Treaty of Tordesillas Syndrome: Sovereignty *ad Absurdum* and the South China Sea Arbitration

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The South China Sea is the fifth largest body of water in the world. It accounts for five trillion dollars in annual commercial activity involving a third of maritime traffic worldwide. China claims wide-ranging sovereign rights over upwards of ninety percent of this Sea via a controversial U-shaped line. Its claim upsets regional stability and portends a coming conflict with the United States, the world’s supreme maritime power, over the application of the United Nations Convention on the Law of the Sea (UNCLOS). China claims its sovereign authority predates UNCLOS by millennia; critics date China’s claim to 1947. Already described as the most important ruling in the modern history of the international law of the sea, a Tribunal of the Permanent Court of Arbitration handed down a sweeping rebuke of China’s contentions in the July 2016 Award in the South China Sea Arbitration (Philippines v. China), setting up a confrontation between emergent China and established United States. This Article discusses that Award in light of the fundamental tension within the liberal model of freedom of the seas—the unreconciled tension involving ownership interests over resources of the sea (dominium) and the decision-making power to rule over the seas (imperium). While scholarly attention dissects the Tribunal’s discussion of historical and factual circumstances (effectivités) that aggregate against China’s sovereignty claims, this Article notes deeper problems, too: Ambiguities in UNCLOS have allowed powerful states to historically territorialize wide swaths of the dwindling global commons, all within the compliant liberal framework. Such claims are reminiscent of the Treaty of Tordesillas (1494), where Spain and Portugal divided up ownership of the world. The territorializing instinct of the Treaty of Tordesillas serves as a syndromic indicator of a recurring problem involving the sea and its increasingly scarce resources. It sets up a major challenge for international law as between superpower interests in the South China Sea, and, more generally, over disputes involving the global commons and spatial regimes on the emerging frontier of technological capability.

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**Introduction**

On January 22, 2013, the Philippines served notice to China that it would initiate compulsory arbitral proceedings before the Permanent Court of Arbitration (PCA) under Article 287 and Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS)\(^1\) to resolve a dispute with China over maritime entitlements in the South China Sea.\(^2\) The Philippines alleged China improperly claimed underlying seabed extending

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2. Notification and Statement of Claim at 22, *In re South China Sea Arbitration (Republic of the Phil. v. People’s Republic of China)*, PCA Case Repository 2013-19 (Perm. Ct. Arb. 2016), http://www.philippineembassy-usa.org/uploads/pdfs/embassy/2013/2013-0122-Notification%20of%20Claim%20of%20the%20Philippines%20in%20the%20South%20China%20Sea%20Arbitration.pdf [hereinafter Notification South China Sea Arbitration] [https://perma.cc/MU55-HYMP]. The controversy commonly is framed in terms of the South China Sea, although it is important to note that it is known as the East Sea in Vietnam and the West Philippine Sea in the Philippines. The main features of the South China Sea are: the Paracel Islands in the northeast (disputed by China/Taiwan and Vietnam); the Pratas Islands, a coral reef eleven miles wide (administered by Taiwan but claimed by China); Scarborough Reef (contested by China/Taiwan and the Philippines); the Spratly Islands, off the coasts of the Philippines, Malaysia and southern Vietnam (claimed in whole or in part by Brunei, China/Taiwan, Malaysia, the Philippines, and Vietnam); and the Natuan Islands in the north-western South China Sea. See Clive Schofield, *Adrift on Complex Waters: Geographical, Geopolitical and Legal Dimensions to the South China Sea Disputes*, in *The South China Sea Maritime Dispute: Political, Legal and Regional Perspectives* 24, 25–26 (Leszek Buszynski & Christopher B. Roberts eds., 2015) [hereinafter The South China Sea Maritime Dispute].
almost nine hundred nautical miles from the nearest Chinese coast\(^3\)—to within fifty nautical miles of the Philippine islands of Luzon and Palawan\(^4\)—thereby encroaching on the Philippines’ Exclusive Economic Zone (EEZ) and continental shelf. It petitioned the Tribunal to sustain the applicability of UNCLOS, which both China and the Philippines had ratified,\(^5\) and to determine that the Spratly Islands were rocks, low tide elevations, submerged reefs, or banks\(^6\)—but not actually islands, as China claimed.\(^7\) Numerous hydrographic reports indicate that the Spratlys neither form a natural or physical unit, nor conform to an accepted definition.\(^8\) The Spratlys consist of one hundred islets, atolls, calderas, shoals, and coral reefs—idiomatically referred to as “features”—scattered over an area covering 410,000 square kilometers (158,000 square miles); at high tide, no more than five square kilometers remain dry.\(^9\) Rock outcroppings incapable of sustaining economic life or human habitation, according to

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3. See Notification South China Sea Arbitration, supra note 2, ¶ 1 (challenging China’s claims to areas of the South China Sea vis-à-vis the Philippines as far as 870 nautical miles from the nearest Chinese coast).


6. Of principal concern to the Philippines was determination of the status of nine maritime features: Scarborough Shoal, Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef and McKennan Reef (including Hughes Reef), Johnson Reef, Cuarteron Reef and Fiery Cross Reef. See In re South China Sea Arbitration, PCA Case Repository 2013-19, Award on Jurisdiction and Admissibility, ¶ 169 (Perm. Ct. Arb. 2015) [hereinafter South China Sea Arbitration (Jurisdiction and Admissibility)].

7. See In re South China Sea Arbitration, PCA Case Repository 2013-19, Award, ¶¶ 279–648 (Perm. Ct. Arb. 2016) [hereinafter South China Sea Arbitration (Award)]. Low-tide elevations are submerged (non-visible) rocks and reefs. They generate no maritime entitlement under UNCLOS, meaning they are not entitled to any territorial sea or EEZ. See UNCLOS art. 13. Before being modified by Chinese construction projects, Mischief Reef, Keenan Reef, Gaven Reef, and Subi Reef were completely submerged low-tide elevations before modified by Chinese construction projects. See Hung Pham, Philippines v. China: The South China Sea Finally Meets International Law, 16 CHI.-KENT J. INT’L & COMP. L. 1, 7 (2016). UNCLOS arts. 60(8) and 80 preclude artificial islands from attaining territorial seas of their own or acquiring the status of an island.


