graphs,[45] pictures,[46] and even movies[47] can help them by rendering their discipline more concrete and interesting. Material culture can make international law accessible across disciplines, and among academic, practitioner and public audiences. Material culture can "add[] a whole new layer of learning that textbooks simply cannot provide."[48] Material culture "can make abstract ideas . . . come alive for students."[49]

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41. Joyce, *supra* note 33, at 231.

42. *See, e.g.*, Wouter Werner, *Justice on Screen: A Study of Four Documentary Films on the International Criminal Court* 29 LEIDEN J. OF INT' LAW 1043, 1043 (2016) (analyzing four documentaries on the International Criminal Court and highlighting that "[d]ocumentaries have thus become important tools for education and the spread of imageries of international criminal justice.").

43. Zenon Bankowski & Maksymilian Del Mar, *The Torch of Art and the Sword of Law*, *in* LAW AND ART 165 (Oren Ben-Dor ed., 2011) (also noting at 167, that "the exclusive emphasis on textual resources . . . carries with it significant dangers").

44. *See generally* Costas Douzinas, *Whistler v. Ruskin: Law's Fear of Images*, 19 ART HIST. 353 (1996) (referring to law generally).

45. For an example of a graph used for visual aid, *see* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. OF INT'L L. 45, 58 (2013).

46. For an example of a picture used for visual aid, *see* Amanda Perry-Kessaris, *Anemos-ity, Apatheia, Enthousiasmos: An Economic Sociology of Law and Wind Farm Development in Cyprus*, 40 J. OF L. AND SOC'Y 68, 72 (2013).

47. Olivier Corten, *Mais ou est donc passée la Charte des Nations Unies? Representations et sous-representations des regles sur l'usage de la force dans les films d'action*, *in* DU DROIT INTERNATIONAL AU CINEMA 89–133 (Olivier Corten and François Dubuisson eds., 2015); *see generally* Stefan Engert & Alexander Spencer, *International Relations at the Movies: Teaching and Learning International Politics Through Films*, 17 PERSPECTIVES 83 (2009); *See generally* Anthony Chase, *International Law on Film*, 24 L. STUD. 559 (2000).

48. Ernest Andrew Brewer & Penelope Fritzer, *Teaching Students to Infer Meaning Through Material Culture*, 84 THE CLEARING HOUSE: A J. OF EDUC. STRATEGIES, ISSUES AND IDEAS 43, 43 (2011).

49. *Id.* at 44.

This approach is particularly promising for the study of international law and its history. As is known, professors of international law are "a special sub-category of academics within humanities and social sciences."[50] Nowadays, international law governs almost any field of human activity, and it has become a key subject of study. Moreover, knowledge of international law is a condition of its respect. Fostering education about international law is a way to build peace "in the minds of men" and women,[51] "strengthen[] international peace and security[,] and promot[e] friendly relations and co-operation among States."[52] International law promotes the dissemination of certain fundamental values, such as human rights and human dignity.[53] By increasing "the general public knowledge of international rights and duties" and promoting "a popular habit of reading and thinking about international affairs," international law scholars build peace "in the minds of men" and women, and can prevent, and/or facilitate the settlement of, international disputes.[54] Therefore, the teaching and studying of international law both have a high social value, contribute to building a culture of peace, and foster peaceful and prosperous relations among nations. They can also become "a form of resistance when the very purposes of international law . . . are . . . put in jeopardy."[55]

Material culture can play an important role in teaching and disseminating international law. Material culture offers new ways to teach international law and develop critical thinking about the same. The interplay between material culture and international law can be a "real eye-opener for many students:" not only can they "learn to glean historical information from the study of material culture," but they can also perceive international law "as engaging and ongoing" and think

50. Pierre D'Argent, *Teachers of International Law*, *in* INTERNATIONAL LAW AS A PROFESSION 412, 412, 417 (Jean d'Aspremont et al. eds., 2017) (considering teachers of international law as "entrusted with a social mission that transcends them.").

51. UNESCO, *Constitution of the United Nations Educational, Scientific and Cultural Organization* (Nov. 16, 1945) (affirming that "since wars begin in the minds of men, it is in the minds of men that the defenses of peace must be constructed.").

52. D'Argent, *supra* note 50, at 417.

53. For an analogous argument in relation to law more generally, *see generally* David Sugarman, *Theory and Practice in Law and History: A Prologue to the Study of the Relationship Between Law and Economy from a Socio-Historical Perspective*, *in* LAW, STATE AND SOCIETY 70, 83 (Bob Fryer et al. eds., 1981).

54. Elihu Root, *The Need of Popular Understanding of International Law*, 1 AM. J. INT'L L. 1, 2 (1907).

55. D'Argent, *supra* note 50, at 418; UNESCO, *Constitution of the United Nations Educational, Scientific and Cultural Organization* (Nov. 16, 1945).

about it critically.[56] International law scholars have used movies to help students understand definitions, challenges, and complexities of international law.[57] Nevertheless, these scholars are fully aware that the portrayal of international law in movies, although exact at times, can be conveyed in an approximate manner, thus warranting a need for critical legal assessment.[58] Moreover, visual depictions can be simplistic, reproducing "the hero/villain theme" rather than representing facts in an accurate way.[59] In addition, one has to be careful in maintaining objectivity.[60]

Third, material culture can also illuminate the state of the art, the promises and pitfalls of international law. Artists, reporters, filmmakers, and the creators of visual data have become increasingly interested in denouncing complex social problems with international relevance. They have often provided critical depictions of key areas of international law.

For instance, in a recent exhibition, Chinese artist, Ai Wei Wei, wrapped the Renaissance façade of Florence's Palazzo Strozzi in a series of orange rubber lifeboats.[61] Entitled *Libero* ('Free'), the exhibition drew attention to the fate of refugees often rescued by similar boats when they cross the Mediterranean Sea.[62] The display of such migration tools on the façade of a patrician building—in the form of temporary installation

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56. Ernest A. Brewer & Penelope Fritzer, *Teaching Students to Infer Meaning Through Material Culture*, 84 The Clearing House: J. Educ. Strategies, Issues & Ideas 43, 43–45 (2011) (adding that professors can also invite students to construct a replica of material culture and/or contribute to creating a museum of artefacts relating to the (history of) international law).

57. Xavier Philippe, *Les crimes internationaux vus par le cinéma: une mobilisation intuitive du droit international pénal*, *in* DU DROIT INTERNATIONAL AU CINEMA 215, 216 (Olivier Corten & François Dubuisson, eds., 2015)

58. *Id.* at 218.

59. John Denvir, *What Movies Can Teach Law Students*, *in* LAW AND POPULAR CULTURE 183, 191 (Michael Freeman ed., 2005).

60. Gerry Simpson, *On the Magic Mountain: Teaching Public International Law* 10 EUROPEAN J. OF INT'L L. 70, 91 (1999) (cautioning that international law should not be taught as "the converse of an holiday brochure – brief illustrations from places we would not want to visit."); Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal* (2005) 16 EUROPEAN J. OF INT'L LAW 113, 122 (contending that "[i]nternational law is burdened by kitsch" and that the concept of *jus cogens* is an example of such kitsch, being expressed in "a dead European language" with "no clear reference to this world" but "longing for such reference.").

61. Steve Scherer, *Boats Evoking Refugees Hang from Italy Palace in Ai Weiwei Installation*, REUTERS (Sept. 22, 2016), *available at* https://www.reuters.com/article/us-europe-migrants-aiweiwei-italy/boats-evoking-refugees-hang-from-italy-palace-in-ai-weiwei-installation-idUSKCN11R2KC (last visited Feb. 26, 2018).

62. *Id.*

art—sparked intense debate.[63] While some critics contended that the installation of dinghies ruined the aesthetics of the city center, others welcomed the initiative as a form of engaged artistic expression in favor of the plight of refugees.[64] For the artist, "[r]efugees must be seen to be an essential part of our shared humanity."[65] Visiting the exhibition, international lawyers cannot but reflect upon how international law protects the rights of refugees.[66]

In another example, Banksy, a well-known yet anonymous British street artist, painted nine graffiti on the "425-mile long barrier that separates Israel from the Palestinian territories."[67] Allegedly built for security reasons, the wall has sparked controversy.[68] In its Advisory Opinion, the International Court of Justice held that Israel's actions violated the International Covenant on Civil and Political Rights (ICCPR) because of their disproportion, and the International Covenant on Economic Social and Cultural Rights (ICESCR) because of their intent.[69] The street artist transformed the same wall into a canvas for some of his/her most celebrated works. The graffiti are thought provoking and can be interpreted in different ways. For instance, one portrays a little girl gently lifted by balloons toward the top of the wall.[70] Filled with wit and metaphor, the graffiti transcends language barriers and seem to

63. *Id.*

64. *Id.*

65. *See generally* Ai Weiwei, *The Refugee Crisis Isn't About Refugees: It's About Us*, THE GUARDIAN (Feb. 2, 2018), *available at* https://www.theguardian.com/commentisfree/2018/feb/02/refugee-crisis-human-flow-ai-weiwei-china (last visited Mar. 30, 2018).

66. *See, e.g.*, Convention relating to the Status of Refugees, 189 U.N.T.S. 150, in force April 22, 1954, preamble (recalling the principle that "human beings shall enjoy fundamental rights and freedoms without discrimination" and considering the "concern [of the UN] for refugees and [the organization's] endeavour[r] to assure refugees the widest possible exercise of these fundamental rights and freedoms."); Protocol relating to the Status of Refugees, 606 U.N.T.S. 267, in force 4 October 1967.

67. Sam Jones, *Spray Can Prankster Tackles Israel's Security Barrier*, THE GUARDIAN, (Aug. 5, 2005), *available at* https://www.theguardian.com/world/2005/aug/05/israel.artsnews (last visited Mar. 5, 2018).

68. Nathaniel Berman, *The Ambivalence of Walls in the Internationalist Imagination: Legal Scandal or the Foundation of Legal Order?*, *in* LES MURS ET LE DROIT INTERNATIONAL 117, 117-18 (Jean-Marc Sorel ed., 2010).

69. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, at 177, 181, 201 (July 9).

70. Adela H. Kim, *Banksy and the Wall*, THE HARVARD CRIMSON, (Mar. 26, 2014), *available at* http://www.thecrimson.com/column/the-art-of-protest/article/2014/3/26/the-art-of-protest-banksy/ (last visited Mar. 30, 2018) (describing the graffiti depicting "[a] young girl [who] grasps onto numerous balloons, attempting to fly").

advocate a process of peace among the parties. The maintenance of peace is one of the fundamental aims of international law.[71]

In a significant fashion, movies that have represented international crimes often highlight "the inability of law in general, and international criminal law in particular, to concretely and effectively cope with the perpetration of such crimes."[72] These movies show that "such crimes are intolerable," but also show that "[international] law seems powerless and unable to offer a satisfactory response to the same."[73] They mix the idealism of international law in theory with the realism of its ineffectiveness in practice.[74] This is not to say that international law is useless. Certain documentaries have showed the inadequacy of certain legal responses as well as the need to reinforce international law mechanisms in equal measure. For instance, Tim Slade's *The Destruction of Memory*[75] shows "the ways in which laws and policy moved in or out of step with the [deliberate] destruction" of cultural heritage, but also offers "glimmers of hope" depicting the evolution of international law and "creat[ing] an effective call to peace."[76]

International lawyers themselves can use material culture to examine the state of the art, the promises, and the pitfalls of international law. For instance, the cover illustration of a recent book, entitled *International Law as a Profession*, includes the visual reproduction of a painting, *A Lawyer in his Study* by Adriaen Van Ostade.[77] While the painting is not particularly famous, it depicts an old white-haired lawyer reading his files.[78] The portrait certainly conveys the idea that (international) lawyers work long hours while spending their life in a shadowy workplace as time passes by. But the painting fails to depict the diversity of international lawyers.[79]

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71. U.N. Charter art. 1.1 ("The Purposes of the United Nations are: 1. To maintain international peace and security . . .).

72. Philippe, *supra* note 57.

73. *Id.*

74. *Id.*

75. THE DESTRUCTION OF MEMORY (Icarus Films 2016).

76. Tim Slade, *The Destruction of Memory*, *in* ARTS & INTERNATIONAL AFFAIRS, (Jan. 21, 2017) (internal reference omitted).

77. INTERNATIONAL LAW AS A PROFESSION (Jean d'Aspremont et al. eds., 2017).

78. *Id.*

79. Oscar Schachter, *The Invisible College of International Law*, 72 NW. U. L. REV. 217 (1977) (indicating that the "invisible college of international law" included "a fairly small community made up almost entirely of upper-class, European, French-speaking, male lawyers who knew or were related to each other"); *see generally* Hilary Charlesworth, *Transforming the United Men's Club: Feminist Futures for the United Nations*, 4 TRANSNAT'L L. &

Fourth, the iconography of warfare can contribute to the illustration of the dramatic consequences of war, thus indirectly cultivating a culture of peace. In the twentieth century, the British War Memorials Committee commissioned the American painter John Singer Sargent (1856–1925) to document an episode of chemical warfare during World War I.[80] Although Sargent was regarded more for his paintings portraying high society, his oil on canvas titled *Gassed*—depicting a line of wounded and blindfolded men—struck a chord, won prizes, and "has become widely recognized as an embodiment of the pain of war."[81] Pablo Picasso's *Guernica*, a 20th century art icon,[82] depicts the effects of the bombing of the Basque town of Guernica by the German air force in 1937, during the Spanish Civil War of 1936–39.[83] Like other visual depictions of war crimes, this great painting constitutes a powerful anti-war protest[84] and indirectly contributes to fostering a culture of peace.[85]

Last, material culture in general, and the visual arts in particular, can play a role in international dispute settlement. Material culture can document and provide evidence of historical events of international

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CONTEMP. PROBS., 421, 422 (1994) (discussing ways to mainstream gender within the United Nations); *see generally* Dianne Otto, *The Exile of Inclusion: Reflections on Gender Issues in International Law Over the Last Decade*, 10 MELB. J. OF INT'L L. 11, 13 (2009) (investigating a range of gender issues in international law). On the need of more representative international courts and tribunals, *see* Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. OF INT'L L. 647, 647 (2012) (discussing the linkage between the adequate representation of women in international courts and the legitimacy of the same courts); *see generally* Nienke Grossman, *Achieving Sex Representative International Court Benches*, 110 AM. J. OF INT'L L. 82 (2016) (proposing methods to increase the representation of women in international courts).

80. ONE HUNDRED YEARS OF CHEMICAL WARFARE: RESEARCH, DEPLOYMENT, CONSEQUENCES edited by Bretislav Friedrich, Dieter Hoffmann, Jürgen Renn, Florian Schmaltz, Martin Wolf (Springer 2017) 176 (adding that "Sargent visited the Western front . . . [in] 1918").

81. *'Gassed', by John Singer Sargent*, THE GUARDIAN (Nov. 12, 2008), *available at* https://www.theguardian.com/world/2008/nov/13/gassed-john-singer-sargent (last visited Mar. 4, 2018).

82. John Corbin, *Images of War: Picasso's Guernica*, 13 VISUAL ANTHROPOLOGY 1, 1 (1999).

83. *Id.* at 1 (noting that *Guernica* "is a painting of violence rendered with violence, full of strong contrasts, sharp angles, broken shapes.").

84. *Id.* at 2 (reporting that "most interpreters regard *Guernica* as an anti-war protest expressed in open, universal terms.").

85. Paula Newton & Thom Patterson, *The Girl in the Picture: Kim Phuc's Journey from War to Forgiveness*, CNN (Aug. 20, 2015), *available at* http://www.cnn.com/2015/06/22/world/kim-phuc-where-is-she-now/index.html (last visited Mar. 3, 2018) (noting that the image of a 9-year-old girl running for her life during the Vietnam War has crossed boundaries and allegedly contributed to hasten the end of the war.).

relevance.[86] It can also constitute the object (*petitum*) or the reason underlying a claimant's cause of action (*causa petendi*) of given international law disputes.[87] Irrespective of its artistic merit, such material culture enables international law scholars and practitioners to "encounter the past at first hand."[88] It can contribute to the making of international law, raising consciousness, triggering action, and influencing international lawyers.

Although the interplay between material culture and international law as a field of study is a rich and promising one, international lawyers have rarely engaged with the material traces and forms of law. Only recently have they started dealing with material culture in a more intense fashion.[89] Some have foregrounded material culture for theoretical purposes.[90] Others have focused on the promising and emerging area of international cultural law.[91] Material culture has also been used as evidence and for procedural purposes.[92]

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86. ARTFUL ARMIES, BEAUTIFUL BATTLES: ART AND WARFARE IN EARLY MODERN EUROPE 4 (Pia Cuneo ed., Brill Pub. 2002).

87. *See* NOUT VAN WOUDENBERG, STATE IMMUNITY AND CULTURAL OBJECTS ON LOAN 443 (Martinus Nijhoff Pub. 2012).

88. Prown, *supra* note 11, at 3.

89. *See generally* LUIS ESLAVA, LOCAL SPACE GLOBAL LIFE: THE EVERYDAY OPERATION OF INTERNATIONAL LAW AND DEVELOPMENT (Cambridge Univ. Press 2015); Annelise Riles, *Models and Documents: Artifacts of International Legal Knowledge*, 48 INT'L & COMP. L. Q. 805 (1999).

90. International lawyers have analogized the debate on the functioning of international courts and tribunals to some architectural debate. *See* Dinah Shelton, *Form, Function, and the Powers of International Courts*, 9 CHI. J. OF INT'L L. 537, 537 (2009) (on the debate raised by the construction of the first skyscrapers in Chicago); Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. OF INT'L L. 295, 295, 298 (2013) (analogizing state sovereignty to "a small apartment in one densely packed high-rise" and the international community to "a global condominium"); VALENTINA VADI, PROPORTIONALITY, REASONABLENESS AND STANDARDS OF REVIEW IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Edward Elgar Pub. 2018) (analogizing treaty makers to city planners and arbitrators to architects).

91. *See* Hilary Charlesworth, *Human Rights and the UNESCO Memory of the World Programme*, *in* CULTURAL DIVERSITY, HERITAGE AND HUMAN RIGHTS: INTERSECTIONS IN THEORY AND PRACTICE 21 (Michele Langfield et al. eds., Routledge 2010).

92. *See* Valentina Vadi, *International Law and the Uncertain Fate of Military Sunken Vessels*, 19 IT. Y.B. OF INT'L L. 253 (2009) (detailing how sparse underwater cultural heritage, *in casu*, coins, enabled the judge to ascertain that a shipwreck was the *Mercedes*, a Spanish galleon). *See also* Ana Filipa Vrdoljak, *The Criminalisation of the Intentional Destruction of Cultural Heritage in* FORGING A SOCIO-LEGAL APPROACH TO ENVIRONMENTAL HARMS: GLOBAL PERSPECTIVES 237 (Tiffany Bergin & Emanuela Orlando, eds., Routledge 2017).

> "Several indictments brought before the ICTY for the deliberate destruction or damage of cultural property of religious or ethnic groups included counts of

This section has briefly shown that such interplay between material culture and international law constitutes a rich field for analysis. Not only has international law inspired some artists, but material culture has interacted with international law in a variety of ways. First, material culture can make international law accessible to a wide audience. Second, material culture can contribute to the teaching and dissemination of international law. Third, it can illuminate the current trajectories, promises, and pitfalls of international law. Fourth, it can contribute to building a culture of peace, which is one of the fundamental purposes of international law. Finally, material culture can play a role in international dispute settlement, constituting evidence or the object (*petitum*) or reason underlying an international dispute (*causa petendi*).

III. THE PITFALLS OF USING MATERIAL CULTURE

There are some research limitations associated with using material culture in relation to the study and critical assessment of international law. This section identifies five principal pitfalls, but the list is not a closed one, and other criticisms are of course possible. First, international law and material culture have been seen as separate fields of study. Second, the artistic/political value of material culture can clash with the historical/legal value of the same. Third, an object can give rise to different interpretations, depending on the "cultural matrices" of the interpreters. Fourth, interdisciplinary methods can complement rather than supplant more traditional legal methods. Finally, in some instances, the use of material culture can re-politicize legal issues. Let us now examine each of these arguments more in detail.

First, in what has become a general fragmentation of knowledge and (over)specialization of fields, international law as a discipline and material culture studies often do not speak to each other. The implicit assumption seems to be that the different branches of learning are separate. International lawyers study, interpret, and apply international law that governs international relations, and promotes a range of objectives including human rights, justice, peace, and prosperity.[93]

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persecution and genocide. Such acts have been used to establish the mens rea of a defendant, that is, the discriminatory intent required for proving genocide and persecution."

Id.

93. MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT (2008)(arguing that "International law supports order in the world and the attainment of humanity's fundamental goals of advancing peace, prosperity, human rights, and environmental protection.")

Material culture studies explore the relationship between people and objects, develop ideas and represent them through a range of varied techniques, materials, and processes.[94] While international law has a normative nature,[95] material culture studies empower individuals to develop creativity. Both the discipline of international law and material culture studies foster critical thinking, but each one does so using different languages and methods. While the discipline of international law relies mainly on written language, material culture studies use all of our senses. International lawyers generally prefer linear, consolidated, and black letter approaches to questions. Material culture uses multiform techniques.

International lawyers do research in an individual, standardized, and text-driven fashion.[96] They "rel[y] upon and produc[e] a wealth of written material."[97] They relate predominantly to international law through written legal sources such as "[c]ases, treaties and volumes of academic writing."[98] They often "feel such texts are [their] major project and output."[99] International law books rarely contain images.[100] When they do, international lawyers use images to illustrate a point; they rarely consider them as a source of information about international law.[101]

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94. [Various authors], [Editorial], 1 JOURNAL OF MATERIAL CULTURE (1996) 5-14, 5 (arguing that "The study of material culture may be most broadly defined as the investigation of the relationship between people and things irrespective of time and space...") and 13 (suggesting that "As a field, cultural studies has been immensely productive precisely because it lacked constraints on what should be investigated and how phenomena should be conceptualized.")

95. *See generally* Ana Filipa Vrdoljak and Federico Lenzerini (eds) INTERNATIONAL LAW FOR COMMON GOODS: NORMATIVE PERSPECTIVES ON HUMAN RIGHTS, CULTURE AND NATURE (2014).

96. Jessie Hohmann, *Opium as an Object of International Law: Doctrines of Sovereignty and Intervention*, *in* 5 INTERNATIONAL LAW AND... SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 277 (August Reinisch et al. eds., Hart Pub. 2016) (noting that "[t]he study of international law is highly text-based.").

97. *Id.*

98. *Id.* ("[C]ases, treaties, and volumes of academic writing' are the legal sources through which most of us working in international law relate to the subject, and, at times we might come to feel that these texts are our major project and output.").