9. See Spratly Islands, CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/pg.html (last updated Sept. 13, 2016) [https://perma.cc/QL5G-YJ22]. The Spratlys are claimed entirely by China, Taiwan, and Vietnam. Portions are claimed by Malaysia and the Philippines. Forty-five islands are occupied by a small number of military forces from China, Malaysia, the Philippines, Taiwan, and Vietnam. Brunei claims a continental shelf overlapping a southern reef [Louisa Reef] but has not made a formal claim to the reef; Brunei also claims an EEZ over the area. There are no indigenous inhabitants, but there are four airports and three heliports. Id.
UNCLOS, generate a small territorial sea (twelve nautical miles). Islands, however, carry much greater weight. They generate two hundred nautical mile EEZs and additional rights relating to the subjacent continental shelves, which possibly can be extended. Indeed, Vietnam and Malaysia’s joint submission claiming extensions to the outer limits of their respective continental shelves triggered the dramatic escalation in events resulting in this arbitration. China claimed expansive maritime rights over these features, and the living and non-living resources of their pur-

10. See UNCLOS, art. 2. UNCLOS art. 121(3) provides: “Rocks which cannot sustain human habitation or economic life of their own shall have no [EEZ] or continental shelf.” For a discussion of this article, see Alex G. Oude Elferink, Clarifying Article 121(3) of the Law of the Sea Convention: The Limits Set by the Nature of International Legal Processes, IBRU BOUNDARY & SEC. BULL. 58–68 (1998). Other major island and reef formations in the South China Sea include the Paracel Islands, Prats, the Natuna Islands and Scarborough Shoal. For a helpful map of the geography of the South China Sea and disputed maritime claims, see South China Sea: Conflicting Claims and Tensions, LOWY INST. INT’L POL’Y (2016), http://www.lowyinstitute.org/issues/south-china-sea.

11. UNCLOS art. 121(1), Apr. 29, 1958, 516 U.N.T.S. 205 (mirroring art. 10 of the 1958 Convention on the Territorial Sea and the Contiguous Zone and defining an island as a naturally formed area of land, surrounded by water, which is above water at high tide). UNCLOS art. 121(2) attaches to islands the legal characteristics assimilated to other land territory, including the territorial sea, the contiguous zone, the EEZ, and the continental shelf.

12. See id. at 121(2). For discussion of the Tribunal’s treatment of the insular features of the South China Sea, see generally Nilufer Oral, Symposium on the South China Sea: “Rocks” or “Islands”? Sailing Towards Legal Clarity in the Turbulent South China Sea, 110 AJIL UNBOUND 279–84 (2016).


14. See WU SHICUN, SOLVING DISPUTES FOR REGIONAL COOPERATION AND DEVELOPMENT IN THE SOUTH CHINA SEA: A CHINESE PERSPECTIVE 166 (2013) (calling the joint submission by Malaysia and Vietnam the “turning point for a new round of escalation”); Guifang (Julia) Xue, The South China Sea: Competing Claims and Conflict Situations, in THE LIMITS OF MARITIME JURISDICTION 225, 231 (Clive Scholfield et al. eds., 2014) (noting the joint submissions added “an extra dimension . . . [escalating the] situation.”).

15. See Note Verbale from the Permanent Mission of China to the U.N. to the U.N. Secretary-General (May 7, 2009), http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf (“China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof.”) [https://perma.cc/VEA3-BVGM].
ported continental shelves and EEZs. In asserting its claim, China prevented Filipino fishermen from engaging in their artisanal craft off Scarborough Shoal (outside the Spratlys), and constructed an artificial island, with installations and structures, within the Philippines’ two hundred nautical-mile EEZ on Mischief Reef, Fiery Cross, and Subi Reef.

China’s actions also interrupted the Philippines’ oil exploration off the coast of Palawan (including Reed Bank). Most problematically, China asserted historic sovereignty rights over eighty to ninety percent of the

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20. See Geoffrey Till, The Global Significance of the South China Sea Disputes, in THE SOUTH CHINA SEA: A CRUCIBLE OF REGIONAL COOPERATION OR CONFLICT – MAKING SOVEREIGNTY CLAIMS? 13, 15 (C. J. Jenner & Tran Truong Thuy eds., 2016) [hereinafter THE SOUTH CHINA SEA: A CRUCIBLE OF REGIONAL COOPERATION] (discussing China’s military upgrades on Subi, Johnson South, and Fiery Cross Reefs, along with Taiwan’s upgrades (on Itu Aba), Malaysia’s upgrades on Swallow Reef, and the Philippines’ upgrades (on Thitu)).

entire South China Sea—a body of water covering three and one-half million square kilometers. Central to China’s claim is a map, which presented a U-shaped nine-dash/dotted line stretching more than 1500 kilometers from its southermost territory of Hainan Island to James Shoal off the coast of Borneo (the southermost point of the U-shaped line). China did not nor has yet made explicit “through legislation, proclamation, or other official statements the legal basis or nature of its claim,” noting, in addition to “indisputable sovereignty over the islands in the South China Sea and the adjacent waters,” its oblique enjoyment of sovereign rights over “relevant waters as well as the seabed and subsoil thereof.” If by “adjacent waters” China intends to claim maritime zones connected to insular island features, then the resolution of disputed sovereignty issues would have provided a basis for settlement under UNCLOS, if island or rock features had existed. But the conflation of “adjacent waters” with “rel-

22. See Notification South China Sea Arbitration, supra note 2, ¶ 2. See also Pham, supra note 7, at 1 (noting that the nine-dash line accounts for eighty or ninety percent of the South China Sea). China submitted two notes verbales to the Secretary-General in 2009 asserting historic rights to the South China Sea that extended far beyond maritime entitlements under the Convention. The notes verbales appended a map detailing a nine-dash line covering China’s assertion of historic rights. See Note Verbałe of the People’s Republic of China to the U.N. to the Secretary-General of the U.N. (May 7, 2009), http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf [https://perma.cc/4488-YP9B]; Note Verbałe from the Permanent Mission of the People’s Republic of China to the United Nations to the Secretary-General of the United Nations (May 7, 2009), http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf [https://perma.cc/2CCX-PTH8].

23. South China Sea Arbitration (Award), supra note 7, ¶ 3.

24. See id. ¶ 16.

25. The Tribunal referred to the line as a “nine-dash line” but did not acknowledge any particular nomenclature as correct or authoritative. See South China Sea Arbitration (Award), supra note 7, ¶ 169 n.131.

26. See BILL HAYTON, THE SOUTH CHINA SEA: THE STRUGGLE FOR POWER IN ASIA 56, 116 (2014) (discussing the U-shaped line stretching as far South as James Shoal). Hayton noted Chinese government map makers simply transliterated “the names of the features on . . . British maps into Chinese,” and misconstrued the British maps being copied [for instance James Shoal, which is under water, not an island)]. Id. at 55. See also Li Jinming & Li Dexia, The Dotted Line on the Chinese Map of the South China Sea: A Note, 34 OCEAN DEV. & INT’L L. 287, 288 (2003) (noting the 1935 Map of Chinese Islands in the South China Sea declared China’s southermost boundary should reach the 4° northern latitude, including the James Shoal).


28. Id.

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“relevant waters” opens up an array of expansive interpretations, which is compounded both by China’s non-differentiation between insular features that qualify as islands within the meaning of UNCLOS, and by those qualifying as something less substantial (such as rocks, shoals, reefs, or banks). The vagueness of the claim, along with seemingly interchangeable references to “historic rights,” “historic title,” and “historic waters,” raises the prospect that China seeks political advantage through intentional use of unclear terminology. An ambiguous “wait and see” negotiating posture accompanied China’s law of the sea negotiations between 1973 and 1982. Similarly, a complaint of “deliberate ambiguity” now attaches to China’s historic claim over the South China Sea. Other analysts note China’s “strategy of incremental action,” or “salami-slicing,” which allows China to consolidate gains, deter others from doing the same, and trivialize objections to its non-conforming behavior “under the reasonable assumption that it will be unthinkable for the United States to threaten major-power war over a trivial incident in a distant sea.”

China’s unformed language may also indicate it is in no hurry to define terms from the lexicon of western international law, given the latter’s history with regard to the law of the sea. Indeed, the western legal tradition never inherited a uniform interpretation of sovereignty from


32. See id. at 124, 128 (questioning whether the vagueness of China’s South Sea claim forms part of a political strategy and noting China’s usages of changing terminology relating to historic rights, title, and waters).


36. Id. at 13 (quoting Robert Haddick).

37. Id. at 17.

38. Nien-Tsu Alfred Hu & Ted L. McDorman, Post-2009: An Overview of Recent Developments Concerning the South China Sea, in Maritime Issues in the South China Sea: Troubled Waters or a Sea of Opportunity 155, 160 (Nien-Tsu Alfred Hu & Ted L. McDorman eds., 2013); Brendan Taylor, The South China Sea as a ‘Crisis’, in The South China Sea Maritime Dispute, supra note 2, at 172, 175 (noting Chinese officials have yet to publicly refer to the South China Sea in ‘core’ terms usually referencing Taiwan, Tibet or Xinjiang).

39. See id.
Roman law. Instead, early modern thought twinned imprecise usages of \textit{dominium} (ownership) and \textit{imperium} (rule) into what would transmute over centuries into a public law concept of state sovereignty. The gradual incorporation of these loose usages ambivalently affected the modern law of the sea. This law has imperfectly accommodated increasing claims of coastal state jurisdiction over areas formerly beyond the scope of national jurisdiction within a regime that has attempted to decouple the rights of ownership from the power of rule.

Before Jean Bodin classically defined sovereignty as “the absolute and perpetual power of the state,” the cognate resembled an ensemble of expressions signifying control, ownership, and imperative. Its power-conferring qualities spread across a feudal arc of status-holders, as indicated by a variety of terms: sovereign, seigneur, suzerain, sire, sir, sieur, monsieur, monseigneur. Sovereignty’s linguistic pre-history blended together a private law concept of ownership with the prerogative power of the king as \textit{dominus}—where the king “was not merely the ruler over his realm” but also the undifferentiated owner of the realm.\textit{Proprietas}, or private property, granted subjects a status, too.\textit{Et domus sua cuique est tutissimum refugium} [and each man’s home is his safest refuge]. The extensive rights of the \textit{paterfamilias} within this limited realm of Roman family law extended into medieval Europe and recast the king’s exercise of \textit{dominium} to mean a right of \textit{dominium} over the whole realm, but not necessarily all of its internal parts. This “internal” de-linking contrasted with matters beyond the physical sphere (and later the borders) of the \textit{imperium}, where the spatial prerogative powers of the king as \textit{dominus} remained

\begin{enumerate}
\item Daniel Lee, \textit{Sources of Sovereignty: Roman Imperium and Dominium in Civilian Theories of Sovereignty}, 2 POLITICA ANTICA 79, 80 (2012).
\item Barcelosn, supra note 41, at 28–30.
\item See Jean Bodin, \textit{Six Livres de la Republique} 122 (1576) (“la puissance absolue & perpetuelle d’une Republique”) (modernized from the old French).
\item Kurt Burch, “Property” and the \textit{Making of the International System} 143 (1988).
\item See id. at 89.
\item Id. at 144–45.
\item See id. at 90.
\end{enumerate}
This concept of external sovereignty developed over centuries and remodeled the idea of the *dominus* through custom and convention.\textsuperscript{51} But the development of external sovereignty took centuries to create; its appearance was not as sudden as the Peace of Westphalia (1648), the so-called birth of the state system, makes it out to be.\textsuperscript{52} The decoupling of sovereignty’s medieval portmanteau-like components of *dominium* and *imperium*\textsuperscript{53} has never been complete, especially in the law of the sea. This imperfect de-linking has created uneasy tensions involving the ownership of the oceans’ living and mineral resources, the security interests of coastal states and maritime powers, the fate of the dwindling global commons, and the international legal authority meant to balance disparate and historical private law influences of *dominium* within the rule-oriented regime structure of UNCLOS.

Perhaps Chinese national identity politics project a more ambitious notion of the nation state than is described by Westphalian sovereignty—a version that embraces prospective and retrospective temporal frameworks constituting a “civilizational state.”\textsuperscript{54} This notion adheres to its own intrinsic logic and advances a set of distinct “Asian Values” while mindful of a “Century of Humiliation” caused by western imperial interference and unequal treaties.\textsuperscript{55} If China thinks time is on its side, it may be seeking to re-establish tributary relationships which would substitute the authoritarian Chinese political regime for the mythologized folklore of China as the Middle Kingdom—the center of the East and South Asian universe.\textsuperscript{56} The prospect of a Sinocentric Age of Empire arises,\textsuperscript{57} akin to that created by nineteenth century European probes to “find the peripheries” of ideological and economic domination in Africa, Asia, and the Pacific.\textsuperscript{58} Finding the peripheries of China’s land empire—given its historical self-identification as a dynastic land power—has been a major historical and twentieth century preoccupation.\textsuperscript{59} But at the Eighteenth Party Congress in November 2017...
ber 2012, President Hu Jintao called for China to attach great importance to maritime security. Finding the peripheries of China’s maritime empire in the South China Sea claim now prompts attempts by scholars and the United States State Department to connect the dots or dashes to decrypt exactly what China’s U-shaped broken line means.