99. *Id.*

100. *But see generally* Ana Filipa Vrdoljak, *International Law, Museums, and the Return of Cultural Objects*, 33 MUSEUM ANTHROPOLOGY 75, 75 (2006).

101. *But see* KATJA LUBINA, CONTESTED CULTURAL PROPERTY: THE RETURN OF NAZI SPOLIATED ART AND HUMAN REMAINS FROM PUBLIC COLLECTIONS (Josh Moll & Sytze Steenstra eds., 2009) (In describing the photo on the back of the book cover, it was noted that "stamps and stickers on the back of paintings often provide relevant information for the reconstruction of a painting's whereabouts during the years 1933–1945.").

Some scholars have hypothesized that "the separation and closure of [international] law stands at the basis of its power," suggesting that international law has imperial claims and "presents itself as a discourse about all other discourses."[102] Accordingly, international law "must either digest the non-legal and transform it into legality, or it must reject it."[103] International law's vision is that of an ordered, coherent, and stable system, while material culture is "anarchic, open and free."[104] At the same time, "law has always had a visual policy, it has always understood the importance of the governance of images for the maintenance of the social bond."[105]

International lawyers follow certain formal aesthetics.[106] In order to write persuasive legal arguments, international lawyers follow criteria of brevity, clarity, and consistency and carefully select words, arguments, and sources. Texts visually represent data and have visual aspects. Thus, international lawyers consciously make a series of informed choices about how to arrange their texts, including the font, margins, and headings to be used. The selection of these elements contributes to a certain "functional aesthetics."[107] Some images also frequently appear on the covers of international law books.[108] International lawyers, scholars suggest, "use the cover page of their international law books, not only to illustrate their work but, more fundamentally, to attract readers into a game."[109] In fact, the readers are invited to "fin[d] an explanation for the cover of the book."[110] While some international lawyers build "explanatory bridges" between the imagery of the cover and the content of the book within the book itself, others provide "space for imagination."[111]

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102. Douzinas, *supra* note 44, at 354.

103. *Id.* at 355.

104. *Id.*

105. *Id.* at 362.

106. Karl N. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9, U. CHI. L. REV. 224, 228 (1942) ("Structured beauty becomes thus the aesthetic goal–an intellectual architecture, clean, rigorous; above all, carried through in sharp chiselling to body out the predetermined plan, in every vault, in each line, into each angle.").

107. *Id.* at 248.

108. *See* JEAN D'ASPREMONT & ERIC DE BRABANDERE, THE PAINTINGS OF INTERNATIONAL LAW (Sept. 27, 2016), Forthcoming in INTERNATIONAL LAW'S OBJECTS (Jessie Hohmann & Daniel Joyce eds., 2018).

109. *Id.* at 3.

110. *Id.*

111. *Id.* at 4.

However, even though some imagery has started to appear in international law works, a traditional discomfort with material culture still pervades international law. As a matter of fact, "modern (abstract) painting . . .has proved to be the greatest source of imagery in recent years, especially for books which . . . presuppose a more theoretical or critical perspective on international law."[112] More generally, there is a traditional uneasiness of law scholars with using images.

Perhaps, law's anxiety about the power of images has a strong philosophical, religious, and cultural genealogy. Since Plato, the ancient Greek philosopher who famously considered images as mere distortions of ideas, arguments against images have permeated philosophical thought for centuries and characterized certain religious beliefs.[113] Jewish, Islamic, and Christian iconoclasts prohibit images based on similar arguments.[114] According to this iconophobic tradition, the text is what really matters, and pictures are a distraction at best, and a deviation at worst, from the sacred text.[115] This philosophic, religious, and cultural opposition to images has culturally influenced the field of international law. International law coalesced in its modern form at the end of the sixteenth century, "[a]s the icons were excluded from churches, figures and imagery were banned from the law."[116] For early modern international lawyers, "[t]he word and the text" became "higher, spiritual expressions of the law."[117] The image is perceived as "too sensual[,]" "contingent[,] and transient" to complement the "law as the exercise of reason."[118] Yet, the traditional separation between the discipline of

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112. *Id.* at 5.

113. Douzinas, *supra* note 44, at 353-54.

114. Finbarr Barry Flood, *Idol-Breaking as Image-Making in the 'Islamic State'*, RELIGION AND SOCIETY: ADVANCES IN RESEARCH 7 (2016) 116–138, 117 (noting that "The erasure of the materials of memory is common to many historical episodes of iconoclasm" and that "The standard rationale for this ... is the rejection of shirk, beliefs or practices considered idolatrous or polytheistic by virtue of their deviation from the worship of one immaterial and unrepresentable God."), and 119 (highlighting the "shift from image to word as a kind of aniconic revolution, comparable to that which took place in sixteenth-century Europe, when Protestant reformists expelled the images from the churches.").

115. Douzinas, *supra* note 44, at 364-65 (highlighting that for Tertullian, "the greatest foe of icons and the systematizer of the arguments of the iconoclasts", "idolatry is the [principal crime of humankind] *principale crimen generis humani*.").

116. Costas Douzinas, *The Legality of the Image*, 63 MOD. L. REV. 813, 814 (2000).

117. Douzinas, *supra* note 44, at 366.

118. *Id.* (also adding that "law loves and fears images."); Richard K. Sherwin, *Visual Jurisprudence*, 57 N.Y.L. SCH. L. REV. 11, 19 (2012–2013) (pointing out the "deeply rooted love/hate relationship with visual images."); Douzinas, *supra* note 44, at 366 (noting that "law is the combination of reason and necessity, art of sensuality and freedom.").

international law and material culture studies does not mean that international lawyers should not be intellectually open in "an on-going process of self-questioning about the issues [they are] exploring and the approaches [they] adopt to do so."[119]

In turn, disciplines such as art history, archaeology, and material culture studies have developed distinctive methods and theoretical approaches to investigate objects.[120] These disciplines study artifacts, including diverse elements such as sculpture, crafts, and others, and consider them as an expression of a given civilization. Examining material culture unveils "an entire cultural universe . . . waiting to be discovered."[121] Objects can be time capsules, which open new perspectives on the past.

The traditional epistemic separation between the discipline of public international law and material culture studies raises the question as to whether inter-disciplinary approaches can be envisaged, and if so, whether they are desirable. International lawyers, archaeologists, and art historians ask different questions when examining the same artifacts. They have different aims, objectives, and methods. Therefore, questions arise as to whether methods of object analysis can and/or should migrate from one field to another. Moreover, without some methodological caution, there is a risk of epistemological misappropriation, as international lawyers are not trained in examining objects.

Second, context matters. Art historians have cautioned that there is a complex linkage between art and history, between cultural production and historical reality.[122] Artworks provide less neutral cultural evidence than other artifacts.[123] One should be cautious when interpreting material

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119. Sarah Nouwen, *Scholarship in International Law: The Challenge of Relevance without Arrogance*, ESIL NEWSLETTER, June 2017, at 3.

120. Prown, *supra* note 11, at 7.

121. *Id.* at 6.

122. JONATHAN HARRIS, ART HISTORY—THE KEY CONCEPTS, 23 (Routledge 2006) (noting that "Since the early twentieth century, though particularly after the Second World War, art history in this broad sense became an academic discipline"); Jennifer Doody, *The Link between Art and History*, HARVARD GAZETTE, (Apr. 19, 2016), *available at* https://news.harvard.edu/gazette/story/2016/04/the-link-between-art-and-history/ (last visited Feb. 8, 2018) (reporting the opinion of a history student: "It's not very interesting to just read about past events. But when you . . . see the art made by people actually living in that time, when you think about it and talk about it or even re-create a work by drawing it, you get a more in-depth understanding of that time and what people were going through. We get to see the context, and really experience it ourselves.").

123. Prown, *supra* note 11, at 12.

culture as historical evidence.[124] In fact, one should try to understand given artifacts in the light of their historical, political, and cultural context. As the art sociologist Arnold Hauser points out, "artists always work in the midst of a social situation."[125] One should ascertain whether artists had direct access to the given event; as well as whether there were any artistic or ideological interventions on the part of the artist and/or his or her patron.[126] Visual artifacts require critical engagement in order to become meaningful.[127] Unavoidably, material culture does not merely reflect history, nor does it remain separate from politics. The artistic and political value can clash with the historical and legal value.

The same historical events can and have been visually rendered in diametrically opposite ways depending on the context in which the artist lived and worked. For instance, the French painter Jacques Louis David (1748–1825) depicted Napoleon Bonaparte (1769–1821) as a military hero.[128] As the painter of the imperial court, he completed several versions of *Napoleon Crossing the Alps*, depicting Napoleon riding an unruly horse in rather celebratory tones.[129] These large paintings became tools of propaganda, glorifying Napoleon's military successes and helping to legitimize his rule.[130] Rather than providing a realistic portrait of Napoleon, David idealized his features emphasizing his role as a military leader.[131]

From a completely different standpoint, the Spanish painter Francisco Goya (1746–1828) depicted Napoleon's troops invading Spain, in a famous series of prints named *The Disasters of War* (*Los desastres de la guerra*)[132] and a painting, *The Third of May 1808* (*El tres*

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124. PIA F. CUNEO, *Introduction*, ARTFUL ARMIES, BEAUTIFUL BATTLES, 3, 4 (2001).

125. Arnold Hauser, *The "L'Art pour l'Art" Problem*, 5 CRITICAL INQUIRY 425, 427 (1979).

126. *See* CUNEO, *supra* note 124, at 7.

127. *See id.*

128. *See generally* ODILE NOUVEL-KAMMERER, SYMBOLS OF POWER: NAPOLEON AND THE ART OF THE EMPIRE STYLE, 1800-1815 (Harry N. Abrams 2007).

129. Sarah Cokeley, *Brushes with Conflict*, MILITARY HISTORY, (Mar. 2015), at 52–57.

130. MARTYN LYONS, NAPOLEON BONAPARTE AND THE LEGACY OF THE FRENCH REVOLUTION 178 (Palgrave 1994) (noting that "[i]mperial propaganda was designed to praise the achievements of France and of the reign").

131. *See* N.J. Cull, *David, Jacques-Louis (1748–1825)*, *in* N. J. CULL ET AL., PROPAGANDA AND MASS PERSUASION: A HISTORICAL ENCYCLOPEDIA, 1500 TO THE PRESENT (1st ed., 2003) (noting that "[u]nder Napoleon (1769–1821) David used his skills to develop a heroic image of the emperor. Strong classical echoes resurfaced in his painting of *Napoleon crossing the Alps*, which pictures the emperor, with billowing cloak, astride a rearing horse").

132. Francisco Goya, *Disasters of War*, 1810–20.

de mayo de 1808).[133] In both the prints and the painting, Goya took a "radically new look at war, 'where heroes have vanished and only human beings remain.'"[134] Rather than focusing on military leaders, Goya painted the victims of war, individual soldiers, and civilians. In the painting, *The Third of May 1808* (*El tres de mayo de 1808*), Goya depicted "an indiscriminate killing of civilians by French soldiers in reprisal for a guerrilla attack the previous day."[135]

As aptly noted by a legal scholar:

> The soldiers who are about to execute the young man look at their target but their faces are hidden from us. The witnesses cover their eyes from the violence to come; the eyes of the dead are closed. . . . Only the central figure [who is the young man soon to be executed] returns the gaze of the firing squad.[136]

Art historians have raised several questions in this context: "[h]ow would the man in front of the firing feel in Goya's . . . painting?"[137] "Can we tell who is more powerful and who has lost power in each image?"[138] "What political messages was Goya delivering in his large-scale painting?"[139] There are not set answers to the questions, as people have "different attitude[s] toward fear, anger, danger, hatred, war, violence, and death."[140] Certainly, the painting displays "a strong and powerful understanding" of war and "the human condition."[141] The young man soon to be executed appears as a point of light in the midst of darkness. Whether he has fear, one cannot tell. For some, Goya's painting "was intended to arouse anger and hatred on the part of the Spanish viewers."[142] For others, the painting "call[s] for an examination of the essential nature

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133. Francisco Goya, *Third of May 1808* (oil on canvas), Museo del Prado, Madrid, 1814; David A. Bell, *Total War*, MILITARY HISTORY 38, 47 (2007) (noting that the "atrocities . . . drove [Goya] to produce a series of . . . powerful etchings titled *The Disasters of War*, which . . . exposed the horrors of war in a manner rarely before seen in European art").

134. Paul Bouvier, *"Yo lo vi". Goya Witnessing the Disasters of War: An Appeal to the Sentiment of Humanity*, 93 INT'L REVIEW OF THE RED CROSS, 1107, 1133 (2011).

135. Arthur C. Danto, *Surface Appeal*, THE NATION (Jan. 11, 2007), *available at* https://www.thenation.com/article/surface-appeal/ (last visited Apr. 11, 2018).

136. Desmond Manderson, *Klimt's Jurisprudence—Sovereign Violence and the Rule of Law*, 35 OXFORD J. LEGAL STUD. 515, 534 (2015).

137. Alice Arnold, *Confronting Violence through the Arts: A Thematic Approach*, 58:4 ART EDU. 20 (2005).

138. *Id.* at 21.

139. *Id.*

140. *Id.* at 22.

141. *Id.* at 20.

142. Danto, *supra* note 135.

of war: power, aggression, chaos, and loss."[143] From an international law perspective, the painting seems to call for the respect of the law of war in particular, and the prevention of war in general.

The broad brushes used by Goya convey an impression of rushed realism; but the Spanish government commissioned the painting after the expulsion of the French.[144] Despite the formal commission, the painting conveys a sense of personal emotion and political resistance to the events it portrays; it was Goya who proposed the painting of these dramatic events.[145] Moreover, Goya's anti-war prints were published only thirty five years after his death, because their account of the brutality of war "[was] constructed as an assault on the sensibility of the viewer" and they were considered unpatriotic in their time.[146]

Third, the cultural perspective of the interpreter needs to be considered. Material culture can give rise to different interpretations, depending on the "cultural matrices" of the interpreters.[147] Those international lawyers willing to engage in material culture to investigate their field are products of different cultural contexts.[148] Can interpreters overcome their own cultural assumptions and "interpret evidence objectively in terms of the beliefs of the individuals and the society that produced that evidence?"[149] Arnold Hauser has argued that "once we become aware of the problem [of perspective] we can struggle against subjectivity, against individual and class interests, and can move toward greater objectivity."[150]

Yet, as the writer Susan Sontag put it, perspective matters: instead of seeing the carnage of war, and thus uniting to prevent it, for "those who are sure that right is on one side, oppression and injustice on the other, and that the fighting must go on, what matters is precisely who is killed and by whom. . . . To the militant, identity is everything."[151] In other words, material culture in the form of images of war can "vivify the

143. Arnold, *supra* note 137, at 24.

144. KENNETH CLARK, LOOKING AT PICTURES 132, 136 (1968).

145. *Id.*

146. Susan Sontag, *Looking at War*, THE NEW YORKER (Dec. 9, 2002), *available at* https://www.newyorker.com/magazine/2002/12/09/looking-at-war (last visited Mar. 5, 2018).

147. Prown, *supra* note 11, at 6.

148. *Id.* at 4.

149. *Id.*

150. *Id.* (referring to ARNOLD HAUSER, SOCIOLOGY OF ART 272 (Berel Lang & Forrest Williams eds., 1972)).

151. Sontag, *supra* note 146, at 4.

condemnation of war."[152] However, as Sontag aptly cautions, "to those who in a given situation see no alternative to armed struggle, violence can exalt someone subjected to it into a martyr or a hero."[153]

Therefore, it is crucial to acknowledge that both the discipline of international law and material culture studies embody some subjectivity. In fact, the process of interpretation is fraught by indeterminacy. How can interpreters cope with subjectivity? On the one hand, one should be aware of her own perspective to ideally neutralize possible bias and strive for objectivity, as Hauser suggested.[154] On the other hand, there is a risk that material culture re-politicizes issues that international law seeks to transform into legal matters.

Fourth, material culture studies cannot offer the sole, let alone the ultimate lens of analysis of international law as a field of study. We cannot acquire complete access to international law through material culture only. Rather, "[e]xternal information—that is, evidence drawn from outside the object . . . plays an essential role in the process."[155] Interdisciplinary methods can complement rather than supplant more traditional legal methods.[156] Therefore, a "*dialogue between* methods" should be promoted.[157] If international law scholars adopt approaches based on material culture studies, such methods should be part of a larger methodological tool kit.[158]

For instance, going back to the case study at the beginning of this article, Grotius' chest of books was a mere container of books. An examination of the chest does not indicate which books Grotius was reading in prison. Rather, it merely confirms that Grotius was reading books during his imprisonment. The chest of books is a starting point; further investigation on the early modern origins of international law requires an in-depth analysis not only of material culture, but also of written sources and historical context. In particular, Grotius' letters to his relatives shed light on the content of the book chest. Grotius' references also contribute to mapping his intellectual landscape. Investigating the historical period in which Grotius lived can provide

152. *Id.* at 5.

153. *Id.* ("Photographs of an atrocity may give rise to opposing responses: a call for peace; a cry for revenge; or simply the ... awareness ... that terrible things happen.").

154. Hauser, *supra* note 125.

155. Prown, *supra* note 11, at 6.

156. Woodward, *supra* note 17, at 361.

157. *Id.*

158. *See* Prown, *supra* note 11, at 5.

additional elements in investigating his life, worldview, and work.[159] Therefore, using multiple methods and sources can be a promising way to investigate international law and its history.

Finally, in certain instances, the use of material culture can politicize the discipline of international law. International law is often criticized for being more political than other legal fields and for lacking enforcement mechanisms similar to those of domestic legal systems.[160] Some international relations scholars even question whether international law is really law, or whether it rather reflects power politics.[161] According to this view, international law is an arm of politics, and the legal character and effectiveness of international law remains contested.[162]

This article certainly does not endorse this view; rather, it supports the view that international law is a legal system that aims to actualize the common interest of the international community as a whole.[163] Accordingly, international law aims at governing relations among nations and promoting fundamental values such as human rights, justice, peace, and prosperity. The proliferation of international law instruments, international dispute settlement mechanisms, and international legal scholarship show that there is some faith in the system. The juridification of international relations has implied a gradual shift from power politics to international law. In fact, international law aims at replacing power politics, by providing a legal framework that is binding on states. Most states comply with international law and wish to be considered as reliable players in the system. While municipal systems may be more structured systems, they are not necessarily better systems.

Against this background, one may wonder whether any politicization of the field, driven by the use of material culture, can be self-defeating, pointless, and even harmful. Material culture seldom offers a complete picture of events, rather, only a selective one. Therefore, at least in certain cases, scrutinizing international law through the lens of material culture risks inserting an excessive level of subjectivity in international legal discourse. In such contexts, the use of material culture in international legal discourse can defeat the aim of international law of providing legal rather than political solutions to given

159. *See supra* Introduction.

160. *See* Joyce, *supra* note 33, at 232.

161. *See id.*; *see generally* Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4, 4-32 (1990); Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT'L L. 7, 7-19 (2009).

162. *See* Joyce, *supra* note 33, at 232.

163. Philip Allot, *The Concept of International Law*, 10 EUR. J. INT'L L. 31, 37 (1999).

issues. For instance, there is a risk that media coverage directs international legal responses and that "international legal agendas . . . could come to depend too greatly on the priorities and biases of the media."[164] There is a risk that the demands of international justice are subjected to a phenomenon known as "trial by media."[165] The fact that "media coverage of conflict can . . . contribute to the failure of [negotiations and] international legal responses in certain cases"[166] suggests that in such cases the use of material culture can be harmful. In certain cases, media coverage can defeat diplomatic efforts, politicize issues, and lead to the escalation of conflict.

The interplay between international law as a field of study and material culture has not been properly addressed yet. However, such a gap in legal literature does not mean that the issue is pointless or irrelevant.[167] Gaps in the literature do not necessarily indicate whether a question is relevant or not. Gaps in the literature can be a matter of time. Circumstances change and may require new thinking and scholarly attention. Moreover, if a topic has been understudied, research in that field can be promising exactly because it can contribute something new to the available state of the art. The question as to whether a given research topic has relevance and/or has traction is a very important question that has to be addressed by the researcher at a very early stage of her investigation. However, the quality of a given research question is not necessarily linked to quantity of previous studies in the field. In any case, the interplay between international law and material culture is attracting the growing attention of scholars and practitioners as shown by some recent scholarship.[168] And it seems relevant because it can contribute to the teaching of international law and its critical assessment. And international law is a relevant field of analysis.

In conclusion, examining international law through the lens of material culture presents a number of risks. The discipline of international law and material culture studies have been traditionally perceived as separate branches of knowledge. The artistic and political value of material culture can clash with its historical/legal value.

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164. Joyce, *supra* note 33, at 231.

165. *Id.* at 233.

166. *Id.* at 231.

167. *But see* Nouwen, *supra* note 119 ("How can a gap in the literature lead to a relevant question if the literature itself is irrelevant? Are we not just filling a wall of irrelevance?").

168. *See generally* INTERNATIONAL LAW'S OBJECTS (Jessie Hohmann & Daniel Joyce eds. (forthcoming Sept. 2018)); THE ARTS AND THE LEGAL ACADEMY: BEYOND TEXT IN LEGAL EDUCATION (Zenon Bankowski, et al., eds., 2013).

Interpreters may interpret material culture differently based on their cultural background. Material culture also risks further politicizing international law. In sum, there are risks of "bias and distortion," as well as "simplification [and] amplification."[169] This does not mean that the interplay between international law and material culture should automatically be discarded; rather, such assessment should be conducted on a case-by-case basis.

IV. CRITICAL ASSESSMENT

The traditional lack of reflection on the role of material culture in international law as a field of study does not necessarily correspond to lack of relevance; on the contrary, international law and material culture have interacted in a variety of ways for centuries.[170] On the one hand, artists have long depicted events of international legal history for artistic, documentary, and even political reasons. Moreover, material culture studies have recently taken an international law turn.[171] Some artists have paid increasing attention to a number of international law concerns, responding to the events of their time through art.[172] By doing so they can influence or help shape international public opinion by the art they produce. For instance, Banksy's graffiti portraying a girl lifted by balloons toward the top of the wall is featured on the book cover of a recent monograph on the international law of occupation.[173] The traditional dialogue between material culture and international legal phenomena has intensified.

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169. Joyce, *supra* note 33, at 234.

170. *See, e.g.*, Jocelyn Penny Small, *Time in Space: Narrative in Classical Art*, 81 ART BULLETIN 562, 562, 568 (1999) (noting how Greek vases depicted wars and the Trajan's Column, in Rome, Italy, provides a visual history of the wars between the Romans and Dacians, a civilization in what is now Romania).