Some Chinese scholars argue that the broken line represents sovereignty claims over the features of the South China Sea. Another group of scholars attaches historic rights significance to the line, conferring exclusive rights to economically exploit, explore, and conserve the resources of the water and construct and install artificial islands over the waters. Yet others indicate that the line circumscribes historic waters or China’s traditional maritime boundary, notwithstanding its broken or non-continuous configuration. But Wu Shicun, the president of China’s National Institute for South China Seas Studies, signaled that China’s core design represents an amalgam of “sovereignty + UNCLOS + historic rights.” He indicated that the U-shaped line projected Chinese sovereignty over the features within the line, sovereign rights over water as defined by UNCLOS, and historic rights regarding fishing, navigation, and resource development. However, he noted that “the debate will continue if China remains modern state); Greg Austin, China’s Ocean Frontier: International Law, Military Force and National Development 13–15 (1998) (discussing China’s post-war preoccupation with its land frontiers, including the distraction of Taiwan after 1949, concern over its southern frontier during the Korean War, and border wars with India and the USSR).


62. See Baumert & Melchior, supra note 27, at 11 (postining three different interpretations of the dashed-line claim).


64. See id. at 39 (citing Fu, Huang, Wu, Gao, and Jia).

65. See Sienho Yee, Editorial Comment, The South China Sea Arbitration Decisions on Jurisdiction and Rule of Law Concerns, 15 CHINESE J. INT’L L. 219, 233 (2016) (noting the dotted line has been displayed as a national boundary line); Wu, supra note 14, at 80 (noting Chinese scholarly categories of interpretation for the line).


silent and keeps its claim ambiguous.”

China claimed that “the dotted line came into existence much earlier than” UNCLOS, and that its historic rights were independent of the Convention but protected by it. China also accused other littoral states of encroaching on its historic title. Articles 74 and 83 of UNCLOS require that, with respect to the EEZ and the continental shelf, boundary delimitation “shall be effected by agreement on the basis of international law” to achieve an “equitable solution.” But China’s flat-out assertion of entitlement prompted diplomatic protests from Indonesia, Malaysia, the Philippines, and Vietnam, and boundary protests from claimants such as Indonesia, Taiwan, and Brunei, and threats by China against med-

68. WU, SOLVING DISPUTES, supra note 14, at 83.
71. See Zou, supra note 61, at 21–23 (noting that China asserted encroachment by Vietnam (1170 square kilometers), the Philippines (620,000 square kilometers), Malaysia (170,000 square kilometers), Brunei (50,000 square kilometers), and Indonesia (35,000 square kilometers)).
72. UNCLOS art. 73.
77. See Yenni Kwok, Indonesian President Jokowi Visits the Natuna Islands to Send a Strong Signal to China, TIME (June 23, 2016), http://time.com/4379401/indonesia-china-jokowi-natuna-sovereignty-maritime-fishing-dispute/ (regarding Jakarta’s objection to Beijing’s nine-dash line, which overlaps with Indonesian sovereignty claims over the Natuna Islands) [https://perma.cc/3FFQ-8JUZ].
dling by non-claimants such as Japan, New Zealand, and Australia.\textsuperscript{80} China’s sovereignty designs over this sea—Asia’s so-called cauldron,\textsuperscript{81} or crucible of conflict\textsuperscript{82}—portend ominous consequences in the fast-emerging strategic rivalry with the reigning maritime power, the United States.\textsuperscript{83} New realities in Southeast Asia contrast an emerging China with a retrenching United States, prompting concerns as old as the Peloponnesian War (431–404 B.C.E.) about an inevitable confrontation between rising and receding powers,\textsuperscript{84} this time “in the new world of the South China

\textsuperscript{78} Jiye Kim, \textit{Where Does Taiwan Stand on the South China Sea?}, NAT’L INT. (May 7, 2016), http://nationalinterest.org/blog/the-buzz/where-does-taiwan-stand-the-south-china-sea-16099 (China’s One-China policy systematically excludes Taiwan from track-one security dialogue processes in the Asia-Pacific, including the Association of Southeast Asian Nations (ASEAN) Regional Forum) [https://perma.cc/PNS5-DAE4]; see Yann-huie Song, \textit{The South China Sea Workshop Process and Taiwan’s Participation, in MARITIME ISSUES IN THE SOUTH CHINA SEA} 70, 77–78 (Nien-Tsu Alfred Hu, Ted L. McDorman eds., 2013) (noting that China’s One-China policy systematically excludes Taiwan from track-one security dialogue processes in the Asia-Pacific, including the ASEAN Regional Forum); Yann-huie Song, \textit{Taiwan’s Response to the Philippines-PRC South China Sea Arbitration, ASIA MAR. TRANSPARENCY INITIATIVE} (July 15, 2015), https://amti.csis.org/taiwans-response-to-the-philippines-prc-south-china-sea-arbitration/ (noting that although this exclusion has muffled Taiwan’s voice in international forums, it has persistently voiced opposition to any solution to the South China Sea dispute arrived at without its participation, particularly involving Itu Aba [Taiping Island], which it claimed in 1946 and has garrisoned troops there since 1996) [https://perma.cc/8M24-ZDAT].

\textsuperscript{79} See Brunei Maintains a Low Profile in Pressing Its South China Sea Claims, WORLD POL. REV. (Jan. 28, 2016), http://www.worldpoliticsreview.com/trend-lines/17799/brunei-maintains-a-low-profile-in-pressing-its-south-china-sea-claims (discussing Brunei’s discreet opposition to China’s South China Sea claims and Brunei’s overlapping claims to Louisa Reef, Owen Shoal, and Rifleman Bank (including Bombay Castle) based on Brunei’s 1984 signing of UNCLOS) [https://perma.cc/R5KJ-KSDU].


\textsuperscript{81} See Robert D. Kaplan, \textit{Asia’s Cauldron: The South China Sea and the End of a Stable Pacific} (2014).

\textsuperscript{82} Hayton, supra note 26, at xvi.