171. Joyce, *supra* note 33, at 241 (noting the turn to international law within the media); Eva Brems and Hilde Van Gelder, *Engaged Visual Art as a Tool for Normative Renewal in International Human Rights*, *in* INTERNATIONAL LAW AND . . . 463 (Reinisch et al., eds., 2016) (noting that since the beginning of the new millennium a 'legal turn' has taken place within the visual arts. Artists, art theoreticians, art critics and curators have paid increasing attention to human rights.).

172. Brems & Van Gelder, *supra* note 171 (noting that "[c]oncerned about the numerous problems posed by the global crisis [artists, art theoreticians, art critics and curators] have sought a valid means to express social commitment. Since human rights law is a dominant language for talking about injustice, it has proven highly inspirational").

173. AEYAL GROSS, THE WRITING ON THE WALL—RETHINKING THE INTERNATIONAL LAW OF OCCUPATION (2017).

On the other hand, international lawyers have become increasingly fascinated by material culture and the visual arts. In a "visually driven era, . . . the visual dimension of law and the normative power of the image" have received increasing attention.[174] "[I]nternational law has a rich existence in the world," and international lawyers have started investigating the relevance of given objects to the same.[175] Investigating international law through the lens of material culture demonstrates "the centrality of [the former] to the lives [of people]," and illuminates "the way [it] penetrates and intervenes in multiple aspects of each state's sovereignty."[176] For international lawyers, what matters is not the aesthetic quality of the object, but what that object says about international law.

The interaction between material culture and international law takes place in different ways. First, certain pieces of artworks have had a long-lasting influence on international lawyers. For instance, Mr. Advocate General Ruiz-Jarabo Colomer referred to Goya's *Third of May 1808* in an Opinion on the applicability of the Brussels Convention and in relation to the question of whether the privilege of State immunity from legal proceedings is compatible with the system of that Convention.[177] Analogously, Goya's *The Disasters of War* has been discussed in relation to humanitarian action.[178] A large tapestry reproduction of Picasso's *Guernica* has been exhibited in the United Nations building in New York City since 1985, constituting a visual reminder of the organization's responsibility to maintain peace.[179] Not only can material culture make international law open and accessible to a wide audience and have a didactic value, but it can illuminate the state of the art and the promises and pitfalls of the discipline. By depicting the dramatic effects of war, it can indirectly foster a culture of peace. The recognition that some forms of material culture constitute world heritage contributes to developing a sense of unity and common destiny in the international community.

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174. Daniel Joyce & Gabrielle Simm, *Zero Dark Thirty: International Law, Torture and Representation*, 3 LONDON REV. INT'L L. 295, 295 (2015).

175. Hohmann, *supra* note 96, at 277.

176. *Id.* at 287.

177. Case C-292/05, Lechouritou v. Dimosio, 2007, E.C.R. I-01519, Opinion of Mr. Advocate General Ruiz-Jarabo Colomer delivered on Nov. 8, 2006, European Court Reports, para. 2 (noting that "the harmful effects of war have been portrayed in all styles of art").

178. Paul Bouvier, *'Yo lo vi'. Goya witnessing the disasters of war: an appeal to the sentiment of humanity*, 93 INT'L REV. RED CROSS 1107, 1107-08 (2011).

179. GIJS VAN HENSBERGEN, GUERNICA: THE BIOGRAPHY OF A TWENTIETH-CENTURY ICON 212 (2004).

Second, material culture can be the object of international regulation and/or play a role in international dispute settlement. Given the growing expansion of international law, the discipline has increasingly governed elements of material culture from artworks to landscapes,[180] from world heritage sites[181] to underwater cultural heritage,[182] and so on. For instance, international copyright law governs the legal relationship between authors and inventors and their creations at the international level.[183] International cultural law is the branch of international law that governs different types of cultural heritage.[184] The international protection of cultural heritage, which includes some qualified forms of material culture, can promote peaceful relations among nations. By recognizing the international public value of cultural creations, international law can foster mutual understanding, dialogue, and cooperation among civilizations thus contributing to the prevention of war, and the promotion of peaceful relations among nations.[185] Other branches of international law have also dealt with aspects of material culture, from international criminal law[186] to the law of armed conflict;[187]

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180. *See* UNESCO European Landscape Convention, Council of Europe, Oct. 20, 2000, European Treaty Series 176, III-7.

181. *See* UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 11 I.L.M. 1358.

182. *See* UNESCO Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001 (entered into force Jan. 2, 2009) UNESCO Doc.31C/Resolution 24; *see* 41 I.L.M. 37 (2002).

183. *See generally* SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW AND POLICY (2008).

184. *See generally* JANET BLAKE, INTERNATIONAL CULTURAL HERITAGE LAW (2015); CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE (2012); ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW (Francesco Francioni & James Gordley eds., 2013); CULTURAL LAW: INTERNATIONAL, COMPARATIVE, AND INDIGENOUS (James A. R. Nafziger et al., eds., 2010).

185. Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972.

186. *See generally* CAROLINE EHLERT, PROSECUTING THE DESTRUCTION OF CULTURAL PROPERTY IN INTERNATIONAL CRIMINAL LAW (2014).

187. *See generally* HELGA TURKU, THE DESTRUCTION OF CULTURAL PROPERTY AS A WEAPON OF WAR (2018); MARINA LOSTAL, INTERNATIONAL CULTURAL HERITAGE LAW IN ARMED CONFLICT (2017).

from the law of the sea[188] to international private law;[189] and from international economic law[190] to climate change law.[191]

Material culture can also play a role in international dispute settlement.[192] Certain artifacts can have documentary value. Objects can portray a significant legal event, such as the signature of a treaty, the outbreak of a war, or the legal consequences of war. They can constitute evidence at trials before international courts and tribunals.[193] They can also constitute the object or reason underlying a claimant's cause of action. For instance, the theft, looting, and destruction of cultural items during military conflicts has been subject to extensive debate in international law and has furthered a number of international law responses, in the form of conventions, guidelines, and high-profile disputes.[194]

Third, material culture can also be "a tool for normative renewal."[195] By portraying how international law works in practice, material culture

188. *See, e.g.*, Tullio Scovazzi, *The Law of the Sea Convention and Underwater Cultural Heritage*, 27 INT'L J. MARINE & COASTAL L. 753 (2012).

189. *See generally* CHRISTA ROODT, PRIVATE INTERNATIONAL LAW, ART AND CULTURAL HERITAGE (2015).

190. *See generally* CULTURE AND INTERNATIONAL ECONOMIC LAW (Valentina Vadi & Bruno de Witte eds., 2015); VALENTINA VADI, CULTURAL HERITAGE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (2014).

191. *See generally* CLIMATE CHANGE AS A THREAT TO PEACE: IMPACT ON CULTURAL HERITAGE AND CULTURAL DIVERSITY (Sabine von Schorlemer & Sylvia Maus eds., 2014).

192. *See generally* V. Vadi & H. Schneider, *Art, Cultural Heritage and the Market: Legal and Ethical Issues*, *in* ART, CULTURAL HERITAGE AND THE MARKET: ETHICAL AND LEGAL ISSUES 1–26. (V. Vadi & H. Schneider eds., 2014).

193. Philippe, *supra* note 57, at 233 (noting that the Nuremberg trial was the first international criminal trial where images were used as evidence of crimes); Christian Delage, *Image as Evidence and Mediation: The Experience of the Nuremberg Trials*, *in* LAW AND POPULAR CULTURE (2005) 491–503, 495 (reporting that "most of the existing images were to be taken by the Allied forces at the moment of the liberation of the camps" and, at 503, that such movies "contributed to elucidating what happened in the camps"); Joyce & Simm, *supra* note 174, at 295 (pinpointing that "in the fields of human rights and international criminal justice, film has been used as evidence"); *see generally* Joyce, *supra* note 33. Sharon Sliwinski, *Visual Testimony: Lee Miller's Dachau*, 9 J. OF VISUAL CULTURE 389, 403 (2010) (highlighting that in the aftermath of World War II, "pictorial evidence came to outweigh all other forms of testimony").

194. ANA FILIPA VRDOLJAK, INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS (2006); LOSTAL, *supra* note 187; ALPER TAŞDELEN, THE RETURN OF CULTURAL ARTEFACTS—HARD AND SOFT LAW APPROACHES (2016); HUI ZHONG, CHINA, CULTURAL HERITAGE, AND INTERNATIONAL LAW (2017).

195. Eva Brems & Hilde Van Gelder, *Engaged Visual Art as a Tool for Normative Renewal in International Human Rights: The Case of Ariella Azoulay's Potential History (2012)*, 4 EUR. SOC'Y OF INT'L L. (2014).

can highlight areas for improvement of the discipline. Material culture can express criticism, nurture dissent, and foster protest. This can spur adjustment, evolution, and reform of critical areas of international law. Material culture can be a tool for critical thinking and bring positive developments in the field of international law.

At the same time, engaging with material culture also presents some risks. The discipline of international law and material culture studies have been traditionally perceived as separate branches of knowledge. The increasing use of material culture in international legal theory and practice requires the acquisition of "a more refined capacity for critical visual judgment" and methodological awareness.[196] Material culture has not a mere aesthetic value; rather, it has a deep relationship with reality, conveys meaning, and expresses a point of view.[197] It "do[es] not simply resemble reality, [it] also tend[s] to stimulate . . . emotional responses."[198] "To the extent that visual images amplify emotion . . . , images tend to be more compelling than texts alone."[199] The artistic and political value of material culture can clash with its historical and legal value. Both material culture and international law require interpretation and this often implies a degree of subjectivity. Material culture risks enhancing the political aspects of international law. Nonetheless, it can complement textual sources in a meaningful way, contributing to "the historical record precisely where words fail."[200]

In conclusion, material culture and international law have interacted in various ways. This article has studied this interplay and provided a roadmap for further investigation, showing that material culture can provide an additional tool to conduct meaningful, fruitful and relevant research in international law, while also cautioning against the risks it presents.

CONCLUSION

Hugo Grotius' chest of books has no aesthetic merit, but a significant relevance for the (history of) international law. Not only does it epitomize a lawyer's quest for freedom, but it also narrates a gripping tale

196. Richard K. Sherwin, *Visual Jurisprudence*, 57 N.Y.L. SCH. L. REV. 11, 14 (2012–2013).

197. *See* Rodrigo Ferrada Stoehrel, *The Legal Image's Forgotten Aesthetic*, 26 INT. J. SEMIOT. L. 555, 558 (2013).

198. Sherwin, *supra* note 196, at 14.

199. *Id.*

200. Sharon Sliwinski, *Visual Testimony: Lee Miller's Dachau*, 9 J. VISUAL CULTURE 389, 404 (2010).

of courage. It also contributes to unveil Grotius' reliance on a number of previous scholars. The chest shows that the origins of international law are more pluralist than we used to think. It also shows that material culture matters to international law, and can contribute to its study in a significant way.

For centuries, international law has been dominated by textual representation. This article has investigated the question as to whether it is possible to understand, learn and practice international law differently. In particular, this article shows that international law and material culture have become increasingly porous. The interaction between material culture and international law takes place in different ways. Not only have certain objects exercised a long-lasting influence on international lawyers, but material culture can be the object of international regulation and/or international dispute settlement. Material culture can be a fruitful tool of research complementing traditional tools of legal investigation. It can provide international lawyers with "visual access to the past."[201] It can also be a tool for normative renewal. Visual representations of international law aspects can contribute to highlight and critically assess the promise and pitfalls of the field. They can reveal "pressing needs . . . and anxieties as well as beliefs, hopes and aspirations" about international law.[202] Studying the linkage between the discipline of international law and material culture studies has the potential to defragment knowledge and overcome disciplinary boundaries. It has the potential to make international law more accessible across disciplines and among academic and other interested audiences.

At the same time, the use of material culture also presents some risks, such as that of politicizing international law. While some politicization is not necessarily a bad thing in the sense that it can be an opportunity for improvement, change and evolution, in some cases such politicization can be self-defeating, pointless and even harmful. There is a risk that media exposure delays processes of peace, or that it only presents a selection of the relevant facts, thus jeopardizing the proper functioning of international law and its dispute settlement mechanisms. However, this does not mean that material culture should not be relevant to international legal discourse in all cases.

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201. Agata Fijalkowski & Sigrun L. Valderhaug, *Legal Decisions, Affective Justice, and 'Moving On?'*, 7 OÑATI SOCIO-LEGAL SERIES 337, 340 (2017).

202. Richard K. Sherwin, *Law's Enchantment: The Cinematic Jurisprudence of Krzysztof Kieslowski*, *in* 7 LAW AND POPULAR CULTURE 87, 90 (Michael Freeman ed., 2005).

The linkage between international law and material culture is high risk high gain. In this regard, some careful interaction between international law and material culture can help the former develop intellectual openness, overcome disciplinary boundaries, and raise new relevant questions. International lawyers are well trained in retrieving information in written texts, but have traditionally only marginally dealt with interpreting information encoded in objects. Yet, material culture can constitute a promising tool for investigating international law. At the same time, international lawyers should be aware of the fact that material culture presents a number of risks. As "the image of international law . . . now matters more than ever,"[203] the relationship between international law and material culture certainly deserves further study.

203. Daniel Joyce, *Human Rights and the Mediatization of International Law*, 23 LEIDEN J. INT'L L. 507, 527 (2010).

U.N. REGULATION - THE BEST APPROACH TO EFFECTIVE CYBER DEFENSE?

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I. INTRODUCTION

As a rapidly growing threat and form of warfare, cybersecurity's presence in today's international community demands effective and proactive responses from the public and private sectors – as each sector is affected by such crime.[1] Defending against foreign attacks requires a two-pronged approach and would best be implemented and governed by the United Nations (U.N.) to ensure uniform standards and regulation. First, public private partnerships (PPPs) must reach a level of seamless cooperation within nations in order to most effectively defend against foreign cyberattacks. Second, such defense cannot be accomplished on solely a domestic level. International cooperation, which is essential to defending against foreign cybercrime, can most successfully be accomplished through utilizing the U.N. as the regulating body to set forth specific regulations for nations to follow and utilize to cooperate with each other.

Nations have shown increased efforts to strengthen their domestic cybersecurity departments,[2] and the need for international cooperation within PPPs has been recognized by many as an essential step in effective cyber defense.[3] Integrating these two widely-recognized concepts into one method governed by the U.N. would better regulate cyber defense and ensure a cohesive governing body over this prevalent issue.

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1. *See* Marthie Grobler et al., *Preparing South Africa for Cyber Crime and Cyber Defense*, 11 SYSTEMICS, CYBERNETICS & INFORMATICS 32, 33 (2013).

2. *National Digital Security Strategy: "A Good Balance Between Security Considerations and Economic Dynamism,"* GOUVERNEMENT.FR (Oct. 19, 2015), *available at* http://www.gouvernement.fr/en/national-digital-security-strategy-a-good-balance-between-security-considerations-and-economic (last visited Apr. 10, 2018) (noting that the French National Cybersecurity Agency 'Anssi' vowed to increase their agents from an initial 100 when the agency was founded in 2009, to 600 agents by 2017).

3. *Addressing Cyber Security Through Public-Private Partnership: An Analysis of Existing Models, Intelligence and National Security Alliance* (Nov. 2009), *available at https://www.insaonline.org/wp-content/uploads/2017/04/INSA_AddressingCyber_WP.pdf* (last visited Apr. 10, 2018).

The first section of this note will provide a brief overview of the status of the world in cybersecurity today and will speak briefly to the importance of international agreements. The second section will explore successful versus ineffective collaborations between the public and private sectors, with a close focus on the goals and importance of partnerships as well as common obstacles that both sectors face prior to and after engaging in a partnership. This section will also look into existing cybersecurity bodies of different nations and will analyze successful collaborations along with areas that can be improved upon in order to have a more effective impact on the prevention of foreign cyberattacks. Because defense against foreign cyberattacks cannot be accomplished through domestic measures alone, the third section examines international law's role in cybersecurity, with specific focus on the benefit of international cooperation between nations on a large scale. This section will look into the domestic practices that various countries use to defend against cyberattacks from foreign actors, potential issues with both existing and proposed collaborations, and international law governing public and private sector partnerships. This section also will examine why the U.N. is the most effective body to regulate and govern this cooperation between nations.

II. PUBLIC AND PRIVATE CYBERSECURITY: A BRIEF OVERVIEW

As warfare evolves, cyberattacks, cybercrime, and cyberespionage have become more prevalent and inevitable than ever before. Some nations have publicly declared that cybercrime is a main element of their foreign military strategy.[4] As attractive targets, government systems lure foreign cyber hackers through the very existence of national security secrets and personal identification information.[5] In November 2016, Saudi Arabia's aviation agency was attacked by a foreign actor that sent a virus specifically intended to penetrate government agencies.[6]

Private corporations are also common victims of cyberattacks, regardless of their size or apparent abundance of resources to prevent

4. Government of Canada, *Canada's Cyber Security Strategy: For a Stronger and More Prosperous Canada*, 1, 5 (2010), *available at* https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/cbr-scrt-strtgy/cbr-scrt-strtgy-eng.pdf (last visited Apr. 10, 2018).

5. *Id.*

6. Sewell Chan, Cyberattacks Strike Saudi Arabia, Harming Aviation Agency, N.Y. TIMES (Dec. 1, 2016), *available at* https://www.nytimes.com/2016/12/01/world/middleeast/saudi-arabia-shamoon-attack.html?_r=0 (last visited Apr. 10, 2018).

such attacks. Within the past five years, Staples, Home Depot, and JPMorgan Chase have all been victims of cyberattacks.[7] A single data breach reportedly costs U.S. companies each approximately $500,000.[8] As a result of successful hacks, the public images of these corporations suffer, and a large range of their sensitive information is compromised including product ideas, merger and acquisition information, corporate strategy, employment records, customer records, and financial data.[9] Further, smaller businesses are becoming more prone to attacks because they are typically less prepared and able to defend themselves than governments and larger businesses.[10]

Commonly accused offenders of cyberattacks on both foreign nations and private entities include China, Israel, North Korea, Iran, Russia, and the United States (U.S.).[11]

III. COLLABORATION BETWEEN THE PUBLIC AND PRIVATE SECTOR

Collaboration between the public and private sectors is a vital step in securing effective countermeasures against cyberattacks on sovereign states.[12] Countries across the world have recognized that the benefits of cybersecurity are not mutually exclusive to one sector.[13] Some have gone so far as to suggest that a successful cyber defense collaboration requires cooperation between the public sector, private sector, military, and

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7. Kevin Granville, *9 Recent Cyberattacks Against Big Businesses*, N.Y. TIMES (Feb. 5, 2015), *available at* https://www.nytimes.com/interactive/2015/02/05/technology/recent-cyberattacks.html (last visited Apr. 10, 2018).

8. *Cyberattacks on the Rise: Are Private Companies Doing Enough to Protect Themselves?*, PWC: GROWING YOUR BUS., 1, *available at* https://www.pwc.com/us/en/private-company-services/publications/assets/pwc-gyb-cybersecurity.pdf (last visited Apr. 10, 2018).

9. *Id.*

10. *Why do Hackers Want to Attack Small Businesses?*, NAT'L CYBERSECURITY INST. AT EXCELSIOR COLLEGE: CYBER EXPERTS BLOG (Feb. 10, 2016), *available at* http://www.nationalcybersecurityinstitute.org/general-public-interests/why-do-hackers-want-to-attack-small-businesses/ (last visited Apr. 10, 2018).

11. Kim Zetter, *We're at Cyberwar: A Global Guide to Nation-State Digital Attacks*, WIRED (Sept. 1, 2015), *available at* https://www.wired.com/2015/09/cyberwar-global-guide-nation-state-digital-attacks/ (last visited Apr. 10, 2018).

12. Daniel B. Garrie & David N. Lawrence, *The Need for Private-Public Partnerships Against Cyber Threats — Why A Good Offense May Be Our Best Defense.*, THE HUFFINGTON POST (Jan. 1, 2016), *available at* http://www.huffingtonpost.com/daniel-garrie/the-soft-power-war-isis-d_b_8818866.html (last visited Mar. 28, 2018).

13. Sean D. Carberry, *The Challenge of Liability Protection for Cyberthreat Sharing*, FCW (Sept. 27, 2016), *available at* https://fcw.com/articles/2016/09/27/cyber-liability-carberry.aspx (last visited Mar. 22, 2018); G.A. Res. 71/28, pmbl., ¶ 5 (Dec. 5, 2016).

citizens of each nation.[14] While the PPP concept has experienced significant growth – over half of all countries report relationships between the public and private sectors[15] – there is still significant room for improvement on the international plane if cyberattacks are to be effectively countered. To bridge this gap, private entities and governments must break the mold and willingly collaborate with one another across sectors.[16]

A. Purpose and Importance of Partnerships

PPPs are hardly a concept unique to cybersecurity.[17] However, the goal of establishing effective relationships between public and private sectors specific to cybersecurity, is to facilitate the exchange and sharing of information regarding cyber threats, common trends in attacks, prevention of attacks, and action in certain instances.[18] The need for partnerships is recognized within individual nations across the world as well as by the international community. The U.N. General Assembly recognized the need for countries to "[p]romote partnerships among stakeholders, both public and private, to share and analyse critical infrastructure information in order to prevent, investigate and respond to damage to or attacks on such infrastructures."[19]

In addition to clear-cut criteria regulating the partnerships, the most effective partnerships are founded "on trust, clear legal guidance, a bottom-up approach for efficient operation, and community involvement . . . for the betterment of society."[20] Though all of the elements contribute to an effective partnership, the most essential element for both sectors is trust, which necessarily takes time to establish.[21] However, in a climate

14. *See* Grobler et al., *supra* note 1, at 39 (using South Africa as an example).

15. United Nations Office on Drugs and Crime, *Comprehensive Study on Cybercrime*, at xxvii (Draft Feb. 2013), *available at* https://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf (last visited Mar. 21, 2018) [hereinafter UNODC].

16. EDWARD C. LIU ET AL., CONG. RESEARCH SERV., R42409, CYBERSECURITY: SELECTED LEGAL ISSUES 19 (2013).

17. Madeline Carr, *Public–private partnerships in national cyber-security strategies*, 48, *available at* https://www.chathamhouse.org/sites/files/chathamhouse/publications/ia/INTA92_1_03_Carr.pdf (last visited Apr. 11, 2018).

18. UNODC, *supra* note 15.

19. G.A. Res. 58/199, at 3 (Jan. 30, 2004).

20. Max Manly, *Cyberspace's Dynamic Duo: Forging a Cybersecurity Public-Private Partnership*, 8 J. OF STRATEGIC SEC. 85, 85 (2015).

21. *Id.* at 90.

where cyberattacks are frequent and evolving, this paradox does not assist timely defense efforts.

B. Obstacles to Successful Collaborations

1. Lack of Transparency

Possibly the biggest concern surrounding PPPs is the lack of trust that inherently exists between the two sectors. Although part of this notion will be discussed in detail below,[22] it is worth noting as an overarching concept that the partnership "will never be completely transparent."[23]

This concept may require more effort from the public sector than from the private sector. Under the National Cybersecurity and Communications Integration Center (NCCIC) model, private sector representatives are granted security clearance to join government representatives in a secure environment where both parties can view classified information and work directly with each other.[24] By inviting private sector representatives into government facilities, the public sector is attempting to instill confidence in the private sector.[25] However, this level of trust cannot be established in one instance or even prior to the actual implementation of the partnership. Rather, both sectors must be responsible for having an initial level of trust for the other so the partnership has a better chance of succeeding from the start.

2. Governmental Regulation of the Private Sector

Before one can consider a partnership between the public and private sectors, governmental overregulation is a concern that must be addressed.[26] A vast majority of private entities are reluctant to have their cybersecurity departments regulated by the government for a multitude of reasons. First, corporations and other private entities want to

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22. *See infra* section III.B.d.

23. Manley, *supra* note 20, at 91.

24. *See* Rachel Nyswander Thomas, *Securing Cyberspace Through Public-Private Partnership: A Comparative Analysis of Partnership Models*, CTR. FOR STRATEGIC & INT'L STUD. 1, 21 (2012), *available at* https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/130819_tech_summary.pdf (last visited Apr. 11, 2018).

25. *Id.*

26. *See* Amitai Etzioni, *The Private Sector: A Reluctant Partner in Cybersecurity*, INST. FOR COMMUNITARIAN POL'Y STUD., GEO. WASH. U. (Dec. 19, 2014), *available at* https://icps.gwu.edu/private-sector-reluctant-partner-cybersecurity (last visited Apr. 11, 2018).

autonomously decide what works best for their companies.[27] Privately-run corporations are hesitant to follow government-imposed regulations that would facilitate a partnership due to fear of loss of autonomy.[28] To ensure the private sector does not feel it is being overregulated by governmentally-imposed regulations, there needs to exist some level of trust that the government will not interfere with corporate activities beyond what is necessary to prevent and defend against cybercrime.[29]

As this process is one which requires significant resources, private entities fear that governmental regulation will come along with substantial costs that would render corporations "incapable of meeting profitability."[30]

Private entities fear that overregulation from the government will hinder corporate innovation, flexibility, and creativity.[31] Part of this worry comes from the notion that the government's oversight of a corporation's activities regarding cybersecurity information could provide information about the entity that might be used against them in a subsequent legal or regulatory action.[32] A partnership cannot be unilateral. Each sector must provide and accept input and advice from the other in order for there to be an effective, working relationship between the two sectors.[33]

An approach to partnerships that focuses on working from the bottom up may be the most effective way to prevent the private sector from feeling dictated and micro-managed by a governmental entity.[34] Australia, for example, forces corporations to participate in cybersecurity

27. *Id.*

28. *See* Ronald D. Lee & Nicholas L. Townsend, *New Government Cybersecurity Standards Could Impact Many Companies*, LEXOLOGY (Aug. 12, 2013), *available at* http://www.lexology.com/library/detail.aspx?g=d5650eac-65dd-42de-8784-5c62f5798b94 (last visited Apr. 11, 2018).

29. Judith H. Germano, *Cybersecurity Partnerships: A New Era of Public-Private Collaboration*, THE CTR. ON L. AND SEC., N.Y.U. SCHOOL OF LAW 1, 3 (2004), *available at* www.lawandsecurity.org/wp-content/uploads/2016/. . /Cybersecurity.Partnerships-1.pdf (last visited Apr. 11, 2018).

30. Etzioni, *supra* note 26.

31. Amitai Etzioni, *Cybersecurity in the Private Sector,* ISSUES IN SCI. AND TECH., *available at* http://issues.org/28-1/etzioni-2/ (last visited Apr. 11, 2018); Etzioni, *supra* note 26.

32. Andrew Nolan, *Cybersecurity and Info. Sharing: Legal Challenges and Solutions*, CON. RESEARCH SERV. 37 (2002), *available at* https://www.fas.org/sgp/crs/intel/R43941.pdf (last visited Apr. 11, 2018).

33. *See* Grobler et al., *supra* note 1, at 34.

34. Manly, *supra* note 20.

defense and to share internal data regarding attacks.[35] Corporations that are regulated without choice are more likely to feel overregulated by the government and less likely to want to share important information.[36]

3. Exposition of Hacks Could Hinder Economic Growth and Hurt Their Public Image

The private sector is reluctant to participate in open information sharing with governmental bodies because doing so might lead the public to believe that companies are economically weak or insecure.[37] Larry Clinton, of the Internet Security Alliance, categorized the plan of information sharing between the two sectors as counterintuitive by requiring private businesses to disclose their security statuses to the public.[38]

However, the more private corporations are encouraged to disclose their breaches, the more succeeding victims will be willing to follow suit. Google's announcement in 2009 of a security breach allegedly perpetrated by China is an example of this "if it happened to Google, it could happen to anyone" mindset.[39] The reluctance to announce cybersecurity breaches in fear of harming the corporation's public image could be eliminated if more corporations were open and candid about their susceptibility to outside attacks.

Some companies also claim that the very existence of a partnership with the government could hinder their public image.[40] This fear can only be removed by a solid, well-established partnership between the two sectors.[41] It will be difficult for companies' customers and investors to

35. Corey P. Gray, *Cyber Utilities Infrastructure and Government Contracting*, UNIV. OF MIAMI NATL. SEC. & ARMED CONFLICT L. REV. 151, 162 (2013); *see also* Manly, *supra* note 20.

36. *See generally* Manly, *supra* note 20.

37. *See* JUDITH H. GERMANO, CYBERSECURITY PARTNERSHIPS: A NEW ERA OF PUBLIC-PRIVATE COLLABORATION (NYU School of Law, Center on Law and Security 2014), *available at* http://www.lawandsecurity.org/wp-content/uploads/2016/08/Cybersecurity.Partnerships-1.pdf (last visited Mar. 21, 2018).

38. *See* ISSUES IN SCI. AND TECH., *supra* note 31 (explaining that corporations may be "shamed" if breaches are discovered and publicly disclosed).

39. Shane Harris, *Google's Secret NSA Alliance: The Terrifying Deals Between Silicon Valley and the Security State*, SALON (Nov. 16, 2014), *available at* https://www.salon.com/2014/11/16/googles_secret_nsa_alliance_the_terrifying_deals_between_silicon_valley_and_the_security_state/ (last visited Apr. 11, 2018).

40. *See* Manly, *supra* note 20, at 97. "The reluctance to join in a PPP could likely be credited to the potential for the government to gather mass amounts of sensitive information on company and customer information . . . ." *Id.*

41. *See id.*

place their trust in a corporation that does not trust its own data-sharing relationship with the public sector.

4. Disclosure of Confidential Information to the Opposite Sector

Each sector has a justified concern in protecting its own confidential information, even in the midst of sharing information to counter a threat as important as foreign cyberattacks. Governments naturally do not want confidential, protected information leaked to the general public or to private entities. In 2011, the U.S. White House Office of the Press Secretary issued a Cybersecurity Legislative Proposal which recognized the need for protection of government cyber-equipment and networks.[42]

The private sector holds a well-founded concern that the potential disclosure of internal business information might be used for unauthorized purposes by the government or by its business competitors.[43] Some method of removal and protection of this confidential information from the outset of a partnership needs to be negotiated and established prior to information sharing between the two sectors.[44]

5. Lack of Confidence in Public Sector's Ability to Regulate Themselves

It is difficult for the private sector to fully put its faith in the public sector when the public sector is so susceptible to cyberattacks itself.[45] In 2015, Canadian governmental agency servers were attacked likely by "[hostile] foreign governments."[46] France was victim to 24,000 cyber-

42. *See generally* Press Release, White House Office of the Press Secretary, Fact Sheet: Cybersecurity Legislative Proposal (May 12, 2011), *available at* https://www.whitehouse.gov/the-press-office/2011/05/12/fact-sheet-cybersecurity-legislative-proposal (last visited Mar. 21, 2018).

43. *See* EDWARD C. LIU ET AL., CONG. RESEARCH SERV., R42409, CYBERSECURITY: SELECTED LEGAL ISSUES (2013).

44. *See* Eric O'Neill, *Government's Efforts to Raise the Standard for Cyber Security with New Threat Sharing Regulation Still Problematic*, THE HILL (June 17, 2016), *available at* http://thehill.com/blogs/congress-blog/technology/283914-governments-efforts-to-raise-the-standard-for-cyber-security (last visited Mar. 29, 2018).

45. *See* Jody Westby, *The Government Shouldn't Be Lecturing Private Sector On Cybersecurity*, FORBES (June 15, 2015), *available at* http://www.forbes.com/sites/jodywestby/2015/06/15/the-government-shouldnt-be-lecturing-the-private-sector-on-cybersecurity/#b6bf79c38d64 (last visited Mar. 21, 2018).

46. Ben Makuch, *Canada Discovers It's Under Attack by Dozens of State-Sponsored Hackers*, VICE (Jan. 25, 2016), *available at* https://news.vice.com/article/canada-discovers-its-under-attack-by-dozens-of-state-sponsored-hackers (last visited Mar. 29, 2018); *see also Canadian Government Websites go Dark After 'Cyber Attack,'* BBC (June 17, 2015), *available at* http://www.bbc.com/news/world-us-canada-33170534 (last visited Apr. 17, 2018).

threats[47] and the U.S. Internal Revenue Service was victim to a cyberbreach which disclosed information from an unknown number of taxpayer accounts, however is estimated that between 104,000 and 700,000 accounts were compromised.[48] Attacks on the national infrastructure of foreign states have become increasingly more common in recent years.[49] Cybercrime successfully carried out on foreign governments damages both national "economies and State credibility."[50] As these attacks become more frequent and successful, private entities are less likely to put their trust in governmental bodies.

The private sector would most likely have more faith in trading information and confidential cybersecurity operations with the public sector if the public sector was not victim to cyberattacks on such a frequent basis. Nevertheless, French Defense Minister Jean-Yves Le Drian claimed that in regard to the 24,000 cybersecurity threats that "thousands . . . had been blocked."[51] This suggests that it may be beneficial for private corporations to reconsider their ambivalence towards partnership with the public sector based on the perceived inability of the public sector to defend against cyberattacks.

6. Information Sharing as a One-Way Street

The inevitable confidential nature of any nation's government and its agencies creates worry amongst private entities that sharing will not be reciprocated.[52] To eliminate any potential imbalance of shared information, specific limits should be established at the outset of negotiations between a PPP that clarify exactly what type of information will be shared. It is in the interest of both sectors for these limits to be established prior to the entering into an agreement so that this issue does

47. *France Thwarts 24,000 Cyber-Attacks Against Defence Targets*, BBC (Jan. 8, 2017), *available at* http://www.bbc.com/news/world-europe-38546415 (last visited Feb. 18, 2018).

48. *See* Rick Link, *What you Need to Know About the Cybersecurity Information Sharing Act of 2015*, ISACA (Oct. 10, 2016), *available at* https://www.isaca.org/cyber/cyber-security-articles/Pages/what-you-need-to-know-about-the-cybersecurity-information-sharing-act-of-2015.aspx (last visited Feb. 18, 2018); *see also* Kevin McCoy, *Cyber Hack Got Access to Over 700,000 IRS Accounts*, USA TODAY (Feb. 26, 2016), *available at* http://www.usatoday.com/story/money/2016/02/26/cyber-hack-gained-access-more-than-700000-irs-accounts/80992822/ (last visited Feb. 18, 2018).

49. *100% increase in cyber attacks will overwhelm critical infrastructure*, INFORMATION AGE (Dec. 6, 2017), *available at* http://www.information-age.com/increase-cyber-attacks-overwhelm-critical-infrastructure-123469887/ (last visited Apr. 17, 2018).

50. Grobler et al., *supra* note 1, at 35.

51. *France Thwarts 24,000 Cyber-Attacks Against Defence Targets*, *supra* note 47.

52. Germano, *supra* note 29, at 3.

not become an obstacle to real-time information sharing throughout the course of the partnership.

7. Lack of Real-Time Information Sharing

Aside from the list of concerns the private sector may claim as reasons for hesitancy towards engaging in a PPP, it is within the best interests of private entities to consider participation for the sole possibility of reduced legal issues due to reduced cybersecurity breaches.[53] The more private entities become victims to cyberattacks, whether they compromise customer information or not, the more susceptible they are to lawsuits filed by angered customers or clients.[54]

Because of the autonomy they enjoy, private companies typically have the technology and means to expediently respond to cyberattacks. However, due to "bureaucratic and other constraints," the government does not enjoy the same amount of flexibility that the private sector does in this regard.[55] Depending on the structure of the partnership, if the government is the sector that happens to be leading a specific cyberattack investigation, the private company victim to the attack might miss out on valuable time that they could be responding to the threat with their own expedient methods and resources.[56]

Some suggest that the only way to effectively approach real-time information sharing between the public and private sectors might be an untraditional one.[57] Because cyberattacks are a relatively recent form of warfare, those who aim to effectively counter these attacks might be forced to abandon their traditional views on cooperation between the public and private sectors.[58]

C. Existing Collaborations: What We Can Learn and What We Can Fix

Learning from past and current failures and triumphs in the cyber world will help create a more effective defense system in the future. In order to craft an ideal U.N. organization that oversees cyber defense,

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53. Markus Rauschecker, *Thinking Ahead – Implementing the NIST Cybersecurity Framework to Protect from Potential Legal Liability*, U.S. CYBERSECURITY MAG., 35, *available at* https://www.mdchhs.com/wp-content/uploads/UM-CHHS_article_USCYSU14.pdf (last visited Apr. 11, 2018).

54. *Id.* at 36.

55. Germano, *supra* note 29, at 3.

56. *Id.* at 11.

57. TUNNE KELAM, *Cyber Space-Ultimate Case for Trust,* THE EUROPEAN FILES: CYBERCRIME, CYBERSECURITY, AND CYBERDEFENCE IN EUROPE 14 (2016).

58. *See id.*

PPPs, and international cohesion, existing collaborations should be examined so issues can be eliminated from the outset. Taking a preliminary, proactive, and comprehensive look at issues surrounding existing partnerships will have a positive impact on eliminating these potential problems, and will ideally set up for a more functional overseeing body.

1. Overseeing Bodies

In the U.S., the Cyber Command specifically oversees the operations of the Department of Defense networks, while the Department of Homeland Security defends all other U.S. government networks.[59] Both the United Kingdom (U.K.) and Canada employ a central body to oversee national cybersecurity, while "Estonia, France, the Netherlands, and NATO have departments . . . specifically for cybersecurity."[60] Both the Danish Security and Intelligence Service and the European Union's (E.U.) approaches are slightly different from those nations that employ a centralized focus in that they assign departments responsibilities over different sectors.[61]

Some suggest that approaches similar to those instituted by Denmark and the E.U. require significant coordination in order to be successful.[62] Systems that are not coordinated by one governing cybersecurity body pose potential instability issues, as well as inconsistent communication between branches.[63] International cybersecurity efforts can only be as strong as the weakest nation's efforts,[64] therefore suggesting that more consistent domestic approaches would only benefit international coordination.

Though international cooperation is implicated by the fact that the governing bodies of cybersecurity vary tremendously across nations, it is beneficial to consider the array of different approaches nations take. Evaluation of the methods used by different countries allows international efforts to be more comprehensively developed, especially by a governing body such as the U.N. Some have suggested going so far as mapping out all governing cyber institutions as a first step towards

59. Neil Robinson, *Cybersecurity Strategies Raise Hopes of International Cooperation*, RAND CORP., *available at* http://www.rand.org/pubs/periodicals/rand-review/issues/2013/summer/cybersecurity-strategies-raise-hopes-of-international-cooperation.html (last visited Mar. 19, 2018).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Robinson, *supra* note 59.

"seamless cooperation" between nations to counter cybersecurity.[65] With seamless cooperation as the goal, it is with this interest in mind that all cooperating nations should be willing to contribute their most effective and ineffective approaches towards cybersecurity.

One proposed method of an integrated overseeing body between the public and private sectors was set forth by the U.S. Intelligence and National Security Alliance (INSA) Cyber Task Force, suggesting that an "executive committee" should be established, consisting of both corporate executives and governmental officials.[66] The INSA Cyber Task Force emphasized the government's role as superior in such a partnership, as only the government has the "legitimacy to regulate industry where private citizens' interests are at risk."[67] While this notion may be partially true, full or even majority governmental control over a PPP would not be beneficial for an effective defense system against cyberattacks. The private sector will inevitably feel inferior, opening up the possibility of hindered cooperation between branches.

In order for cybercrime to be effectively countered on an international level, it is in every state's best interest that foreign approaches are considered, evaluated, mended if needed, and eventually harmonized. There is a higher chance of success at diminishing foreign cybercrime if there is a more cohesive, universal approach to the issue rather than various uncoordinated efforts emanating from different countries around the world.

2. Current and Operating Collaborations

Many nations currently have cybersecurity PPPs in place. Examining the domestic partnerships that other nations have is beneficial to the creation of an overseeing U.N. body so effective collaborations can be replicated, and troublesome collaborations can either be fixed or avoided.

The European Commissioner for Digital Economy and Society planned to "establish a contractual public-private partnership on cybersecurity" in 2016 that required participation from a range of actors including national security agencies, to cyber-equipment producers, to

65. *Id.*

66. *Addressing Cyber Security Through Public-Private Partnership: An Analysis of Existing Models, Intelligence and National Security Alliance* 1, 3 (2009), *available at* https://www.insaonline.org/wp-content/uploads/2017/04/INSA_AddressingCyber_WP.pdf (last visited Mar. 22, 2018) [hereinafter INSA].

67. *Id.*

critical infrastructure operators.[68] The European Cybersecurity Strategy launched a program that integrates the public and private sectors and addresses research priorities, identifies common and prevalent issues, and discusses common outcomes of cybersecurity efforts.[69] The strategy also looks into ways in which both sectors can focus and organize research efforts.[70] Portugal in particular has recognized the importance of information sharing between the public and private sectors with the common goal of eventually regulating cybersecurity on the global level.[71]

In the U.S., the Federal Bureau of Investigation (FBI) has recently become more involved in engaging with the private sector to participate in public awareness efforts.[72] One of the more well-known alliances between the U.S. government and a private entity is that between the National Security Agency (NSA) and Google. After Google was the victim of a large-scale cyberattack in 2009, it was announced in The Washington Post that Google had partnered with the NSA with the main goal of proactively defending Google from future cyberattacks.[73] Neither organization officially commented on their alleged partnership.[74] Allegedly, however, information was shared between the two groups, though Google did not share "proprietary data" with the NSA while the NSA did not have access to Google users' searches or email accounts.[75] According to sources connected to the alliance, Google agreed to provide

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68. Gunther H. Oettinger, *Partnerships to step up cybersecurity in Europe*, THE EUR. FILES: CYBERCRIME, CYBERSECURITY, AND CYBERDEFENCE IN EUR., Jan. 2016, at 6, 7.

69. *See Public Private Partnership on Cybersecurity*, EUR. COMM'N (Dec. 14, 2015), *available at* ec.europa.eu/smart-regulation/roadmaps/docs/2015_cnect_004_cybersecurity_en.pdf (last visited Apr. 17, 2018).

70. *See id.*

71. *See* U.N. Secretary-General, *Developments in the Field of Information and Telecommunications in the Context of International Security*, 17-18, U.N. Doc. A/71/172 (July 19, 2016).

72. *Statement Before the House Committee on Homeland Security, Subcommittee on Counterterrorism and Intelligence*, FBI (June 28, 2012), *available at* https://archives.fbi.gov/archives/news/testimony/economic-espionage-a-foreign-intelligence-threat-to-americans-jobs-and-homeland-security (last visited Mar. 26, 2018); Melanie Reid, *A Comparative Approach to Economic Espionage: Is Any Nation Effectively Dealing With This Global Threat?*, 70 U. MIAMI L. REV. 757, 767 (2016).

73. Ellen Nakashima, *Google to Enlist NSA to Help It Ward Off Cyberattacks*, WASH. POST, (Feb. 4, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/02/03/AR2010020304057.html (last visited Mar. 26, 2018); Stephanie A. DeVos, *The Google-NSA Alliance: Developing Cybersecurity Policy at Internet Speed*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 172, 200-01 (2011); *see also* Harris, *supra* note 39.

74. Nakashima, *supra* note 73.

75. Nakashima, *supra* note 73; DeVos, *supra* note 73, at 201.

traffic information on its networks in exchange for information on foreign hackers from the NSA.[76]

Direct partnerships similar to that between the NSA and Google are virtually impossible to establish on a national, never mind global, scale due to the sheer volume of governmental agencies and private corporations that exist. However, such partnerships are ideal in that they can be mutually beneficial in that parties to this type of relationship could possibly offer information to the other party in exchange for reciprocal information or protection.[77] It is widely accepted that the public sector has adequate resources and ability to defend against cyberattacks.[78]

In 2013, the U.S. government (specifically the National Institute of Standards and Technology within the Department of Commerce) implemented a program called the Cybersecurity Framework as the result of collaboration between the government and private sector.[79] This framework uses commonplace language to suggest methods of cybersecurity management that private entities can follow, without making such methods mandatory.[80] While this framework is not binding on corporations, ideally they would see the benefits that this program (or one similar implemented in countries outside of the U.S.) provides and would eventually adopt a similar program on their own accord.

Also in the U.S. is the NCCIC, a 24-hour center which shares cybersecurity information across both government entities and the private sector.[81] This model appears extremely beneficial for the real-time information sharing portion of PPPs as well as confidence-building between the two sectors. Nevertheless, it is important to consider where the government should draw the line in term of granting the private sector access to the center. Should a line be drawn, or should the government maintain an "all are welcome" attitude so as to include as many corporations as possible? These threshold issues are among those which

76. Harris, *supra* note 39.

77. *Id.*

78. Germano, *supra* note 29, at 2.

79. Rauschecker, *supra* note 53, at 35-36.

80. *See id.*

81. *About the National Cybersecurity and Communications Integration Center (NCCIC)*, HOMELAND SEC., (June 22, 2017), *available at* http://www.dhs.gov/xabout/structure/gc_1306334251555.shtm (last visited Mar. 26, 2018); *see also* RACHEL NYSWANDER THOMAS, SECURING CYBERSPACE THROUGH PUBLIC-PRIVATE PARTNERSHIP: A COMPARATIVE ANALYSIS OF PARTNERSHIP MODELS 19 (2012), *available at* https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/130819_tech_summary.pdf (last visited Apr. 17, 2018).

can be incorporated and negotiated by an organ of the U.N. in setting forth guidelines for PPPs.