\textsuperscript{84} See, e.g., Paul Kennedy, \textit{The Rise and the Fall of the Great Powers} (1989) (detailing trans-historical confrontations between land and sea powers); see also Mark J.
This Article revisits this contentious case based on China’s emphasis on historic rights to the South China Sea. Contested sovereignty claims generate appeals to the historical record, where factual circumstances, called effectivités, buttress and counter narratives to establish better title among disputants. Rather than ending such disputes, effectivités often fall prey to selective interpretation, making reliance on them, as the Tribunal noted in the Eritrea v. Yemen Arbitration, “voluminous in quantity but . . . sparse in useful content.” Maps do not necessarily establish facts—“[they] merely constitute information,” which of themselves “and by virtue solely of their existence . . . cannot constitute a territorial title.” The disconnection between China’s historical account and the factual circumstances supporting historic title is startling. Chinese scholars claim China’s historic title spans millennia. Opposing arguments in the case dated it formally to May 7, 2009, based on a 1947 map drawn by the Valencia, The South China Sea and the “Thucydides Trap”, in THE SOUTH CHINA SEA: A CRUCIBLE OF REGIONAL COOPERATION 59, 60 (C. J. Jenner & Tran Truong Thuy eds., 2016) (discussing the prospect of war between emerging and established powers).

85. HAYTON, supranote 26, at 269.

86. See generally CHARLES DE VISSCHER, LES EFFECTIVITÉS DU DROIT INTERNATIONAL PUBLIC (A. Pedone ed., 1967); Frontier Dispute (Burkina Faso/Mali), 1986 I.C.J. Rep. 554, 586-87, ¶ 63 (Dec. 22) (defining effectivités as “the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period”).

87. See, eg, Frontier Dispute (Burkina Faso/Mali), 1986 I.C.J. Rep. 554, ¶ 63 (discussing the purpose of effectivités).


89. Frontier Dispute, (Burkina Faso/Mali), Judgment, 1986 I.C.J. Rep. 554, ¶ 54; see also Dupuy & Dupuy, supra note 31, at 135-36 (reviewing Chinese commentators’ emphasis on the ancientness of China’s sovereignty over the South China Sea).

While scholars reflect on China’s vague presentation of historical evidence, a deeper yet recurring problem arises: the tendency of powerful states to lay claim over resources and geo-space when opportunities and abilities align. Already described as “the most important set of jurisprudential rulings in the modern history of the international law of the sea,” the South China Sea Arbitration will likely mark the beginning of a new set of potentially destabilizing and dangerous encounters based on this deeper problem. At stake is the long-established dogma defending high seas freedoms. But were they ever so secure?

In medicine, the correlation of particular signs and symptoms produce a set of characteristics known as a syndrome. In maritime history, the correlation between power and interests over pelagic space indicate a similar syndromic convergence—a territorializing tendency that may reflect a broader, systemic pathogenesis for the future of pelagic space and the global commons, when not validated by other maritime powers as an emerging customary norm or rule. International law may attempt to forestall the pathogenesis, but it has deep familiarity with the syndrome. Syndromes often take the form of eponyms because they bear the name of their first identifier or describer, or as with disease naming structures, the event or place where they first appear. In international law, no better example of this territorializing syndrome exists than with the Treaty of Tordesillas (1494), where, facilitated by fifteenth century papal donation, Portugal and Spain, acting as domini, divided the world in two.
China’s claim to the South China Sea is not as encompassing, but it is potentially more enforceable and almost as significant. The South China Sea is a semi-enclosed sea, with half of China’s total shoreline adjacent to it. It is the world’s fifth largest body of water, and it accounts for five trillion dollars in annual commercial activity involving one-third of maritime traffic worldwide. Treaty of Tordesillas syndrome appears active in the twenty-first century, ironically paralleling its European genesis, yet now distinctly Sinocentric in imperial character.

Following this introduction, Part I will investigate the factual circumstances that layer complexity onto this dispute. These circumstances involve consideration of China’s construction of artificial islands in the South China Sea and the understanding of historic entitlement in international law. Elements of the opposing historical narratives will be reviewed, not as typically done to weigh the value of effectivités supporting claims of better title, but to highlight their limited appeal in view of the historical penchant of states to claim control over resources when opportunities arise. This penchant reflects the far more significant factual circumstance at play here—as the Treaty of Tordesillas suggests in the history of international law. Part II reviews elements of this syndrome from historical and contemporary law of the sea perspectives, and the Article concludes with an assessment of the legal and political implications likely to radiate from this Award for years to come.

I. The Award and Its Significance

On July 17, 2016, the PCA ruled in favor of the Philippines on every substantive issue. Disputed features were deemed rocks or low-tide elevations incapable of sustaining human habitation or economic life, thus generating no entitlement to an EEZ or continental shelf. With regard to China’s historic claims, UNCLOS Article 298 provides that a state may except from compulsory dispute settlement disputes relating to “sea

99. See South China Sea Arbitration (Jurisdiction and Admissibility), supra note 6, ¶ 3; see also Nien-Tsu Alfred Hu & Ted L. McDorman, Co-editor’s Preface, in MARITIME ISSUES IN THE SOUTH CHINA SEA, supra note 38, at ix (describing the South China Sea as semi-enclosed, as defined in Art. 122 of UNCLOS).

100. SARAH RAINE & CHRISTIAN LE MIÈRE, REGIONAL DISORDER: THE SOUTH CHINA SEA DISPUTES 17 (2013).


102. See Fensom, supra note 92.

103. South China Sea Arbitration (Award), supra note 7, ¶ 1203. Of the Tribunal’s sixteen declarations and findings, many consisting of multiple sub-findings, the Tribunal ruled in favor of the Philippines save for finding 6 (a) [Philippines’ Submission No. 14] pertaining to the military stand-off on Second Thomas Shoal, where the Tribunal found it had no jurisdiction to consider the Philippines’ submission because it involved “military activities” within the meaning of UNCLOS art. 298(1) (b). Id.

104. See South China Sea Arbitration (Award), supra note 7, ¶ 1203 (finding A (1)) (dismissing China’s claim).
boundary delimitations or . . . historic bays or titles.” 105 Because China invoked this exception in 2006, 106 the Tribunal refused to review matters “concerning sovereignty or maritime boundary delimitation.” 107 But the Tribunal proceeded to the merits on the question of historic rights as opposed to historic title, which, in effect, refashioned the implications of China’s U-shaped line, making it a subject of arbitral review. 108 The Tribunal circumvented the consideration that the U-shaped line may have constituted a sea boundary delimitation because the question of historic rights—which “may include sovereignty” 109—also include “a broad and unspecified category of possible claims . . . falling short of sovereignty.” 110 The Tribunal concluded nothing in the jurisdictional nullification clause of UNCLOS Article 298 suggested historic rights falling short of sovereignty were out of reach of arbitral review. 111 If China’s presentation of the U-shaped line intended to artfully dodge third party review of its significance as applied to the South China Sea, while ambiguously conflating rights of ownership and rule over the area, then the Tribunal’s decoupling of historic rights from historic title clarifies the role of UNCLOS and will stand as an important legacy of the case. Moreover, the Tribunal found the exercise of sovereign rights “is generally incompatible with another State having rights to the same resources, in particular if such historic rights are considered exclusive,” 112 and rejected China’s historic claims over the South China Sea. 113 It held UNCLOS is a comprehensive agreement and contains no provision preserving or protecting historic rights in variance with it. 114

105. UNCLOS art. 298(1)(a)(i) (involving optional exceptions to applicability of section 2 [relating to compulsory procedures entailing binding decisions]).