While many European nations have strong national cybersecurity strategies in place, as of 2015 the majority have not formalized or implemented a PPP, and rather have informal relationships between the public and private sectors.[82] France's cybersecurity strategy, the French National Digital Security Strategy, recognizes the importance of PPPs,[83] however France has not formally established any such program.[84]

Germany has an exceptionally strong PPP system in place known as UP KRITIS.[85] UP KRITIS defines the goals of the initiative specific to each department involved, recognizing that the goals of every single governmental and private sector are not going to be exactly the same.[86] The German government first recognized the need for a partnership with the private sector in 2005.[87] Through UP KRITIS, concepts from both sectors are compiled together and eventually implemented, training exercises are held, and a system for "crisis management" is established.[88] UP KRITIS emphasizes a network of trust between all members, specifically during the exchange of confidential information.[89] Because trust is such an essential element to a successful partnership between the two sectors, the U.N. should follow UP KRITIS's emphasis on establishing trust from the outset of collaborations. Knowing that trust is an issue for each sector is an important first step to build on, as this can be a platform upon which the U.N. operates to create this environment from the start.

As the risk to cybersecurity and attacks inevitably evolves, some call on the public sector to proactively predict the evolution of these sophisticated threats, and have both safeguards and countermeasures in

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82. *See* BSA, EU CYBERSECURITY DASHBOARD, A PATH TO A SECURE EUROPEAN CYBERSPACE 11-16 (2015).

83. GEN. SECRETARIAT FOR DEF. NAT'L SECURITY, FRENCH NAT'L DIGITAL SEC. STRATEGY 3 (2015), *available at* https://www.enisa.europa.eu/topics/national-cyber-security-strategies/ncss-map/France_Cyber_Security_Strategy.pdf (last visited Mar. 26, 2018).

84. *See id.*; CYBERSECURITY DASHBOARD, *supra* note 84, at 13.

85. *See* UP KRITIS, FED. OFF. INFO. SEC., UP KRITIS: PUBLIC-PRIVATE PARTNERSHIP FOR CRITICAL INFRASTRUCTURE PROTECTION (2014), *available at* http://www.kritis.bund.de/SubSites/Kritis/EN/publications/Fortschreibungsdokument_engl..html (last visited Mar. 26, 2018).

86. *See id.*

87. *Id.* at 29.

88. *Id.* at 7.

89. *Id.* at 29.

place to evolve along with the attacks.[90] The focus of establishing cooperative and effective partnerships between the private and public sectors should be on determining how each sector's contributions can fit together in order to best counter the attacks.[91]

As one of the leading investigative bodies in the U.S., the FBI's longstanding recognition and appreciation of the private sector's willingness to work with the public sector[92] is an essential step towards an effective partnership. Further, the U.S. approach to insulating liability for the private sector is one that would only be beneficial if practiced by all countries, with the end goal of integrating both the public and private sectors. The U.S. proposes that liability protection should be offered to protect the private entities from losing profits as a byproduct of sharing information with the public sector.[93] Establishing private sector trust in the federal government is crucial to the success of information sharing between the two sectors. In establishing what some call a "reverse Miranda protection," essentially nothing the private sector shares with the government can be used to against it.[94] Penny Pritzker, U.S. Commerce Secretary, emphasized at the Chamber of Commerce Cybersecurity Summit that failure to foster the private sector's trust in the public sector would not only leave the country vulnerable to outside cyberattacks, but would "risk slowing the pace of American innovation."[95] Governments hoping to establish successful and seamless partnerships between the public and private sectors need to recognize this concept of allowing the private sector to retain a certain level of autonomy. The risk in removing any of the freedoms the private sector would normally retain if it were not for the partnership with the public sector threatens to interfere with internal economies on a much larger scale.

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90. Danilo D'Elia, *Public-Private Partnership: The Missing Factor in the Resilience Equation - The French Experience on CIIP*, THE CIP REP., 13 (Feb. 2015), *available at* http://www.cyberstrategie.org/sites/default/files/media/danilo_delia_extrakt_-_public-private_partnernship_the_missing_factor_in_the_resilience_equation_the_french_experience_on_ciip_.pdf (last visited Mar. 26, 2018).

91. *Id.*

92. Thomas T. Kubic, *Before the House Committee on the Judiciary, Subcommittee on Crime*, FBI, (June 12, 2001), *available at* https://archives.fbi.gov/archives/news/testimony/the-fbis-perspective-on-the-cybercrime-problem (last visited Mar. 26, 2016).

93. Etzioni, *supra* note 26.

94. Sean D. Carberry, *The Challenge of Liability Protection for Cyberthreat Sharing*, FCW (Sept. 27, 2016), *available at* https://fcw.com/articles/2016/09/27/cyber-liability-carberry.aspx (last visited Apr. 3, 2018).

95. *Id.*

3. Benefits to the Private Sector

While both the public and private sectors have many justifiable concerns regarding partnership, the most effective way to overcome these concerns would be to address them from the start of negotiations. This would ensure that potential issues do not arise unexpectedly, undermining the mutually beneficial aspects that the partnership creates.

As cybersecurity evolves and expands, the notion of consistency, especially among the private sector, may become more important from a legal perspective. Courts that are faced with cybersecurity breach lawsuits may look for one standard to hold the private entities accountable.[96] With multiple varying pieces of legislation, standards of care, and frameworks in place that quasi-govern the private sector's regulation of cybersecurity, it is difficult to hold these private entities to the same, even level of care.

IV. INTERNATIONAL EFFORTS: LEGISLATION, COOPERATION, AND ISSUES

Many countries rely heavily on international law both to encourage active participation in international information sharing and to help establish and encourage partnerships between the public and private sectors.

A. International Law Governing Collaboration and Cooperation Between Nations

The need for international cooperation and some level of information sharing across nations stems from the idea that one nation alone does not hold all of the resources necessary to defend against cyberattacks.[97] One example of an exemplary system of international information sharing is the "Five Eyes" – the U.S., Canada, New Zealand, Australia, and the U.K.[98] While the specifics of this alliance are not publicly known, these five countries operate under the general premise of sharing top-secret cyber intelligence.[99] One nation alone cannot target and

96. Rauschecker, *supra* note 53, at 36.

97. *See* Alexander Moens et al., *Cybersecurity Challenges for Canada and the United States*, FRASER INST. (Mar. 2015) 21, *available at* https://www.fraserinstitute.org/sites/default/files/cybersecurity-challenges-for-canada-and-the-united-states.pdf. (last visited Apr. 3, 2018).

98. *Id.* at 20.

99. *See Privacy International Launches International Campaign for Greater Transparency Around Secretive Intelligence Sharing Activities Between Governments*, PRIVACY INT'L (Oct. 13, 2017), *available at* https://www.privacyinternational.org/node/51 (last visited Apr. 3, 2018).

effectively counter every cyberattack that is mounted against it.[100] Keeping pace with evolving threats and funding research that goes into the defense against cyberattacks are both tasks that are achieved with higher success with cooperation amongst nations.[101]

Individual nations have enacted policies to encourage international cooperation in cybercrime defense. South Africa, for example, drafted a cybersecurity policy that set forth the framework for encouraging international cooperation and compliance with existing cybersecurity standards.[102] These are the types of policies or ideologies that nations should adopt in order to promote international cooperation in cybersecurity.

There are a range of agreements addressing cybersecurity that currently govern, dictate, and suggest methods of international cooperation. Bilateral and multilateral treaties between nations have become more prevalent, fostering agreements to work together and share intelligence regarding threats and attacks. In 2007, Turkey, the U.K., and Northern Ireland agreed to cooperate within their own capacities to assist in the prevention, detection, and suppression of cybercrimes.[103] China and France entered into a similar agreement in 2008, agreeing to assist each other in combatting cybercrime.[104]

While bilateral and multilateral treaties may be effective for the nations they are between, these agreements are not as effective on a global level in uniting as many nations as possible to work together with the goal of successfully countering cyberattacks. The more forceful, binding, and, eventually effective method for international cooperation might be one that is employed on a much larger scale and by one overseeing body. In 2001, the Council of Europe established common goals between European states and other signatory parties at the Budapest Convention on Cybercrime.[105] The Convention recognized the need for cooperation between states' public and private sectors, as well as international

100. *See* Moens et al., *supra* note 97, at 21.

101. *See id.* at 23.

102. Grobler et al., *supra* note 1, at 35.

103. Memorandum of Understanding between the Government of the Republic of Turkey and the Government of the United Kingdom of Great Britain and Northern Ireland on cooperation in combating terrorism, serious crime and organised crime. (Mar. 12, 2007), 2503 U.N.T.S. 44746.

104. *See* Agreement on cooperation in the field of internal security between the Government of the French Republic and the Government of the People's Republic of China art. 2, Sept. 10, 2006, 2515 U.N.T.S. 44911.

105. *See* Convention on Cybercrime, pmbl., Nov. 23, 2001, E.T.S. 185.

cooperation in prosecuting cybercrime.[106] Similarly, the U.N. General Assembly has recognized "the importance of international cooperation for achieving Cybersecurity."[107] The governance of the U.N. over international cybersecurity cooperation would provide a large amount of organization over the collaborations, which would eventually lead to a more cohesive system of information sharing between cooperating nations.

In addition to the Budapest Convention, 41 countries are members of the Wassenaar Arrangement[108] (Arrangement), which is a platform that has been established to contribute to international security by keeping "intrusion software," *inter alia*, out of the hands of terrorists.[109] The Arrangement is voluntary[110] and it is the responsibility of the nations' legislators to incorporate the regulations, as set forth in the Arrangement, into their respective legislation.[111] This type of arrangement is ideal in nature: it incorporates, and thus quasi-regulates, a large number of leading nations (including the U.S., the U.K., Russia, Canada, and Australia[112]), and sets forth consistent international security guidelines for nations to follow.[113]

However, this specific Arrangement has been victim to significant criticism over the past couple of years. The Coalition for Responsible Cybersecurity (CRC), an organization formed to prevent the U.S. government from adopting certain regulations that could negatively impact U.S. cybersecurity efforts,[114] agrees with the general principles of Wassenaar, however considers the Arrangement to be "overly broad."[115]

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106. *Id.*

107. G.A. Res. 58/199, at 2; U.N. Doc. A/RES/58/199 (Jan. 30, 2004).

108. Bill Camarda, *'Meltdown' over international cybersecurity agreement*, NAKED SEC. BY SOPHOS, *available at* https://nakedsecurity.sophos.com/2016/12/28/meltdown-over-international-cybersecurity-agreement/ (last visited Apr. 19, 2018).

109. The Wassenaar Arrangement, *available at* http://www.wassenaar.org/ (last visited Apr. 4, 2018); Camarda, *supra* note 1.

110. Tami Abdollah, *US fails to renegotiate arms control rule for hacking tools*, ASSOC'D. PRESS (Dec. 19, 2016), *available at* http://bigstory.ap.org/article/c0e437b2e24c4b68bb7063f03ce892b5/us-fails-renegotiate-arms-control-rule-hacking-tools (last visited Apr. 19, 2018).

111. Camarda, *supra* note 108.

112. *Id.*

113. *See* The Wassenaar Agreement, *supra* note 109.

114. About Us, COALITION FOR RESPONSIBLE CYBERSECURITY, *available at* http://www.responsiblecybersecurity.org/aboutus/ (last visited Feb. 12, 2018).

115. Tom Reeve, *Wassenaar Arrangement 'inhibits international cyber-security efforts'*, SC MEDIA UK (July 21, 2016), *available at* https://www.scmagazineuk.com/wassenaar-arrangement-inhibits-international-cyber-security-efforts/article/530845/ (last visited Apr. 19, 2018).

Because Wassenaar's goal is to prevent terrorists from acquiring technological developments in "intrusion software,"[116] its essential consequence is a dichotomy in that it also "impede[s] the ability of the international cyber-security community to respond in a timely manner to threats and attacks."[117] Though it attempts to prevent exactly this, Wassenaar is criticized for having a detrimental effect on cybersecurity rather than a beneficial one. Wassenaar is further criticized for its negative impact on the private sector.[118] It proposes a system of license applications which critics believe would subject private companies to increased cyberattacks as well as damage internal company data.[119] Further evidencing its problematic nature, the Arrangement is difficult to renegotiate due to the "secrecy that surrounds the negotiations and the resulting policies."[120]

Wassenaar is an ideal agreement of which to base a U.N. model for governing PPPs and international cooperation in that it sets forth specific implementations for countries to follow and is not too broad. However, an agreement that mirrors Wassenaar exactly might have limited effectiveness due to the private sector's hesitancy to put itself at risk by following the regulations. Though a lofty task, nations who are currently a part of Wassenaar would benefit from either attempting to renegotiate Wassenaar and craft it into an implementable model for the U.N., or creating a new agreement with the same specific goals that does not suggest methods that would potentially harm the private sector. Some have also suggested building upon the Budapest Convention[121] which would be beneficial as well, if more specificity can be included.

In 2015, over 20 nations agreed to a U.N. Group of Governmental Experts (GGE) report regarding norms of international security, including China, France, Russia, the U.K., and the U.S.[122] Signatories to

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116. *See* The Wassenaar Agreement, *supra* note 109; Camarda, *supra* note 108.

117. Reeve, *supra* note 115.

118. *See Wassenaar: Cybersecurity and Export Controls, J. Hearing Before the Subcomm. on Info. Tech. of the H. Comm. on Oversight and Gov't Reform and the Subcomm. on Cybersecurity, Infrastructure Prot., and Sec. Tech. of the H. Comm. on Homeland Sec.*, 114th Cong. 66-73 (2016) (written testimony of Dean C. Garfield, President and CEO, Information Technology Industry Council).

119. *Id.* at 68-69.

120. Reeve, *supra* note 115.

121. *Cybersecurity: A global issue demanding a global approach*, U.N. DEP'T OF ECON. AND SOC. AFF., *available at* http://www.un.org/en/development/desa/news/ecosoc/cybersecurity-demands-global-approach.html (last visited Feb. 18, 2018).

122. Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, GA Res. A/70/174, July 22,

this report agreed to a level of "cyber diplomacy,"[123] and are called upon to both refrain from engaging in cyberattacks, as well as to protect their own systems to the best of their abilities from foreign attacks.[124] The report goes one step further and warns states against using proxies to carry out such activities.[125] Measures such as the norms set forth in the GGE report can be considered "confidence-building measures" between nations.[126] Cooperation and collaboration within the international community are concepts that both rely heavily upon trust. At the very least, the international community would benefit from some sort of framework that regulates how nations should behave in the cybersecurity realm.[127]

The benefits to establishing an international community, which shares information and takes proactive measures to prevent against cyberattacks, are international peace and security.[128] While this concept is easier said than done, taking a look at the multitude of reports, treaties, and other international agreements that are currently being implemented, and extracting the benefits from each to add to an existing or to create a new governing agreement is in every nations' best interest in cybersecurity defense.

B. Existing International Efforts to Harmonize Public and Private Sectors

Aside from treaties and conventions that govern international cybersecurity cooperation, many nations are already members to large-scale international agreements that encourage partnerships between the public and private sectors for defending against cyberattacks.

In 2004, the Council of Europe held a Conference on the Challenge of Cybercrime (Conference) and called for governments to encourage cooperation between state institutions and the private sector.[129] The Convention on Cybercrime has thirty-seven signatories and has been

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2015; Tim Maurer, *The New Norms: Global Cyber-Security Agreements Face Challenges*, CARNEGIE ENDOWMENT FOR INT'L PEACE, *available at* http://carnegieendowment.org/2016/02/05/new-norms-global-cyber-security-agreements-face-challenges-pub-63031 (last visited Apr. 11, 2018).

123. Maurer, *supra* note 122.

124. Governmental Experts, *supra* note 122.

125. *Id.*

126. *Id.*

127. Daniel M. Gerstein, *Define Acceptable Cyberspace Behavior*, U.S. NEWS, (Sept. 26, 2015), *available at* http://www.usnews.com/opinion/blogs/world-report/2015/09/26/us-china-cybersecurity-pact-highlights-bigger-issues (last visited Apr. 26, 2018).

128. *See generally* Governmental Experts, *supra* note 122.

129. Conference on the Challenge of Cybercrime, COUNCIL OF EUR., 1 (Sept. 15-17, 2004), *available at* www.anticorruption.bg/fileSrc.php?id=657 (last visited Apr. 18, 2018).

ratified by five nations.[130] One of the objectives of the Conference is to include the chief executives of corporations in the fight against cybercrime, and to request participation from nations, the E.U., and international organizations.[131] This model's inclusivity is one which should be replicated. Its incorporation of officials from not only the public and private sectors, but from intergovernmental institutions already sets the foundation for a PPP that is regulated by the U.N. Though partnerships need to be negotiated mainly between the public and private sectors themselves, including the U.N. would help maintain consistency and provide a neutral intermediary between the two sectors.

Some agreements have been established on a smaller scale than the Conference, yet lend just as much, if not more, insight as to how international information sharing between the public and private sectors might best be effectuated. In 2003, the Asia-Pacific Economic Cooperation hosted a Cyber-Security Workshop where members of the Economic Commerce Steering Group (ECSG) agreed to work with the private sector to exchange information, practices, and policies related to cybersecurity issues with the goal of identifying the most effective practices to counter cyberattacks.[132] The ECSG vowed to work with the private sector to strengthen "the intersection of privacy and security" with the eventual goal of promoting proactive security policies and protections, and consequently, information sharing with other entities.[133] Aside from the underlying goal of cooperation between governments and the private sector, the workshop emphasized the distinct roles of government and private entities in building a secure culture in the cyber world.[134] According to the ECSG, private businesses have an obligation to educate both employees and partners about cybersecurity issues while governments have the duty to develop partnerships with the private sector to facilitate information sharing.[135]

While this agreement is very narrow, its approach is one which the U.N. would benefit from adopting. Cybercrime defense is at its strongest when the public and private sectors are harmonized and the best way to facilitate this partnership is through specific and planned efforts that

130. *Id.*

131. *Id.* at 2.

132. APEC Electronic Commerce Steering Group; 8th Meeting, Phuket, Thailand, 4 (Aug. 15-16, 2003), *available at* http://mddb.apec.org/Documents/2003/ECSG/ECSG2/03_ecsg2_summary.doc (last visited Mar. 26, 2018).

133. *Id.* at 7.

134. *Id.* at 1.

135. *Id.* at 6.

emphasize the importance of collaboration between the public and private sectors of each participating state.[136] It would be in the U.N.'s best interest to consider approaches taken by all different sizes of international agreements, workshops, conferences, conventions, and research groups. By considering these plans, successful approaches can be adopted, and proven problematic approaches can be avoided.

C. Issues with International Cooperation

While treaties and other international agreements are essential to defeat foreign cyberattacks, there are many potential issues that must be evaluated and resolved prior to officially engaging in international information sharing. The most obvious and vital of these issues is the reluctance of foreign governments to risk sharing internal security information with other nations.[137] While nations party to a treaty or international agreement to assist each other in combating cybercrimes may be allies on that particular topic, or at one particular point in time, it is uncertain that those nations will remain allies in the future.[138] The reluctance to share sensitive security information with other states is founded in a justified concern of providing foreign state's information critical to national infrastructure. If all information regarding cybersecurity is shared with allied states, what security is retained in the cyber world and in warfare? In establishing an international agreement, nations should consider this potential dilemma in order to avoid future misunderstandings regarding the sharing of information. The best way in which nations can be successful in forming an effective collaboration to combat cybercrime is through early preparation of possible issues.[139]

Another major issue with effectively countering cybercrime on an international level is the difficulty in recruiting some of the major world powers because of their suspected involvement in cyberespionage. Since many countries are commonly-accused offenders of cyberespionage, a conflict of interest exists in deciding whether to include them in the

136. *See id.*

137. *See* Sico van der Meer, *Foreign Policy Responses to International Cyber-attacks: Some Lessons Learned*, CLINGENDAEL NETH. INST. OF INT'L REL. (2015), *available at* https://www.clingendael..org/sites/default/files/pdfs/Clingendael_Policy_Brief_Foreign%20Policy%20Responses_September2015.pdf (last visited Mar. 25, 2018).

138. *Id.*

139. *See* Mary Ellen O'Connell, *Cyber Security without Cyber War*, 17 J. OF CONFLICT AND SEC. L. 187, 196 (2012).

international effort to defend against these attacks.[140] These countries (with the exception of the U.S.) are viewed by many as those who justify intellectual property theft because they believe it creates a "level playing field amongst developed and developing countries."[141] Nations who are victims of these attacks are less likely to want to work with the nations who are commonly accused of facilitating these types of cyberattacks. This is an issue that would best be left for an overseeing U.N. body to mediate and work through because it is not a nation state itself.

D. U.N. as the Best Governing Mechanism

In order to ensure international cooperation is as close to seamless as possible, the largest international governing body in the world is the best organization to oversee such regulation. The countless variations of agreements that currently exist in today's international community are a step in the right direction, because they set out to tackle the problem of foreign cyber defense. However, the issue is that the agreements are not large-scale, uniform, specific, and inclusive enough to have a lasting and effective impact.[142]

International organizations have become notably authoritative actors in the international community.[143] The U.N. Security Council has been considered "the most powerful supranational organ in the world" with significant impact on the nation-state system.[144] Though some doubt or question how much power the U.N. actually holds in the world today,[145] many still consider it to be influential. Using this powerful, international body is the best method through which to oversee and regulate PPPs and

140. *See* Rita Boland, *Countries Collaborate to Counter Cybercrime*, SIGNAL, (Aug. 2008), *available at* http://www.afcea.org/content/?q=countries-collaborate-counter-cybercrime (last visited Apr. 11, 2018).

141. Reid, *supra* note 72, at 822.

142. *See* Murat Dogrul et al., *Developing an International Cooperation on Cyber Defense and Deterrence Against Cyber Terrorism*, *in* 3D INT'L CONF. ON CYBER CONFLICT 29, 38 (C. Czosseck et al. eds., 2011).

143. *See* Martin Binder & Monika Heupel, *The Legitimacy of the UN Security Council: Evidence from Recent General Assembly Debates*, 59 INT'L STUDIES QUARTERLY 238, 238 (2015).

144. *Id.*

145. *See generally* Nile Gardiner, *The Decline and Fall of the United Nations: Why the U.N. Has Failed and How It Can Be Reformed*, HERITAGE FOUND. (Feb. 7, 2007), *available at* http://www.heritage.org/report/the-decline-and-fall-the-united-nations-why-the-un-has-failed-and-how-it-can-be-reformed (last visited Apr. 18, 2018).

international cooperation because of the influence it has in the international arena.[146]

V. CONCLUSION

The need for PPPs within the cybersecurity world has long been recognized and is more urgent now than ever with cybersecurity's recent surge as a modern-day form of warfare. Defending against cyberattacks on a global level can best be viewed as a two-step process, and is best implemented by the U.N.

Seamless collaboration within nations between respective public and private sectors is where the world needs to start before cybersecurity can be countered on an international level. Nations would inherently become stronger to fight against these foreign actors if their own domestic sectors are as close to being in tandem agreement as they can in regards to how to best share information and work together to prevent against outside attacks.

The next, equally essential step after domestic cooperation between the public and private sectors is cooperation between nations.[147] Cybersecurity becomes much more effective when it is implemented on a global level, with cohesive standards that nations are able to follow. Cybercrime defense would benefit from uniform standards so that all nations are held to the same standard and all are able to cooperate and collaborate under one uniform organization.

Both of these partnership concepts require significant trust. With well thought-out agreements and cooperative efforts from both the private and public sectors as well as nations across the world, an effective level of cybersecurity can be reached.

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146. *See* Mahmudul Hasam, *International Cyber Security Cooperation*, MODERN DIPL. (Nov. 13, 2016), *available at* https://moderndiplomacy.eu/2016/11/13/international-cyber-security-cooperation/ (last visited Mar. 26, 2018).

147. *See EU Cybersecurity Dashboard: A Path to a Secure European Cyberspace*, BSA: THE SOFTWARE ALL., 3 (Jan. 1, 2015), *available at* http://cybersecurity.bsa.org/assets/PDFs/study_eucybersecurity_en.pdf (last visited Apr. 11, 2018).

OVERSTEPPING ITS BOUNDARIES: THE EUROPEAN COMMISSION FOLLOWED THE OECD'S INFLUENCE BUT WENT ONE STEP TOO FAR

Adam T. Sanderson[†]

I. INTRODUCTION

On August 30, 2016, the European Commission (Commission) announced during a news conference held in Brussels that Apple, Inc. (Apple) owed Ireland up to $14.5 billion in back taxes.[1] Prior to this announcement, Ireland had issued Apple a tax ruling that allowed the company to allocate profits on European Union (EU) sales to an internal head office that existed only on paper.[2] Europe's competition enforcer, Margrethe Vestager, stated that "[t]he arrangements enabled Apple to funnel profit from two Irish subsidiaries to a 'head office' with 'no employees, no premises, [and] no real activities.'"[3] This resulted in a corporate tax rate of 0.005%, far below Ireland's official 12.5% corporate tax rate.[4] The Commission's competition enforcer, among many things, is responsible for "effectively enforcing competition rules in the areas of

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1. European Commission Press Release IP/16/2923, State aid: Ireland Gave Illegal Tax Benefits to Apple Worth up to 13 Billion (Aug. 30, 2016).

2. *See id.*

3. James Kanter & Mark Scott, *Apple Owes $14.5 Billion in Back Taxes to Ireland, E.U. Says*, N.Y. TIMES (Aug. 30, 2016), *available at* https://www.nytimes.com/2016/08/31/technology/apple-tax-eu-ireland.html?_r=0 (last visited Mar. 28, 2018).

4. European Commission Press Release IP/16/2923, *supra* note 1.

antitrust, cartels, mergers and state aid."[5] Vestager has lead the charge against multinational corporate (MNC) tax avoidance, often referred to as "a corporation's worst nightmare."[6]

The Commission announcement did not come without its large share of criticism. Senator Chuck Schumer, senior United States Senator of New York, called it a "'cheap money grab' . . . 'targeting U.S. businesses and the U.S. tax base,'" while "[t]he Senate Finance Committee chairman, Orrin G. Hatch, said that the decision 'encroaches on U.S. tax jurisdiction.'"[7] Even Apple's CEO Tim Cook stated in a letter addressed to Apple's customers, "[t]his claim has no basis in fact or in law."[8] Further, Ireland's Minister for Finance, Michael Noonan, stated: "I disagree profoundly with the Commission's decision. Our tax system is founded on strict application of the law, as enacted by the Oireachtas, without exception."[9] So what does this mean for Apple and other multinational corporations (MNCs) operating within the EU, and did this decision in fact have a valid basis in the law?

The attention that international taxations have been drawing is unprecedented, as "international tax policy, and base erosion and profit shifting (BEPS) have each been the subject of major front-page articles in the financial news."[10] Apple is just one of many MNCs that have been

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5. *Margrethe Vestager*, EUROPEAN COMM'N, *available at* https://ec.europa.eu/commission/commissioners/2014-2019/vestager_en (last visited Mar. 28, 2018).

6. Rachel Butt, *What You Need to Know About Margrethe Vestager, the Politician Going After Apple*, BUS. INSIDER (Aug. 30, 2016), *available at* http://www.businessinsider.com/margrethe-vestager-european-commission-apple-2016-8 (last visited Mar. 28, 2018).

7. Kanter & Scott, *supra* note 3.

8. Tim Cook, *A Message to the Apple Community in Europe*, APPLE (Aug. 30, 2016), *available at* http://www.apple.com/ie/customer-letter/ (last visited Mar. 28, 2018).

9. Press Release, Ir. Dep't of Fin., Minister Noonan Disagrees Profoundly with Comm'n on Apple (Aug. 30, 2016), *available at* https://www.dfa.ie/irish-embassy/spain/news-and-events/2016/min-noonan-apple-decision/ (last visited Apr. 6, 2017); *see also About the Oireachtas*, HOUSES OF THE OIREACHTAS, *available at* http://www.oireachtas.ie/parliament/about/ (last visited Mar. 28, 2018) ("Ireland is a parliamentary democracy. The National Parliament (Oireachtas) consists of the President and two Houses: Dáil Éireann (House of Representatives) and Seanad Éireann (the Senate) whose functions and powers derive from the Constitution of Ireland enacted by the People on 1st July, 1937. The Houses of the Oireachtas are situated at Leinster House, Dublin.").

10. Nicholas J. DeNovio et al., *State Aid: What It Is, and How It May Affect Multinationals and Tax Departments*, TAX EXEC. (Apr. 6, 2016), *available at* http://taxexecutive.org/state-aid-what-it-is-and-how-it-may-affect-multinationals-and-tax-departments/ (last visited Mar. 28, 2018); *see also About the Inclusive Framework on* BEPS, OCED, *available at* http://www.oecd.org/tax/beps/beps-about.htm (last visited Mar. 28,

investigated by the Commission over their tax practices. In June of 2014, when the Commission announced its investigation of Apple in Ireland, it also announced in-depth investigations into Starbucks in the Netherlands, and Fiat Finance and Trade in Luxembourg.[11] The investigations were opened in order to determine if these MNCs were in compliance with EU rules on state aid.[12] Commission Vice President in charge of competition policy Joaquin Almunia stated that "[u]nder the EU's state aid rules, national authorities cannot take measures allowing certain companies to pay less tax than they should if the tax rules of the Member State were applied in a fair and non-discriminatory way."[13] Article 107(1) of the Treaty on the Functioning of the EU provides that:

> [A]ny aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.[14]

The alleged illegal state aid was purportedly granted in the form of comfort letters. These letters specify how "a specific tax will be calculated," and thus if only given to a few selective companies would result in an illegal advantage.[15] On October 21, 2015, the Commission released its decision concluding that "Luxembourg and the Netherlands have granted selective tax advantages to Fiat Finance and Trade and Starbucks, respectively," resulting in illegal state aid.[16] The Commission stated that both Fiat Finance and Trade and Starbucks received tax rulings that "endorsed artificial and complex methods to establish taxable profits for the companies," resulting in an unfair advantage over other

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2018) ("Base erosion and profit shifting (BEPS) refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations.").

11. *See* European Commission Press Release, IP/14/663, State aid: Comm'n investigates transfer pricing arrangements on corporate taxation of Apple (Ir.) Starbucks (Neth.) and Fiat Finance and Trade (Lux.) (June 11, 2014).

12. *See id.*

13. *Id.*

14. Consolidated Version of the Treaty on the Functioning of the European Union, art. 107(1), May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

15. Tom Fairless, *EU to Publish Details of Probes of Tax Deals Benefiting Apple, Fiat*, WALL ST. J. (Sept. 28, 2014), *available at* https://www.wsj.com/articles/eu-to-publish-details-of-probes-of-tax-deals-benefiting-apple-fiat-1411908859?mg=id-wsj (last visited Mar. 28, 2018).

16. European Commission Press Release, IP/15/5880, Comm'n Decides Selective Tax Advantages for Fiat in Lux. and Starbucks in the Neth. are Illegal under EU State Aid Rules (Oct. 21, 2015).

companies.[17] During the announcement of this ruling the Commission stated that "[t]he fight against tax evasion and tax fraud is one of [its] top priorities," and spoke of action plans "aim[ed] to significantly improve the corporate tax environment in the EU, making it fairer, more efficient and more growth-friendly."[18]

This article is going to explore the recent history of the rise of attention to multinational corporate tax avoidance and how it has affected the Member States within the EU, specifically analyzing how the Organization for Economic Cooperation and Development (OECD)/G20 BEPS project has influenced the recent Commission decisions. Both Luxembourg and the Netherlands have appealed the Commission's decision, which concludes the existence of state aid in both cases, and Ireland has also agreed to launch an appeal.[19] In Luxembourg's press release announcing the appeal, the Luxembourg government stated, "Luxembourg is strongly committed to tax transparency and the fight against harmful tax avoidance. Luxembourg fully adheres to the OECD/G20 BEPS project, which will modernize international tax rules and create a global level playing field."[20] The Netherlands released a statement expressing that, "[t]he Dutch practice is lawful and compliant with the international system of the OECD. However, the Commission's verdict in the Starbucks case deviates from national law and the OECD's system."[21] The Netherlands further stated, "[t]he government is of the opinion that the Commission does not convincingly demonstrate that the Tax Authority deviated from the statutory provisions."[22] Last, Ireland's minister for Finance, Michael Noonan, stated in regard to Ireland's

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17. *Id.*

18. *Id.*

19. *See Luxembourg appeals the EU Commission's State aid decision in the Fiat case*, PWC (Dec. 7, 2015), *available at* https://www.pwc.lu/en/tax-consulting/docs/pwc-tax-071215.pdf (last visited Apr. 6, 2018); *see also* EU Direct Tax Newsalert: Non-confidential version of the EC's final State aid decision on Starbucks, PWC (June. 29, 2016), *available at* https://www.pwc.com/gx/en/tax/newsletters/eu-direct-tax-newsalerts/assets/eudtg-newsalert-29-june-2016.pdf (last visited Apr. 5, 2018); *see also* Paul Hannon, *Ireland to Appeal EU's Apple Tax Ruling*, WALL ST. J. (Sept. 2, 2016), *available at* https://www.wsj.com/articles/ireland-appeals-eus-apple-tax-ruling-1472820356 (last visited Mar. 28, 2018).

20. Press Release, Lux. Ministry of Fin., Comm'n/Lux. to appeal the Comm'n's Fiat decision (Apr. 12, 2015), *available at* http://www.mf.public.lu/actualites/2015/12/fiat_041215/index.html (last visited Apr. 6, 2018).

21. *Government appeals the decision in the Starbucks Case*, GOV'T OF NETH. (Nov. 27, 2015), *available at* https://www.government.nl/latest/news/2015/11/27/government-appeals-the-decision-in-the-starbucks-case (last visited Apr. 6, 2018).

22. *Id.*

decision to appeal that "Ireland has done nothing wrong here. We have a proven track record in international tax reform and a strong commitment to meeting the best international standards."[23] All three of these Member States have stressed that they are following and supporting the international standards on taxation. This article will show how these international standards came into effect and how they have influenced the Commission. Furthermore, this article I will demonstrate how the Commission took the battle to combat multinational corporate tax avoidance a step too far.

II. G-20 AND THE OECD'S EFFECT ON MULTINATIONAL CORPS

As a result of the financial crisis of 2008, political pressure began to build in an area that has not materially changed since the 1920's: multinational corporate tax avoidance.[24] Although some question the role tax havens had in the financial crisis,[25] at The Group of Twenty (G20) Summit in London, the leaders of the G20 addressed "tax havens and non-cooperative jurisdictions," as part of their strategy to overcome the financial crisis.[26] The G20 "is a forum for international co-operation that brings together leaders, finance ministers and central bank governors of 20 economies: 19 member countries plus the European Union."[27]

The G20 focuses on globalization, coordinating policy at the international level, and met for the first time in a decade in 2008 to address the state of the world following the financial crisis.[28]

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23. Press Release, Ir. Dep't of Fin., Opening Statement by the Minister for Fin., Michael Noonan, TD – Seanad Statements on the European Commission's decision that Ireland Provided Unlawful State Aid to Apple (Apr. 10, 2016), *available at* https://www.oireachtas.ie/parliament/media/committees/finance/2017/Opening-Statement—-Minister-Noonan.pdf (last visited Apr. 6, 2018) [hereinafter Press Release, Ir. Dep't of Fin.].

24. *See* Itai Grinberg, *The New International Tax Diplomacy*, 104 GEO. L.J. 1137, 1139 (2016).

25. *See* Geoffrey Loomer & Giorgia Maffini, *Tax Havens and The Financial Crisis*, OXFORD U. CTR. FOR BUS. TAX'N (Apr. 2009), *available at* http://eureka.sbs.ox.ac.uk/3554/1/TaxHavensandtheFinancialCrisis.pdf (last visited Mar. 28, 2018).

26. The Group of Twenty, *Declaration on Strengthening the Financial System – London*, (Apr. 2, 2009), *available at* https://www.treasury.gov/resource-center/international/g7-g20/Documents/London%20April%202009%20Fin_Deps_Fin_Reg_Annex_020409_-_1615_final.pdf (last visited Mar. 28, 2018).

27. *G20 Members*, OECD AND THE G20, *available at* http://www.oecd.org/g20/g20-members.htm (last visited Mar. 28, 2018).

28. *See OECD and the G20: About*, OECD, *available at* http://www.oecd.org/g20/about.htm (last visited Mar. 28, 2018).

At the 2008 Washington Summit, in the Declaration of the Summit on Financial Markets and the World Economy the Leaders of the Group of Twenty stated that they are "determined to enhance . . . cooperation and work together to restore global growth and achieve needed reforms in the world's financial systems."[29] Although tax avoidance was not even close to the center of the conversation at the summit,[30] the Declaration did address international taxation briefly, stating that "[t]ax authorities, drawing upon the work of relevant bodies such as the . . . []OECD[], should continue efforts to promote tax information exchange. Lack of transparency and a failure to exchange tax information should be vigorously addressed."[31] Another outcome of the Washington G20 Summit was the agreement for the leaders to meet again "by April 30, 2009, to review the implementation of the principles and decisions," that they had agreed upon.[32]

This led to the Summit in London on April 2, 2009, in which the G20 Leaders "made path breaking decisions that paved the way for subsequent and decisive progress in the fight against tax havens."[33] This particular Summit had high expectations leading up to it as, British Prime Minister Gordon Brown called for "a new Bretton Woods – a new financial architecture for the years ahead."[34] Whether or not the London Summit met these expectations, G20 leaders expressed their view of the summit stating that, "[t]aken together, these actions will constitute the largest fiscal and monetary stimulus and the most comprehensive support programme for the financial sector in modern times."[35] Although it seems

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29. *Declaration of the Summit on Financial Markets and the World Economy*, GEORGE W. BUSH WHITE HOUSE (Nov. 15, 2008), *available at* https://georgewbush-whitehouse.archives.gov/news/releases/2008/11/20081115-1.html (last visited Mar. 28, 2018); *see also About G20*, G20 - 2015 TURKEY, *available at* http://g20.org.tr/about-g20/ (last visited Mar. 28, 2018) ("The Group of Twenty (G20) is the premier forum for its members' international economic cooperation and decision-making. Its membership comprises 19 countries plus the European Union. Each G20 president invites several guest countries each year.").

30. *See generally Declaration of the Summit on Financial Markets and the World Economy*, *supra* note 29.

31. *Id.*

32. *Id.*

33. *OECD and the G20: London, United Kingdom 2009*, OECD, *available at* https://www.oecd.org/g20/summits/london/ (last visited Apr. 5, 2018).

34. Carrick Mollenkamp et al., *For G-20, Lofty Goals Have Fallen to Earth*, WALL ST. J. (Mar. 20, 2009), *available at* http://www.wsj.com/articles/SB123836689501467451 (last visited Apr. 5, 2018).

35. *London Summit – Leaders' Statement 2 April 2009*, OECD, *available at* https://www.oecd.org/g20/summits/london/G20-Action-Plan-Recovery-Reform.pdf (last visited Mar. 28, 2018).

like these leaders were just patting themselves on the back, most of them still realized that "the real work of economic recovery [has] to resume when their planes touch down back home."[36] An aspect of this Summit was the implementation of the Action Plan set out in the previous Washington Summit. One of the agreements set forth in the Action Plan was "to take action against non-cooperative jurisdictions, including tax havens."[37] This was a significant step in combating tax avoidance, as the G20 countries agreed to work closely with the OECD, which at the London Summit "published a list of countries assessed by the global Forum against the international standard for exchange of information."[38] Although this was a small step, the OECD considered it "a major breakthrough in the fight against tax havens."[39]

The OECD, established in 1961 and headquartered in Paris, France, is an intergovernmental economic organization whose mission is "to promote policies that will improve the economic and social well-being of people around the world."[40] Following the 2009 G20 summit, the OECD had become "the linchpin of the major overhaul of the international tax architecture," which among many things, was assigned with "addressing massive tax avoidance by multinational corporations."[41] The next key step in combating tax avoidance taken by the G20 countries came at the 2012 Summit in Los Cabos, Mexico, where the leaders "reiterate[d] the need to prevent base erosion and profit shifting."[42] At the 2013 Summit in St. Petersburg of the Russian Federation, "[t]he OECD made a key contribution to G20 discussions on tax by delivering the Action Plan against Base Erosion and Profit Shifting (BEPS)."[43] OECD Secretary-General Angel Gurría stated when referring to the plan, that:

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36. *G-20 Reality Check*, WALL ST. J. (Apr. 3, 2009), *available at* http://www.wsj.com/articles/SB123872213415985213 (last visited Apr. 5, 2018).

37. *London Summit – Leaders' Statement 2 April 2009*, *supra* note 35.

38. *Declaration on Strengthening the Financial System – London Summit*, 4 (Apr. 2, 2009), *available at* https://www.oecd.org/g20/summits/london/Annex-Declaration-Strengthening-Financial-System.pdf (last visited Apr. 5, 2018).

39. *London, United Kingdom 2009*, *supra* note 33.

40. *About the OECD*, OECD, *available at* http://www.oecd.org/about/ (last visited Apr. 5, 2018).

41. *Taxation*, OECD AND THE G20, *available at* https://www.oecd.org/g20/topics/taxation/ (last visited Mar. 19, 2018).

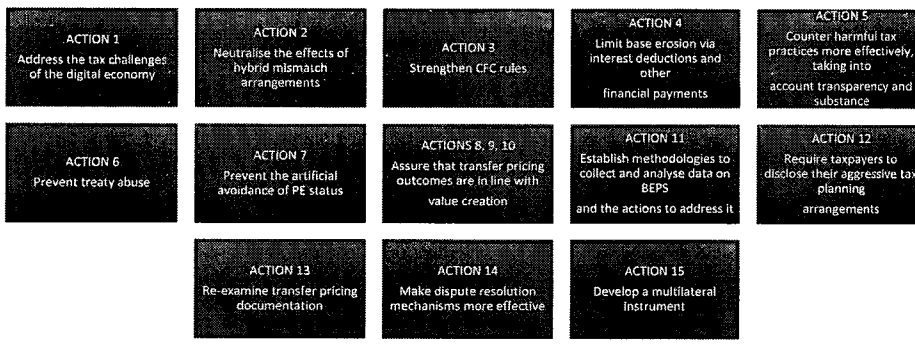
42. *G20 Leaders Declaration*, G2012 LOS CABOS MEX. (June 18-19, 2012), *available at* http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/131069.pdf (last visited Apr. 5, 2018).

43. *St. Petersburg, Russian Federation 2013*, OECD AND THE G20, *available at* https://www.oecd.org/g20/summits/saint-petersburg/ (last visited Apr. 6, 2018).

> International tax rules, many of them dating from the 1920s, ensure that businesses don't pay taxes in two countries – double taxation. This is laudable, but unfortunately these rules are now being abused to permit double non-taxation. The Action Plan aims to remedy this, so multinationals also pay their fair share of taxes.[44]

The Action Plan, which had a two-year goal, specifically lays out fifteen actions with the desired purpose of providing "instruments to prevent corporations from paying little or no taxes."[45] Along with endorsing the Action Plan in St. Petersburg, the G20 called on the OECD to provide "regular reporting on the development of the proposals and recommendations to tackle the 15 issues identified in the Action Plan."[46]

The Action Plan starts by acknowledging that although globalization has tremendously benefited our global economy, the developments that have come along with globalization have opened up doors for MNCs to minimize their tax burdens through aggressive tax planning.[47] It next laid out its 15 actions illustrated in the graphic below.



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44. *Closing tax gaps - OECD launches Action Plan on Base Erosion and Profit Shifting*, OECD (July 19, 2013) *available at* https://www.oecd.org/tax/closing-tax-gaps-oecd-launches-action-plan-on-base-erosion-and-profit-shifting.htm (last visited Mar. 19, 2018).

45. *Id.*

46. *G20 Leaders' Declaration*, RUSSIA G20, ¶ 50 (Sept. 2013), *available at* https://www.oecd.org/g20/summits/saint-petersburg/Saint-Petersburg-Declaration.pdf (last visited Apr. 5, 2018).

47. *See Action Plan on Base Erosion and Profit Shifting*, OECD, 7-8 (2013), *available at* http://www.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en (last visited Apr. 6, 2018).

48. *See generally id.*

The OECD's hope is that the BEPS Action Plan:

> [W]ill reinforce the coherence of corporate income tax law at the international level, primarily by combating "double non-taxation"; insisting that a deduction on one side of a cross-border, intra-company transaction should match up with a taxable inclusion on the other side; realigning taxation and "substance" by requiring that MNCs recognize income in the jurisdictions where value is created; and providing improved transparency and a more stable compliance environment for all stakeholders.[49]

This new concept of combating BEPS received notable support from the world's leaders. For example, United States (U.S.) President Barack Obama, in his Framework for Business Tax Reform, stated, "[t]he empirical evidence suggests that income-shifting behavior by [MNCs] is a significant concern that should be addressed through tax reform."[50]

The next significant step taken in combating tax avoidance occurred at a meeting of G20 Finance Ministers and Central Bank Governors in Cairns, on September 20-21 2014.[51] Here, the G20 endorsed "the finalised global Common Reporting Standard for automatic exchange of tax information [(AEoI)] on a reciprocal basis," which they hoped would work as a deterrent to cross-border tax evasion, and hoped to implement by 2017 or the end of 2018.[52] The AEoI "standard provides for the regular, automatic exchange between governments of all relevant financial information from accounts held by individuals and entities in foreign financial institutions."[53] The G20's endorsement of the AEoI was again expressed at the Summit in Brisbane, Australia, taking place in November of 2014. By the Brisbane Summit, many were starting to believe that "taxation [was] finally catching up with globalisation."[54] At

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49. Grinberg, *supra* note 24, at 1143.