106. See United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter: Declaration of China, UNITED NATIONS: OCEANS & LAW OF THE SEA, http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China Upon ratification (declaring that China does not accept any procedures provided for in Section 2 of Part XV of UNCLOS with respect to all categories of disputes in Article 298 1 (a), (b), and (c)).

107. South China Sea Arbitration (Jurisdiction and Admissibility), supra note 6, ¶ 397.

108. Id.

109. South China Sea Arbitration (Award), supra note 7, ¶ 225.

110. Id. ¶ 226.

111. Id.

112. Id. ¶ 243.

113. Id. ¶ 1203.

114. Id. ¶ 246. UNCLOS arts. 10 and 15 admit prior use derogations in the limited cases of historic bays and from territorial sea entitlement of a neighboring coastal state in cases of historic title affecting territorial sea boundary delimitations. These strict limitations do not apply to EEZs, continental shelves, or high seas. These are the only derogations based on historic rights contained in the convention. See South China Sea Arbitration (Award), supra note 7, ¶ 226 (noting no other mention of historic rights). As a matter of plain geography, the Tribunal held “the South China Sea is not a bay.” Id. ¶ 206. Although recognizing a pre-UNCLOS tendency to apply the “historic” descriptor to “waters” not serving as “historic bays,” the Tribunal referenced the International Court of Justice’s (ICJ) decision in Anglo-Norwegian Fisheries, which noted “‘historic waters’ are usually meant waters which are treated as internal but which would not have that character were it not for the existence of an historic title.” Id. ¶ 220. The term “historic waters” also has been applied to “a claim to territorial sea.” Id. ¶ 225.
The Tribunal further noted that during UNCLOS negotiations, China had “resolutely opposed” any sharing of the EEZ with “other powers that had historically fished in those waters;”115 that China had opposed any other limitation on that exclusive jurisdiction; and that China’s position had largely “prevailed in the final text of the Convention.”116 In any event, the Tribunal held the Convention supersedes earlier rights when any incompatibility arises.117

A. Unusual Factual Circumstances

Factual circumstances combined to make this case unusual although not unique to Chinese efforts to enhance sovereign rights over the South China Sea.118 China built structures on submerged banks and reefs, adding fill dredged up from the ocean’s floor to fabricate elevations that do not qualify as islands under the Convention.119 It adulterated otherwise uninhabitable coral projections barely above the high tide mark (causing substantial, even permanent environmental damage)120 in order to claim entitlement to maritime zones greater than twelve nautical miles, which are

115. South China Sea Arbitration (Award), supra note 7, ¶ 251.
116. Id. ¶ 252.
117. Id. ¶ 246.
118. See Jeremy Bender, China Isn’t the Only One Building Islands in the South China Sea, BUS. INSIDER (May 16, 2016, 1:17 PM), http://www.businessinsider.com/vietnam-building-islands-in-south-china-sea-2016-5/#spratly-island-2014-2016-1 (noting Vietnamese island-building efforts on Southwest Cay (7.45 acres reclaimed), Spratly (37.19 acres reclaimed), Sin Cowe (26.07 acres reclaimed), West Reef (70.50 acres reclaimed), Central Reef (41.3 acres reclaimed), Grieron Reef (3.52 acres reclaimed), South Reef, Southeast (2.47 acres created from completely submerged reef), South Reef, Southwest (1.70 acres created from completely submerged reef). [https://perma.cc/RD8Q-4DFX]. Although not a claimant in the region, the U.S. advocates the cessation of “reclamation” projects by all parties. The Vietnamese acknowledge a military presence on nineteen islands but claim the reclamation projects are “civilian in nature,” and done on sovereign territory “to prevent . . . soil erosion.” Gen. Phung Quang Thanh, Vietnamese Minister of Nat’l Def., Joint Press Conf. by Secretary Carter & Minister of Nat’l Def. Thanh, in Hanoi, Viet. (June 1, 2015) (transcript available at https://www.defense.gov/News/Transcripts/Transcript-View/Article/607052 [https://perma.cc/657D-BBEB]).
120. See South China Sea Arbitration (Award), supra note 7, ¶ 1203 (findings 16(b) and (c)) (finding China has caused irreparable harm and permanent destruction to coral reef ecosystems and natural conditions); see also SEBASTIAN C.A. FERSE ET AL., ASSESSMENT OF THE POTENTIAL ENVIRONMENTAL CONSEQUENCES OF CONSTRUCTION ACTIVITIES ON SEVEN REEFS IN THE SPRATLY ISLANDS IN THE SOUTH CHINA SEA 1, 59–60 (2016), http://www.pccases.com/web/sendAttach/1809 (concluding the spatial extent and duration of the construction of artificial islands, including dredging, removal of geomorphological coral structures (bommies), has damaged up to sixty percent of the shallow
according to “rocks” under Article 121(3) of UNCLOS.\textsuperscript{121} China previously declared that all issues of sovereignty would be excluded from arbitral jurisdiction,\textsuperscript{122} invoking the compulsory dispute settlement opt-out provision allowable under UNCLOS,\textsuperscript{123} and the Convention itself does not address sovereignty claims by states over land territory in the South China Sea.\textsuperscript{124}

Noting China’s declaration excluding sovereignty claims from the compulsory review of the Convention, the Philippines avoided seeking such a determination of rightful ownership over the islands, concentrating instead on the wrongfulness of the historic claim over the seas and the legal classification of the outcroppings and submerged structures making up the now misnamed Spratly “Islands.”\textsuperscript{125} The Tribunal agreed.\textsuperscript{126} While there was “no question” a dispute existed between the parties as to land sovereignty over maritime features,\textsuperscript{127} the Tribunal had not been asked to rule on that question and concluded no implicit determination of sovereignty radiated from its award.\textsuperscript{128} Nevertheless, China rejected the Philippines’ \textit{note verbale} announcing the intention to arbitrate,\textsuperscript{129} later refused to participate in the proceedings,\textsuperscript{130} and published a Position Paper in December 2014 explaining that the dispute comprised an integral maritime boundary question that could not be severally dissected but must be addressed as a unitary whole,\textsuperscript{131} through a series of bilateral negotiations.\textsuperscript{132}
B. The Precursor to Artificial Geo-Space: Lighthouses