50. *The President's Framework for Business Tax Reform*, A JOINT REP. BY THE WHITE HOUSE AND THE DEP'T OF THE TREASURY, 7 (Feb. 2012), *available at* https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/OTA-Report-Business-Tax-Reform-2012.pdf (last visited Apr. 5, 2018).

51. *See generally Meeting of G20 Finance Ministers and Central Bank Governors Cairns*, COMMUNIQUE (Sept. 20-21, 2014), *available at* http://www.mofa.go.jp/files/000059877.pdf (last visited Apr. 5, 2018).

52. *Id.* at 2.

53. *OECD Secretary-General Report to G20 Leader, Brisbane Australia*, OECD, 13 (Nov. 2014), *available at* https://www.oecd.org/ctp/OECD-secretary-general-report-tax-matters-brisbane-november-2014.pdf (last visited Apr. 6, 2018).

54. *Delivering global economic resilience: Taxation - Statement at G20 Leader's Summit*, OECD AND THE G20 (Nov. 16, 2014), *available at* https://www.oecd.org/g20/summits/brisbane/delivering-global-economic-resilience-taxation-statement-at-g20-leaders-summit.htm (last visited Apr. 5, 2018).

the Summit, Angel Gurria, Secretary-General of the OECD, stated that the actions taken against tax avoidance have already started to work, citing that "in the last five years, some 37 billion euros have been collected from voluntary disclosure programmes."[55]

On November 16, 2015, the G20 leaders officially endorsed all 15 actions under the G20/OECD Base Erosion and Profit-Shifting (BEPS) project at the Summit in Antalya, Turkey. The G20 leaders "called on the OECD to monitor progress and to develop, by early [2016] an inclusive framework including the participation of developing economies on equal footing."[56] The G20 Leaders also "strongly urge[d] the timely implementation of the project and encourage[d] all countries and jurisdictions, including developing ones, to participate."[57] The OECD, through the endorsement of the G20 leaders, has implemented the new global common Reporting Standard for AEoI with a deadline at the end of 2018, and successfully gained the endorsement of the BEPS Action Plan, which identifies 15 actions to curb international tax avoidance.[58]

The key term under this plan which is relevant under multiple actions and which affected the recent Commission decisions on Ireland, the Netherlands, and Luxembourg is in the area of transfer pricing.[59] The Action Plan states that "[i]n the area of transfer pricing, the rules should be improved in order to put more emphasis on value creation in highly integrated groups, tackling the use of intangibles, risks, capital and other high-risk transactions to shift profits."[60] The idea behind transfer pricing rules is to ensure that income earned by a multinational company is taxed in the country in which the business is performed.[61] For example, if a company has its manufacturing plant in country X, but ships its product to sell in country Y, the company will only have to pay taxes in country Y on the profit it makes over the cost to transfer the product.

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55. *Id.*

56. *G20 leaders endorse OECD measures to crack down on tax loopholes, reaffirm its role in ensuring strong, sustainable and inclusive growth* (Nov. 16, 2015), *available at* https://www.oecd.org/newsroom/g20-leaders-endorse-oecd-measures-to-crackdown-on-tax-loopholes-reaffirm-its-role-in-ensuring-strong-sustainable-and-inclusive-growth.htm (last visited Apr. 5, 2018).

57. *G20 Leaders' Communique Antalya Summit*, OECD, 4 (Nov. 15-16, 2015), *available at* https://www.oecd.org/g20/summits/antalya/G20-Antalya-Leaders-Summit-Communiqué.pdf (last visited Mar. 17, 2018).

58. OECD AND THE G20, *supra* note 41.

59. *See generally Action Plan on Base Erosion and Profit Shifting*, *supra* note 47.

60. *Id.* at 14.

61. *See id.* at 19.

Guidance in practicing legal transfer pricing can be found in the OECD Transfer Pricing Guidelines, which were published on July 22, 2010.[62] Here, the OECD established transactions methods "that can be used to establish whether the conditions imposed in the commercial or financial relations between associated enterprises are consistent with the arm's length principle."[63] The OECD provides five total methods, three being traditional transaction methods and two being transactional profit methods.[64] The OECD further asserts that "[t]he selection of a transfer pricing method [should] always aim at finding the most appropriate method," on a case by-case-basis.[65]

When discussing transfer pricing within an open market such as the EU, it is important to stress the arm's length principle. In referring to transfer pricing, one may say it is important to keep it at an arm's length. The OECD guidelines for the arm's length principle are "that a transfer price should be the same as if the two companies involved were indeed two independents, not part of the same corporate structure."[66]

These guidelines are laid out in Article 9 of the OECD Model Tax Convention, which states that:

> [When] conditions are made or imposed between . . . two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.[67]

Issues over transfer pricing can arise especially where countries have different rules to determine what the proper transfer prices are, leading to gaps that companies can take advantage of.[68] However, transfer pricing "is not, in itself, illegal or necessarily abusive," as long as it is consistent

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62. *See generally* OECD, OECD TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS (2010).

63. *Id.* at 59.

64. *Id.*

65. OECD TRANSFER PRICING, *supra* note 62, at 59.

66. John Neighbour, *Transfer Pricing: Keeping it at Arm's Length*, OECD OBSERVER (July 3, 2008), *available at* http://oecdobserver.org/news/archivestory.php/aid/670/Transfer_pricing:_Keeping_it_at_arms_length.html (last visited Apr. 5, 2018).

67. *Transfer Pricing in the EU Context*, EUROPEAN COMM'N, *available at* https://ec.europa.eu/taxation_customs/business/company-tax/transfer-pricing-eu-context_en (last visited Apr. 6, 2018).

68. *See* Sam Schechner, *EU Tax Probe Targeting Transfer Pricing, But What Is It?*, WALL ST. J. (June 11, 2014), *available at* http://www.wsj.com/articles/eu-tax-probe-targeting-transfer-pricing-but-what-is-it-1402487524 (last visited Apr. 5, 2018).

with the guidelines laid out by the OECD.[69] Nevertheless its most common purpose, especially among MNCs within the EU, is tax avoidance.[70]

III. INFLUENCE OF THE EUROPEAN COMMISSION ON TAX AVOIDANCE WITHIN MEMBER STATES

The stance against multi-national corporate tax avoidance by the G20 Leaders affected many parts of the world, but had a particularly strong influence within the EU. In fact, some would argue that the Commission's campaign against tax avoidance was inspired by the global standards of the OECD.[71] The Commission is the "EU's politically independent executive arm," which enforces EU law along with the Court of Justice.[72] Recently, within the EU Member States, tax avoidance has come to the forefront as a prominent issue from both the perspective of MNCs and the public, making the issue a priority for the European Union.[73] The main push to address this issue from the EU started in March of 2012, where the European Council called on the Commission to swiftly address the fight against tax fraud and tax evasion.[74]

This resulted in the Commission releasing "[a]n Action Plan to strengthen the fight against tax fraud and tax evasion," in December of 2012.[75] In this Action Plan, the Commission addressed aggressive tax planning by stating that this style of tax planning has a negative impact on society and that it "could thus be considered contrary to the principles of Corporate Social Responsibility."[76] The Commission defines Corporate Social Responsibility stating that it "concerns actions by

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69. Nuraini Sari & Ririn Susanti Hunar, *Analysis Method of Transfer Pricing Used by Multinational Companies Related to Tax Avoidance and Its Consistencies to the Arm's Length Principle*, 6 BINUS BUS. REV. 341, 342 (2015).

70. *See id.*

71. *See The Anti Tax Avoidance Package – Questions and Answers*, EUROPEAN COMMISSION (June 21, 2016), *available at* http://europa.eu/rapid/press-release_MEMO-16-2265_en.htm (last visited Mar. 17, 2018).

72. *European Commission Overview*, EUROPEAN UNION, *available at* https://europa.eu/european-union/about-eu/institutions-bodies/european-commission_en (last visited Apr. 6, 2018).

73. Grinberg, *supra* note 24, at 1139; *see Communication from the Commission to the European Parliament and the Council on Tax Transparency to Fight Tax Evasion and Avoidance*, COM (2015) 0136 final (Mar. 18, 2015).

74. *See Communication from the Commission to the European Parliament and the Council an Action Plan to Strengthen the Fight Against Tax Fraud and Tax Evasion*, COM (2012) 722 final (June 12, 2012) [hereinafter *Communication from the Commission*].

75. *Id.*

76. *Id.*

companies over and their legal obligations towards society."[77] The Action Plan also called on Member States to address double non-taxation through implementing a clause in their Double Tax Conventions.[78]

Here, the Commission is taking its efforts to combat tax avoidance seriously. The then-EU Commissioner for taxation, Algirdas Semeta, stated that "[a]round €1 trillion ($1.3 trillion) is lost to tax evasion and avoidance every year in the EU, . . . not only is this a scandalous loss of much-needed revenue, it is also a threat to fair taxation."[79] However, these steps taken by the Commission did not come without difficulty, as many Member States have fought firmly "against efforts to harmonize tax policy."[80]

The next significant step taken by the EU was the revision of the Directive on Administrative Cooperation, which was adopted in December of 2014.[81] This revision "requires Member States to automatically exchange a wide range of financial information with each other, in line with the new OECD/G20 global standard for automatic exchange of information between jurisdictions."[82] The goal of this revision is to prevent tax evasion while creating a more efficient system of tax collection.[83] This revision came under the mounting pressure of individuals suffering from the EU's financial crisis who are experiencing "cuts in public services and . . . tax increases."[84] Algirdas Semeta stated that "[the EU] can no longer afford freeloaders who reap huge profits in the EU without contributing to the public purse."[85]

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77. *Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM (2011) 681 final (Oct. 25, 2011).

78. *See id.*

79. Max Colchester, *EU Seeks to Crack Down on Tax Havens*, WALL ST. J. (Dec. 6, 2012), *available at* http://www.wsj.com/articles/SB10001424127887324640104578162841356823704 (last visited Apr. 5, 2018).

80. *Id.*

81. *Communication from the Commission to the European Parliament and the Council on Tax Transparency to Fight Tax Evasion and Avoidance*, COM (2015) 136 final (Mar. 18, 2015).

82. *Id.*

83. *See* Council of the European Union Press Release ST 16644/14, Preventing tax evasion and fraud: the scope for automatic exchange of information is extended (Dec. 9, 2014).

84. Tom Fairless, *EU Agrees Twin Tax-Avoidance Measures*, WALL ST. J. (Dec. 9, 2014), *available at* http://www.wsj.com/articles/eu-agrees-twin-tax-avoidance-measures-1418133833 (last visited Apr. 5, 2018).

85. *Id.*

Despite the progress achieved, in 2015 the Commission believed that further action was necessary given the "complexity of tax systems" and the sophistication of "aggressive tax planning practices."[86] This belief led the Commission to the release a Tax Transparency Package and an Action Plan that headlined "[it's] ambitious agenda for 2015 to fight tax evasion and avoidance."[87] The Tax Transparency Package was developed to help each Member State gain the necessary tools to "target companies that try to escape paying their fair share of taxes."[88] Pierre Moscovici, Commissioner for Economic and Financial Affairs, Taxation and Customs, said in addressing the importance of this package:

> Tolerance has reached rock-bottom for companies that avoid paying their fair share of taxes, and for the regimes that enable them to do this. We have to rebuild the link between where companies really make their profits and where they are taxed. To do this, Member States need to open up and work together. That is what today's Tax Transparency Package aims to achieve.[89]

Here, the Commission is addressing the need for tax transparency through proposing an automatic exchange of information on cross-border tax rulings that will be implemented via amendments to the Directive on Administrative Cooperation.[90] In other words, this plan will combat the problem of tax base erosion,[91] which refers to the tax avoidance strategies that take advantage of inconsistencies in tax rules by shifting profits to low or no-tax locations and expenses to high tax locations, resulting in the erosion of corporate income tax.[92] Further, the Commission felt that greater transparency was needed to provide "information sharing on cross-border tax rulings including transfer pricing arrangements."[93] Thus, the Commission believes that greater communication among Member States is vital to protecting each state's tax base.

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86. *Communication from the Commission*, *supra* note 74.

87. *Id.*

88. European Commission Press Release IP/15/4610, Combatting Corporate Tax Avoidance: Commission Presents Tax Transparency Package (Mar. 18, 2015).

89. *Id.*

90. *See id.*

91. *See* Pascal Saint-Amans & Raffaele Russo, *What the BEPS Are We Talking About?*, OECD FORUM (2013), *available at* http://www.oecd.org/forum/what-the-beps-are-we-talking-about.htm (last visited Apr. 5, 2018).

92. *Base Erosion and Profit Shifting*, OECD, *available at* http://www.oecd.org/tax/beps/?TSPD_101_R0=c6755b76db10a3e930b0e8ec19616299o520000000000000000e104f143ffff000000000000000000000000000005a8dbf2400225364fb (last visited Apr. 5, 2018).

93. European Commission Press Release IP/15/4610, *supra* note 88.

This Tax Transparency Package hoped to achieve its goal of automatic exchange of information on cross-border tax rulings through a legislative proposal. This proposal requires "national tax authorities . . . to automatically share basic information on their cross-border tax rulings with all other Member States."[94] This proposal came with controversy. Some believed it would result in the release of "sensitive business information."[95] The proposal sparked additional controversy because the President of the Commission, Jean-Claude Juncker, was the former Prime Minister of Luxembourg during the time in which Luxembourg was considered a tax haven.[96]

On October 6, 2015, the Member States had a unanimous agreement accepting the proposal for the AEoI on cross-border tax rulings. Each "Member States will have to transpose the new rules into national law before the end of 2016."[97] The fact that this proposal was approved within seven months displayed an unusually rapid approval for EU tax legislation, demonstrating how this issue has become a political hot spot.[98]

Next, the Commission's 2015 agenda to counteract tax avoidance was released on June 17, 2015. The Commission released an Action Plan titled: *A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*.[99] The Action Plan looks deeply into the issue of corporations' using EU Member States as corporate tax havens. The EU consists of 28 Member States each with its own tax system and each seeking to attract an optimal amount of foreign direct investment.[100] Based on this competition, Member States often lower their corporate tax rates to safeguard their tax bases. The key aspect of the Action Plan was

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94. *Communication from the Commission*, *supra* note 74, at 5.

95. *See* Valentina Pop, *EU Draft Law on Sweetheart Tax Deals Could Lead to Sensitive Disclosures*, WALL ST. J. (Mar. 16, 2015), *available at* http://www.wsj.com/articles/eu-draft-law-on-sweetheart-tax-deals-could-lead-to-sensitive-disclosures-1426523258 (last visited March 19, 2018).

96. *Id.*

97. European Commission Press Release IP/15/5780, Tax transparency: Commission Welcomes Agreement Reached by Member States on the Automatic Exchange of Information on Tax Rulings (Oct. 6, 2015).

98. Viktoria Dendrinou, *EU Finance Ministers Agree on Tax-Rulings Proposal*, WALL ST. J. (Oct. 6, 2015), *available at* http://www.wsj.com/articles/eu-finance-ministers-agree-tax-rulings-proposal-1444137741 (last visited Apr. 5, 2018).

99. *Communication from the Commission to the European Parliament and the Council: A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*, COM (2015) 302 final (June 2, 2015) [hereinafter *A Fair and Efficient Corporate Tax System*].

100. *Id.* at 4.

to re-launch the "Common Consolidated Corporate Tax Base (CCCTB), as a holistic solution to corporate tax reform."[101] The CCCTB "is a single set of rules to calculate companies' taxable profits in the EU," resulting in multinational companies only having to consult one rulebook when computing their taxable income.[102] The CCCTB was originally proposed in 2011. However, conversations eventually stalled on what many believed to be a faltering plan. The EU's Tax Commissioner, Pieree Moscovici, in support of the proposal stated, "[w]e have a single market and we need a single rule book for corporate taxation."[103] The proposal acknowledged that ultimately the decisions regarding corporate taxation will be left to the Member States.[104]

Further, in this Action Plan the Commission continued to address the improvement of "the Transfer Pricing framework in the EU."[105] Here the Commission explained that its goal is to ensure fairness in the division of profits "between jurisdictions in which multinational enterprise[s] operate[]."[106] Further, the Commission stresses the guidelines laid out by the OECD BEPS project.[107]

The Commission continued to pour resources into tackling tax avoidance in the new Anti-Avoidance Tax Package released on January 28, 2016, which was specifically aimed to provide "a coordinated EU wide response to corporate tax avoidance."[108] This package also demonstrates the influence of the OECD, as the package reflects the "outcomes of the OECD's Base Erosion and Profit Shifting (BEPS) project."[109] The Commission even believes that "[t]he Package complements and reinforces the OECD's BEPS project."[110] The hope is that the package would place the EU Member States as the leaders and

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101. European Commission Press Release IP/15/5188, Commission presents Action Plan for Fair and Efficient Corporate Taxation in the EU (June 17, 2015).

102. *Common Consolidated Corporate Tax Base (CCCTB)*, EUROPEAN COMM'N, *available at* https://ec.europa.eu/taxation_customs/business/company-tax/common-consolidated-corporate-tax-base-ccctb_en (last visited Apr. 5, 2018).

103. Laurence Norman & Tom Fairless, *EU Resurrects Bid to Agree on Common Rules for Corporate Taxation*, WALL ST. J. (June 17, 2015), *available at* http://www.wsj.com/articles/eu-resurrects-bid-to-agree-common-rules-for-corporate-taxation-1434538212 (last visited Apr. 5, 2018).

104. *See A Fair and Efficient Corporate Tax System*, *supra* note 99, at 15.

105. *Id.* at 10.

106. *Id.*

107. *See id.* at 6.

108. European Commission Press Release IP/16/159, Fair Taxation: Commission presents new measures against corporate tax avoidance (Jan. 28, 2016).

109. *The Anti Tax Avoidance Package*, *supra* note 71, at 2.

110. *Id.*

models in "international tax good governance."[111] Vice-President Valdis Dombrovskis stated, referring to the package:

> People have to trust that the tax rules apply equally to all individuals and businesses. Companies must pay their fair share of taxes, where their actual economic activity is taking place. Europe can be a global leader in tackling tax avoidance. This requires coordinated European action, avoiding a situation of 28 different approaches in 28 Member States.[112]

The Action Plan further stresses a coherent approach, stating that "[u]nilateral action by Member States would not adequately tackle the problem of Aggressive Tax Planning and would create problems."[113] The plan goes on to suggest that when Member States act in an uncoordinated manner, it may lead to fear of losing the profits gained by MNCs residing within their jurisdiction.[114] In order to attract or maintain these MNCs, some Member States may shift to granting selective tax advantages.[115] This is referring to Member States granting illegal state aid, which is at the heart of the issue for Ireland, the Netherlands, and Luxembourg. The Action Plan goes on to suggest that "[w]hile preferential regimes and individual tax ruling are currently being subject to targeted enforcement action under State aid rules, this needs to be complemented by legislative measures."[116]

Within this package, the Council begins by outlining the importance that a fair tax system has on the political and economic well-being of the Member States. The plan attempts to appeal directly to individual citizens, stressing how corporate tax avoidance leads to "less mobile taxpayers . . . hav[ing] to carry a heavier burden."[117] The package goes on to stress that although the single market in Europe is vital to ensuring a thriving economy, it can make it more difficult to protect against profit shifting.[118] The problem is that often tax "[r]ules in one Member State can undermine the effectiveness of the rules of others."[119] The package

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111. *Id.*

112. European Commission Press Release IP/16/159, *supra* note 108.

113. *Anti-Tax Avoidance Package: Next steps toward delivering effective taxation and greater tax transparency in the EU,* at 3, COM (2016) 23 final (Jan. 28, 2016) [hereinafter *Next steps toward delivering effective taxation and greater tax transparency in the EU*].

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 2.

118. *Next steps toward delivering effective taxation and greater tax transparency in the EU*, *supra* note 113, at 2.

119. *Id. at 3.*

also addresses transfer pricing stating that "[t]he new G20/OECD guidelines on Transfer Pricing should help link profits to the economic activities which generate them."[120] Here, the council is stressing the importance of combating corporate tax avoidance through promoting their agenda.

Besides promoting their agenda, the Council, in its January 28, 2016 package, released a directive which put forth "anti-tax avoidance rules in six specific fields: deductibility of interest; exit taxation; a switch-over clause; a general anti-abuse rule (GAAR); controlled foreign company (CFC) rules; and a framework to tackle hybrid mismatches."[121] So, what does each of these fields entail? First, deductibility of interest occurs when multinational groups arrange their inter-company loans so that their debt is in a high-tax jurisdiction in order to deduct the interest payments and then the interest on the debt is paid to the company in a jurisdiction with little to no tax rate.[122] The package aims to address this issue by "limiting the amount of interest that the taxpayer can deduct in a tax year."[123]

Next, the package addressed exit taxation, which looks to solve the problem of companies shifting their high value assets and/or tax residence to low tax locations, therefore depriving the original state "of its future right to tax revenues of these [companies], which may have already been created but not yet realised."[124] For example, this would occur if a tech company develops a promising new product in one Member State, deducts the costs of development from its taxable profit in that State, and then, just as the product starts to generate profit, moves the product to a low tax jurisdiction and applies for the patent there.[125] This would result in very little revenue being generated on the intellectual property of the product being taxed. In order to combat this, the package proposes an exit tax, which "serves the purpose of preventing tax base erosion in the State of origin when the assets which incorporate unrealised underlying gains are transferred, without a change of ownership, out of the taxing

120. *Id.* at 5.

121. *Proposal for a COUNCIL DIRECTIVE laying down rules against tax avoidance practices that directly affect the functioning of the internal market*, at 7, COM (2016) 26 final (Jan. 28, 2016), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0026&from=EN (last visited Apr. 5, 2018).

122. *Id.*

123. *Id.*

124. *Id.*

125. *The Anti Tax Avoidance Package*, *supra* note 71, at 10(b).

jurisdiction of that State."[126] This helps make sure that the "taxation better reflects where the economic activity takes place."[127]

Next, the package proposes a switch-over clause, which "requires Member States to deny an exemption from corporate tax with respect to distributions of profits and proceeds from the sale of shares in low taxed entities that are resident in, and [permanent establishments] that are located in, third (non-EU) countries."[128] This attempts to narrow the confusion over the Member States granting credit relief where a MNC may or may not be paying taxes on income in different Member States.[129] This is another method used to discourage MNCs "from shifting profits out of high-tax jurisdictions towards low-tax territories."[130]

Next, the proposed general anti-abuse rule (GAAR), "allows abusive tax practices to be captured despite the absence of a specific anti-tax avoidance rule."[131] This anti-abuse rule was originally proposed in the OCED BEPS project.[132] This allows regulation of tax planning to keep up with fast-evolving schemes where tax legislation cannot.[133] Next, the package proposes CFC rules in order to discourage multinational companies from shifting their profits from the "(highly-taxed) parent company toward subsidiaries which are subject to low taxation."[134] With the proposed CFC rule, the Member State in which the parent company is headquartered would be able to tax the subsidiaries' profits as if the profits have never been shifted.[135] Last, the package proposes a framework to tackle hybrid mismatches.[136] A hybrid mismatch occurs when a company that operates in two or more Member States sets up an entity in one of those States, borrows money, and pays interest on the loan, but then takes the deduction for the interest payments in both Member States.[137] This occurs, because of a difference in "legal

126. *Proposal for a COUNCIL DIRECTIVE*, *supra* note 121, at 8.

127. *The Anti Tax Avoidance Package*, *supra* note 71, at 10(b).

128. *Tax Flash: European Commission publishes Anti Tax Avoidance Package*, LOYENS LOEFF (Jan. 28, 2016), *available at* http://www.loyensloeff.com/en-us/news-events/news/tax-flash-european-commission-publishes-anti-tax-avoidance-package (last visited Apr. 6, 2018).

129. *See Proposal for a COUNCIL DIRECTIVE*, *supra* note 121, at 8.

130. *Id* at 7.

131. *Id.* at 9.

132. *The Anti Tax Avoidance Package*, *supra* note 71, at 4.

133. *See Tax Flash*, *supra* note 128.

134. *Proposal for a COUNCIL DIRECTIVE*, *supra* note 121, at 9.

135. *See id.*

136. *See id.*

137. *See id.*

characterization" of the entity.[138] The proposed measure here would make it so "the legal characterisation given to a hybrid instrument or entity by the Member State where a payment, expense or loss, as the case may be, originates shall be followed by the other Member State which is involved in the mismatch."[139]

The Commission has taken serious steps in combating multinational corporate tax evasion in its attempt to become the model of how to implement the OCED's recommendations. In fact, it has even provided a list of the corresponding measure that they have taken for each of the 15 actions in the BEPS Action Plan.[140]

IV. EFFECT OF OECD AND EUROPEAN COMMISSION ON MNCS

When looking at the responses that Ireland, the Netherlands, and Luxembourg issued in regards to their decision to appeal the Commission's decisions, one thing they all had in common was their assurance that they were in compliance with the international taxation system laid out by the OECD.[141] The Commission, as shown above, has been strongly influenced by the OECD's guidelines on combating multinational corporate tax avoidance; however, the Commission stated in its Anti-Tax Avoidance package when referring to the OECD guidelines that it "will monitor Member States' implementation of the new rules and will consider whether stronger rules are required to prevent manipulation."[142] Thus, it must be determined whether the Commission overstepped its bounds in each of the three cases discussed above, and if it did, whether it had the legal authority to do as much.

First, in looking at the Netherlands in relation to Starbucks, the Commission held that the Netherlands granted "selective tax advantages" in the form of comfort letters to Starbucks that gave them an illegal

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138. *See id.*

139. *Proposal for a COUNCIL DIRECTIVE*, *supra* note 121, at 9.

140. *See The Anti Tax Avoidance Package, supra* note 71, at Annex I.

141. *See Luxembourg appeals the EU Commission's State aid decision in the Fiat case*, PWC (Dec. 7, 2015), *available at* https://www.pwc.lu/en/tax-consulting/docs/pwc-tax-071215.pdf (last visited Mar. 19, 2018); *see* Archie van Riemsdijk, *Netherlands to Appeal EC Decision that Starbucks Tax Deal Is Illegal State Aid*, WALL ST. J. (Nov. 30, 201), *available at* https://www.wsj.com/articles/netherlands-to-appeal-eu-decision-that-starbucks-tax-deal-is-illegal-state-aid-1448653827 (last visited Mar. 19, 2018); *see* Paul Hannon, *Ireland to Appeal EU's Apple Tax Ruling*, WALL ST. J. (Sept. 2, 2016), *available at* https://www.wsj.com/articles/ireland-appeals-eus-apple-tax-ruling-1472820356 (last visited Mar. 19, 2018).

142. *Next steps toward delivering effective taxation and greater tax transparency in the EU*, *supra* note 113, at 5.

advantage.[143] The Commission said that this resulted in illegal state aid under the EU state aid rules, which state:

> Tax rulings cannot use methodologies, no matter how complex, to establish transfer prices with no economic justification and which unduly shift profits to reduce the taxes paid by the company. It would give that company an unfair competitive advantage over other companies (typically SMEs) that are taxed on their actual profits because they pay market prices for the goods and services they use.[144]

As a result, the Commission ordered the Netherlands to recover the unpaid taxes from Starbucks "in order to remove the unfair competitive advantage [it has] enjoyed and to restore equal treatment with other companies in similar situations."[145] This decision is one that is not founded on any precedent and may cause the corporate tax structures to flip upside down throughout the EU.[146] In a letter to the Dutch President, his cabinet stated that "[i]n its decision, the Commission uses its own interpretation and application of the OECD guidelines about the transfer pricing methods."[147] The cabinet further stated that these different interpretations of the OECD guidelines, as well as its different application of the arm's length principle, have caused "confusion and uncertainty."[148] Based on this uncertainty, the cabinet here informed the President that they were appealing the decision in order "to obtain more clarity and jurisprudence."[149] In the announcement of the appeal, the Government of the Netherlands stated that the Commission did "not convincingly demonstrate that the tax Authority deviated from the statutory provisions."[150] The appeal was made official on December 23, 2015, in

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143. European Commission Press Release IP/15/5880, *supra* note 16 (Here, comfort letters refer to "letters issued by tax authorities to give a company clarity on how its corporate tax will be calculated or on the use of special tax provisions.").

144. *Id*; Commission Recommendation of 6 May 2003 Concerning the Definition of Micro, Small, and Medium-Sized Enterprises, 2003 O.J. (C 1422) (SMEs are small and medium sized enterprises).

145. European Commission Press Release IP/15/5880, *supra* note 16.

146. *See* Tom Fairless, *EU Regulators Require Starbucks, Fiat Pay Millions of Euros in Back Taxes*, WALL ST. J. (Oct. 21, 2015), *available at* https://www.wsj.com/articles/eu-rules-that-starbucks-fiat-benefited-from-illegal-tax-deals-1445419279 (last visited Mar. 19, 2018).

147. Letter from J.R.V.A. Dijsselbloem, Minister of Fin., Neth. & Eric Wiebes, State Sec'y of Fin., Neth. to the President of the Second Chamber of the Dutch Parliament, Neth., on Cabinet Response to the European Commission Decision on Starbucks Manufacturing BV, 2 (Nov. 17, 2015).

148. *Id.* at 3.

149. *Id.*

150. *Government Appeals the Decision in the Starbucks Case*, GOV'T OF THE NETH. (Nov. 27, 2015), *available at*

which the Netherlands requested the annulment of the Commission's decision.[151]

Second, in looking at Luxembourg in relation to Fiat, the Commission reached the same holding as it did against the Netherlands, which resulted in a requested recovery of past taxes.[152] Specifically, "[t]he Commission's investigation showed that a tax ruling issued by the Luxembourg authorities in 2012 gave a selective advantage to Fiat and Trade."[153] In other words, the Commission accused Luxembourg of "using 'artificial and complex methods' for intercompany transactions – known as 'transfer pricing.'"[154] On December 4, 2015, the Luxembourg Ministry of Finance announced that it would be appealing the decision "in order to seek legal clarity and previsibility on the practice of tax rulings."[155] The announcement went on to assert that "the Commission has used unprecedented criteria in establishing the alleged State aid," specifically asking for clarification in how Fiat received a "selective advantage[] within the meaning of article 107 TFEU."[156]

Lastly, when looking at Ireland in relation to Apple, the Commission held that "two tax rulings issued by Ireland to Apple have substantially and artificially lowered the tax paid by Apple in Ireland . . . ."[157] The first ruling in question was granted in 1991 and was subsequently replaced by a similar ruling in 2007.[158] These rulings allegedly "endorsed an artificial allocation of Apple's sales profits to their 'head offices,' enabling Apple to pay substantially less tax than other companies."[159] The Commission published the non-confidential version of its final decision on December

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https://www.government.nl/latest/news/2015/11/27/government-appeals-the-decision-in-the-starbucks-case (last visited Apr. 6, 2018).

151. 2015 O.J. (C 59) 50.

152. *See* European Commission Press Release IP/15/5880, *supra* note 16.

153. *Id.*

154. Vanessa Houlder & Ferdinando Giugliano, *Luxembourg Accuses EU of Fomenting Business Uncertainty Over Tax*, FIN. TIMES (Dec. 1, 2015), *available at* https://www.ft.com/content/f2620d42-981d-11e5-9228-87e603d47bdc (last visited Apr. 6, 2018).

155. Press Release, Ministère des Finances Grand-Duché de Lux., Lux. to Appeal the Commission's Fiat Decision (Dec. 4, 2015), *available at* http://www.mf.public.lu/actualites/2015/12/fiat_041215/index.html (last visited Apr. 5, 2018).

156. *Id.*

157. European Commission Press Release, IP/16/2923, *supra* note 1.

158. *Id.*

159. Pam Olson et al., *European Commission finds that Ireland has granted unlawful State aid to Apple*, PWC (Aug. 31, 2016), *available at* http://www.pwc.com/us/en/tax-services/publications/insights/ec-finds-ireland-granted-unlawful-state-aid-to-apple.html (last visited Apr. 6, 2018).

19, 2016, which provided more clarity into the ruling.[160] The Commission's investigation specifically looked at Apple Sales International (ASI) and Apple Operations Europe (AOE), which are two companies incorporated in Ireland, but controlled by Apple Inc., headquartered and incorporated in the United States.[161] Further, ASI and AOE did not have any employees or physical presence in Ireland.[162] Because ASI and AOE had trading activity in Ireland, but were managed outside of Ireland, they were considered non-resident companies and described as "'stateless' for tax residency purposes," in the Commission's decision.[163] This designation of non-resident companies in Ireland made them only liable for an Irish corporate tax on their profit "allocated to their respective Irish branches," and "only a small percentage of the sales profits of ASI and AOE were attributed to their respective Irish branches."[164] The 1991 ruling and the 2007 ruling that allowed ASI and AOE to utilize this profit allocation is what the Commission held as unlawful state aid.

Here, as in the decisions above, the Commission's key reasons for its decision center around transfer pricing and the arm's length principle.[165] The Commission reached the decision that:

> [T]he profit allocation methods agreed for allocating the profit of ASI and AOE to their respective Irish branches were considered to result in a remuneration for those Irish branches that a prudent independent operator acting under normal market conditions would not have accepted and thus to deviate from the arm's length principle.[166]

The argument is whether Ireland must apply the Commission's version of the arm's length principle.

In all three cases above, the Member States determined that the most appropriate transaction method to determine if their tax rulings are

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160. *See generally* Commission Decision (EU) No. 2017/1283 of 30 August 2016, 2016 O.J. (L 187).

161. *See id.* ¶ 39; *see also* Restated Articles of Incorporation of Apple Inc., (Aug. 5, 1997) *available at* https://www.sec.gov/Archives/edgar/data/320193/000119312509153165/dex31.htm (last visited Apr. 22, 2018).

162. *See id.* ¶ 51.

163. *Id.* ¶ 52.

164. Pam Olson et al., *EC publishes Apple State aid decision*, PWC (Dec. 22, 2016), *available at* https://www.pwc.com/us/en/tax-services/publications/insights/assets/pwc-ec-publishes-apple-state-aid-decision.pdf (last visited Apr. 6, 2018).

165. *See id.*

166. *See* Commission Decision (EU) No. 2017/1283 of 30 August 2016, 2016 O.J. (L 187).

consistent with the arm's length principle is based on the Transactional Net Margin Method (TNMM),[167] which is one of the transactional profit methods discussed in the OECD guidelines on transfer pricing.[168] Although this is one of the methods in the OECD guidelines, the Commission concluded the comparable uncontrolled price (CUP) method should have been used, which is a traditional transaction method established in the OECD guidelines.[169] According to the Commission, "[t]he CUP method compares the price charged for the transfer of property or services in a controlled transaction . . . to the price charged for the transfer of property or services in a comparable uncontrolled transaction . . . conducted under comparable circumstances."[170] Whereas, the TNMM is a method that "approximates what would be an arm's length profit for an entire activity, rather than for identified transactions."[171]

On August 24, 2016, the US Treasury in its white paper blasted the Commission decision.[172] The U.S. Treasury stated three primary issues it had with the ruling:

> [1] The Commission's Approach Is New and Departs From Prior EU Case Law and Commission Decisions;
>
> [2] The Commission Should Not Seek Retroactive Recoveries Under Its New Approach; [and]
>
> [3] The Commission's New Approach Is Inconsistent With International Norms and Undermines the International Tax System.[173]

The U.S. Treasury's stake in this decision goes far beyond strictly disagreeing, as the decisions involve primarily U.S.-headquartered companies.[174] This stake is recognized by the Irish government, as their Minister of Finance, Michael Noonan stated that the "recovery sum could be creditable against a company's US tax bill," and that this ruling "would effectively constitute a transfer of revenue to the EU from the

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167. *See id.* ¶¶ 93, 132, 55.

168. *See* OECD TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS, *supra* note 62.

169. Commission Decision 5605, ¶ 328, 2016 O.J. (EC); Commission Decision 7152, ¶ 132, 2015 O.J. (EC); Commission Decision 7143, ¶ 71, 2015 O.J. (EC).

170. Commission Decision 2015/1937, ¶ 71, 2015 O.J. (L 282) (EU).

171. *Id.* ¶ 72.

172. *See generally* U.S. Department of the Treasury, *The European Commission's Recent State Aid Investigations Of Transfer Pricing Rules*, U.S. DEP'T OF THE TREASURY (Aug. 25, 2016), *available at* https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf (last visited Apr. 6, 2018).

173. *Id.* at 1.

174. *Id.* at 2.

U.S. government and its taxpayers."[175] Further, the minister points out a contradiction in the Commission's decision. He states that the recovery sum would be reduced if "other countries were to require Apple to pay more taxes or if the US authorities were to require Apple to pay larger amounts of money to their US parent company."[176] The contradiction is in the Commission's acknowledgment that the amount it ruled must be recovered could be taxable in another jurisdiction, which adds to the confusion and uncertainty.

The White Paper was released as one of a number of attempts by the U.S. to demonstrate its disproval. Earlier, Treasury Secretary Jacob Law sent a letter to the Commission President Jean-Claude Juncker, in which Law urged Juncker to "reconsider [the] approach."[177] The Secretary further stated that the recent state aid rulings could "undermine the well-established basis of mutual cooperation and respect that many countries have worked so hard to develop and preserve," in the realm of international tax policy.[178] Here, just as the EU Member's have expressed, the U.S. articulated its strong desire towards curtailing international tax avoidance stating, the "United States has played a leading role in the G-20 and the OECD Base Erosion and Profit Shifting Project."[179] The Secretary attached to this letter the testimony of Robert B. Stack, Deputy Assistant Secretary (International Tax Affairs) U.S. Department of the Treasury before the Senate Finance Committee on December 1, 2015.[180] Here, the Deputy Assistant Secretary stated that his concerns with the Commission's state aid investigation were that the Commission "appears to be disproportionately targeting U.S. companies," that the decisions "potentially undermine [the United States'] rights under our tax treaties," that the Commission is applying its "new approach retroactively rather than only prospectively," and finally he presented issue with the fact that the Commission is "seeking to tax

175. *Ireland – Minister of Finance's Statement to the Irish Senate on the European Commission's decision that Ireland provided unlawful State aid to Apple*, INT'L TAX PLAZA (Oct. 4, 2016), *available at* http://www.internationaltaxplaza.info/homepage/news-archive/news-archive-october-2016/2752-ireland-minister-of-finance-s-statement-to-the-irish-senate-on-the-european-commission-s-decision-that-ireland-provided-unlawful-state-aid-to-apple (last visited Apr. 16, 2018).

176. *Id.*

177. Letter from Jacob J. Lew, United States Dept. of Treasury to Jean-Claude Juncker, Pres. of the European Comm'n (Feb. 11, 2016), *available at* https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Letter-State-Aid-Investigations.pdf (last visited Mar. 5, 2018).

178. *Id.*

179. *Id.*

180. *See id.*

the income of U.S. Multinational enterprises that, under current U.S. tax rules, is deferred until such time as the amounts are repatriated to the United States."[181] Nevertheless, the letter remained cordial, as it expressed its appreciation in the Committee's interest in international tax reform.

The White Paper referenced above was not as cordial, stating that the Commission's new approach went "beyond enforcement of competition and State aid law under the TFEU into that of a supra-national tax authority that reviews Member State transfer price determinations."[182] Despite its clear showing of concern, these efforts by the U.S. are not likely to affect the Commission; nevertheless, the "Treasury may support 'its' multinationals in Court (informally or possibly as an applicant as a 'directly concerned party' under Art. 263(4) TFEU)."[183]

V. THE EUROPEAN COMMISSION OVERREACHED IN RECENT DECISIONS REGARDING MNCS TAX AVOIDANCE

The decisions alleging illegal state aid brought upon the Member States discussed above were brought under Article 107 of the TFEU. Article 108(3) of the TFEU states that "the Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid."[184] In all three cases addressed, the Commission noted that each Member State "did not notify the Commission of any plan to issue the contested tax ruling,"[185] thus holding each ruling as unlawful state aid. As a result, the Commission can "require recovery for up to ten prior years, with interest for the period the illegal aid is granted until the aid is recovered."[186] This approach is illegitimate, especially from the companies' perspectives, because it is

181. *Id.* at 7-8.

182. U.S. DEP'T OF THE TREASURY, *supra* note 172, at 9.

183. Werner Haslehner, *The US Treasury White Paper on Transfer Pricing and State Aid*, KLUWER INT'L TAX BLOG (Aug. 31, 2016), *available at* http://kluwertaxblog.com/2016/08/31/the-us-treasury-white-paper-on-transfer-pricing-and-state-aid/ (last visited Apr. 5, 2018).

184. Consolidated Version of the Treaty on the Functioning of the European Union art. 108(3), Oct. 26, 2012, 2012 O.J. (C 326) 47.

185. Commission Decision 5605, ¶ 424, 2016 O.J. (EC); Commission Decision 7152, ¶ 353, 2015 O.J. (EC) ("Luxembourg did ot notify the Commisison of any plan to grant . . . contested tax ruling."); Commission Decision 7143, ¶ 436, 2015 O.J. (EC) ("Netherlands did not notify the Commission of any plan to grant the contested aid measure.").

186. U.S. DEP'T OF THE TREASURY, *supra* note 172, at 14.

not based on precedent. It is not just to say that, in hindsight, these corporations should not have been using the transfer pricing rulings from the EU Member states that they had been using in the past. Law, especially international tax in its complex nature, should be prospective, not retrospective. Rulings with retroactive results can shatter stability. Further, if this is indeed how the Commission will rule on state aid cases concerning tax in the future, there needs to be legislative clarification. As stated earlier, the Commission stated in its own Action Plan that the enforcement of state aid rules, "needs to be complimented by legislative measures."[187]

When reviewing prior EU case law, it states "the principle of legal certainly requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly."[188] Thus, especially in light of the confusion and uncertainty pertaining to the proper transaction method of deterring transfer pricing among other things, the Commission should at minimum retract its decision to enforce the Member States to recover the alleged unpaid taxes.

Further litigation is very likely, and could take years as the Court of Justice of the EU will have the final say.[189] Each of these MNCs have a strong chance to "turn the tables on the commission at the bloc's highest courts."[190] Although the Court of Justice has a strong record of upholding the Commission's decisions, there is not a clear precedent in the arena of "state-aid cases dealing with tax matters."[191] In regards to the Court looking at the issue on state aid, it may appear as though each of these Member States only granted favorable deals to Apple, Starbucks, and Fiat; however, the Court cannot just assume that these deals were only granted to these companies. Tim Cook stated in his letter to Apple customers that "[w]e never asked for, nor did we receive, any special

187. *Next steps toward delivering effective taxation and greater tax transparency in the EU*, *supra* note 113 at 3.

188. *See* Case C-345/06 Heinrich, Judgment, 2009 E.C.R., ¶ 44 (Mar. 10).

189. *See* Court of Justice of the European Union (CJEU), EUROPA, *available at* https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en (last visited Feb. 16, 2017).

190. Natalia Drozdiak, *European Commission Decision Isn't Endgame for Apple, Ireland*, WALL ST. J. (Sept. 8, 2016), *available at* https://www.wsj.com/articles/european-commission-decision-isnt-endgame-for-apple-ireland-1473314400 (last visited Apr. 5, 2017).

191. *Id.*

deals."[192] In proving that illegal state aid was implemented, the Commission will have to prove that the information provided was not available to any other MNCs that are operating in a similar capacity. General Counsel for Apple, Bruce Sewell, stated that, "Apple is not an outlier in any sense that matters to the law. Apple is a convenient target because it generates lots of headlines. It allows the commissioner to become Dane of the year for 2016," referring to Margrethe Vestager.[193] Only time will tell if she is deserving of that title.

The Commission has stated in various press releases that the fight against tax evasion is one of its major concerns, and that it currently has two more investigations going on regarding Amazon and McDonalds in Luxembourg.[194] The Commission is running on the campaign that "all companies, big and small, must pay tax where they make their profits."[195] The premise behind this campaign is necessary, and there is indeed a major issue with multi-national corporate tax avoidance; however, retroactive penalties and the way in which the Commission penalized these companies was not the correct solution. Further, these MNCs were complying with the laws of the Member states they operated in. These states are sovereign entities and the MNCs operating within them reasonably relied on the laws provided by these states. Here, in issuing these rulings, the Commission is essentially creating new laws and penalizing MNCs for not following them in the past. In conclusion, the Commission has clearly made a statement on how it will address tax evasion, and MNCs as well as all Member states must comply with this going forward; however, applying this precedent retroactively should not be supported by the Court of Justice.

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192. Cook, *supra* note 8.

193. *Apple Appeals EU Tax Ruling that it Owes Ireland $14 Billion*, FED. TAXES WKLY ALERT (RESEARCH. INST. AM., N.Y., N.Y.), Dec. 22, 2016, at WESTLAW, 12/22/2016 FTWA ART. 5.

194. European Commission Press Release IP/15/5880, *supra* note 16; European Commission Press Release IP/16/2923, *supra* note 1.

195. *Id.*