Creating geo-space as a basis for establishing legal rights to pelagic space was a subject pondered as early as the Fur Seal Arbitration (1893) with discussion about the territorializing effect of lighthouses placed on islands. Sir Charles Russell, co-representative of Great Britain in the case, argued such acquisition of title was possible, but he encountered weighty opposition. Westlake, Oppenheim, and Gidel dismissed extensions of territorial sovereignty to the waters surrounding an artificial structure, although, Gidel noted cases involving historic waters could present an exception to the general doctrinal thrust opposing territorial extensions by such means. Jessup, presciently, held "it would be dangerous doctrine in many parts of the world to allow states to appropriate new areas of water by means of structures on hidden shoals."
A committee of experts established by the League of Nations explored the matter in sub-committee II (territorial waters) of the 1930 Hague Codification Conference, but that conference fell far short of its intended goals. The issue took on “new urgency” due to territorializing questions posed by new structures—such as drilling platforms and oil derricks—created after the birth of the continental shelf doctrine following the 1945 Truman Proclamations. UNCLOS disposed of the territorializing effect of artificial structures, depriving them of the status of islands.

C. The Post War Scramble for the South China Sea

During that time, an array of possessory interests found expression in the South China Sea. Japan set imperial designs on the Spratlys in 1939 as part of a strategy to neutralize Australia. Japan’s defeat set off a “scramble to occupy the islands” involving China and countries of the Association of Southeast Asian Nations (ASEAN)—Indonesia, Malaysia, and the Philippines, and later Vietnam. Chiang Kai-shek’s Kuomintang Government claimed the Paracel Islands in 1945, which had been part of French Indochina, and took hold of the Spratly’s largest islet, Itu Aba, in 1946; however, it abandoned this garrison by 1951, only to return in

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141. See Hunter Miller, The Hague Codification Conference 24 Am J. Int’l L. 674, 693 (1930) (noting that the program was too extensive and temporally limited to achieve conclusive results).
144. See UNCLOS art. 60 (8) (“Artificial 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 [EEZ] or the continental shelf.”); see also Grigorios Tsaltas et al., Artificial Islands and Structures as a Means of Safeguarding State Sovereignty Against Sea Level Rise: A Law of the Sea Perspective 1, 5, 11 (2010), http://ssrn.com/abstract=2409890 (for commentary on UNCLOS art. 60(8)) [https://perma.cc/JB3K-W8L2].
148. See Chas W. Freeman, Jr., Diplomacy on the Rocks: China and Other Claimants in the South China Sea, ChasFreeman.NET (Apr. 10, 2015), http://chasfreeman.net/diplomacy-on-the-rocks-china-and-other-claimants-in-the-south-china-sea/ (remarking that the Republic of China declared the archipelagos of the Paracel and Spratly Islands as part of Guangdong Province) [https://perma.cc/ULV7-WWS6].
149. France had claimed them in the 1930s as part of an 1887 Treaty with China securing a French protectorate over Tonkin (northernmost Vietnam). See Murphy, supra note 90, at 191; Teh-Kuang Chang, China’s Claim of Sovereignty Over Spratly and Paracel Islands: A Historical and Legal Perspective, 23 Case W. Res. J. Int’l L. 399, 400-01 (1991).
1956. The Cairo Declaration (1943) affirmed that “all territories Japan has stolen from the Chinese, such as Manchuria, Formosa [Taiwan], and the Pescadores [Penghu Islands], shall be restored to the Republic of China” and the Potsdam Declaration (1945) affirmed these terms. Chinese authorities repeatedly quote these documents as recognition of China’s claim over the South China Sea, but the declarations pertained only to two South China Sea islands. The question of ownership of other features controlled by Japan was not addressed.

In 1956, a Filipino lawyer and businessman, Tomas Cloma, attempted to create the microstate of Freedomland (Kalayaan in Tagalog) on thirty-three islets, reefs, and shoals off Palawan Island in 1956. He reasoned that Japan’s defeat rendered the area res nullius and “open to whoever was first on the scene.” After Cloma relinquished his claim in 1974, Philippine President Ferdinand Marcos annexed and then occupied a portion of the islands. Malaysia claimed the three southernmost Spratlys in 1978, issued a map of their Malaysian continental shelf in 1979 that included the islands, established a military garrison on Swallow Island in 1983, and occupied two other islands in 1986. Vietnam pressed its claim of sovereignty over the Spratlys at the San Francisco Conference in 1951, occupied them in 1973, and then ceded control to the North Vietnamese in 1975. The People’s Republic of China proclaimed a territorial sea around the Spratly Islands (Nansha) in 1958 and openly skirmished.
with the Vietnamese in 1988. When not hotly contested, the islands—remote and vulnerable to tropical storms—attracted little interest except from enterprising fishermen and phosphate miners. Oil strikes off the coasts of Malaysia and Brunei in the 1970s brought renewed attention to the waters, and the sea’s hydrocarbon reserves created tensions between China and other countries. China promulgated domestic legislation proclaiming ownership of the Spratlys (Nansha), Pratas (Dongsha), Paracel (Xisha), Macclesfield Bank (Zhongsha), and most of the South China Sea in 1992. Currently, “Brunei Darussalam, China, Malaysia, the Philippines, and Vietnam claim some or all of the islands in the Spratly Islands. China and the Philippines claim the islands in Scarborough Shoal, and China and Vietnam claim the Paracel Islands.” Taiwan claims the same islands as China, resulting in one bit of common ground: Taiwan also repudiates the Tribunal’s Award. All states bordering the South China Sea and claiming overlapping sovereignty over the islands in the South China Sea are parties to UNCLOS. The Convention may have assumed that sovereignty over land and island features were settled issues; “[i]t sets out what maritime

163. Murphy, supra note 90, at 188.
164. Id. at 189.
165. Buszynski, supra note 147, at 139 (tension between China and Vietnam). People’s Republic of China’s Premier, Li Peng, and Taiwan’s Foreign Minister, Frederick Chien, laid claim to the Spratly (Xisha) and Paracel (Nansha) Islands in 1990. Japan occupied them and two other groups of South China Sea islands belonging to China (Dongsha and Zhongsha) during World War II; Vietnam claimed them at the 1951 San Francisco Peace Conference. See Teh-Kuang Chang, China’s Claim of Sovereignty Over Spratly and Paracel Islands: A Historical and Legal Perspective, 23 CASE W. RES. J. INT’L L. 399, 400–01 (1991).
167. See Murphy, supra note 90, at 195 (referencing the 1992 domestic legislation).
169. Id.
170. J.R. Wu & Faith Hung, Taiwan Rejects Ruling on South China Sea Island of Itu Aba, REUTERS (July 12, 2016), http://www.reuters.com/article/us-southchinasea-ruling-taiwan-idUSKCN0ZS165 (noting the maps China bases its South China Sea claims on trace to Chiang Kai-shek’s Nationalist rule) [https://perma.cc/VZ88-MQXH].
171. Sam Bateman, Sovereignty as an Obstacle to Effective Oceans Governance and Maritime Boundary Making—the Case of the South China Sea, in The Limits of Maritime Jurisdiction, 219 (Clive Scholfield et al. eds., 2014).
zones can be claimed by States from their land territory and islands, and the rights and duties of coastal States and other States in the various maritime zones.” UNCLOS does provide for exceptional consideration of historic claims, but the Tribunal found those provisions inapplicable, reasoning, as a matter of plain geography, that “the South China Sea is not a bay.” A brief review of international law’s treatment of acquisition by historic title weakens China’s argument but not its unyielding sense of entitlement.

D. The Necessary But Exceptional Theory of Historic Waters in International Law

Confusion over the breadth of the territorial sea and the rights of coastal states over adjacent waters brought attention to the concept of historic rights during the 1930 Hague Codification Conference. Walther Schücking led a draft initiative to demarcate the breadth of the territorial sea, which necessarily focused on distinctions between inland and international waters. He initially suggested a ten-mile closing line for the mouth of a bay subject to exceptional cases demonstrated by continuous and immemorial usage. Interestingly, he was focused on the concept of closing off a single-state bay. The draft articles did not contemplate bays bordering on the land of two or more states, much less extending or analogizing the concept of the historic bay to close off title to a semi-enclosed sea. Balancing the concept of freedom of the seas with the interests of the immediately adjacent coast state was the only kind of exclusion contemplated over claims to the sea. In the drafting of UNCLOS, the issue of the semi-enclosed sea presented a “microcosm” of “virtually all” of the strategic tensions between the coastal states and the maritime states, making it necessary to treat such areas in terms of universally applicable provisions. Bernard Oxman, advocate of the Philippines, argued the same point before the Tribunal: “Since the emergence of modern international law, the semi-enclosed seas have been, and remain, a principal object
of the universal rules of the law of the sea.”

The United States resisted formation of a commission to draw up a list of historic waters on the grounds that individual governments, not an international commission, could only engage in such discussions, associating the concept of historic bays with interior waters. The ICJ later made this connection more explicit, holding in the *Fisheries Case*: “By ‘historic waters’ are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title.” Prescriptive title over the closed off waters vested with the immediately adjacent coastal state, eventually codifying into a twenty-four mile closing line separating historic bays from seaward projections. Gidel labeled the theory of historic waters necessary but exceptional—a deviation, elsewhere summed up by Judge Shigeru Oda, from “the general rule whereby the territorial sea of each riparian state is measured from that state’s own coastline.”

Animated by the first United Nations Conference on the Law of the Sea in 1958, the International Law Commission returned to the subject and petitioned the Codification Division of the Office of Legal Affairs to study the question of historic waters under international law. Issued under the aegis of the Secretariat, the study concluded that superficial agreement about the validity of historic title, again, adjacent to coasts, was uncontested but agreement on a precise definition was “not possible.” In line with the *Fisheries Case*, and supported by leading authority, the study recognized a distinction between historic bays and historic waters, ascribing a “wider scope” to the latter while recognizing more frequent usages attaching to the former. Subsequent case law has noted those more frequent usages are tailored to “concrete” and particular cases, in the context of limited and long-standing usages. While the study


183. See Miller, supra note 141, at 690–91 (reprinting the proposal from the Norwegian delegation and the response from the United States delegation).


186. Gidel, supra note 138, at 651.


189. Id. ¶ 33, 36.

190. See, e.g., id. ¶ 34, 36 (quoting Sir Gerald Fitzmaurice, “There seems to be no ground of principle for confining the concept of historic waters merely to the waters of a bay . . . . [a] claim could equally be made on an historic basis to other waters.”).

191. Id.


193. See *Gulf of Fonseca Case*, 1992 I.C.J. Rep. at 732 ¶ 11, 743 (Diss. Op. Judge Oda) (noting limited historical examples such as the Delaware and Chesapeake Bays on
acknowledged the possibility of securing title through acquisitive prescription, based on immemorial possession or the perfection of defective original title through acquiescence (borrowing from the principle of usucapio in Roman law).\textsuperscript{194} Proof of such title required rigorous review and exceptionally strong circumstances in order to prevail.\textsuperscript{195}

The acquisition of historic title in international law now requires satisfaction of three conditions. The state must exercise the necessary jurisdiction over the water; it must exercise that authority continuously for a long period of time (evidencing \textit{possesio longi temporis}); and it must do so without opposition from other states.\textsuperscript{196}

E. The U-Shaped Map

China places much emphasis of its historic claim to the South China Sea on a map detailing the U-shaped line.\textsuperscript{197} China has not provided an explanation of the origins of the U-Shaped line,\textsuperscript{198} but it is a key consideration in establishing China’s historic entitlement.\textsuperscript{199} The dotted line has an interesting and somewhat discordant provenance. An 1897 map of China’s southeast coastal Guangdong Province and Hainan Island included no other island markings as part of a territorial claim by Chinese authorities.\textsuperscript{200} But by 1909, the domestic political landscape in China had changed dramatically, as had the political fortunes of the Qing Dynasty, in face of national humiliations.\textsuperscript{201} A series of nationalistic challenges to the

194. Secretariat, supra note 188, ¶ 63.
195. Id. ¶ 40.
196. Fisheries Case, Judgment, 1951 I.C.J. Rep. at 18; see also Secretariat, supra note 188, ¶¶ 80, 185 (1964). Cf. Island of Palmas (U.S. v. Neth.), 2 R.I.A.A. 829, 840 (Perm. Ct. Arb. 1928) (establishing territorial sovereignty “by the continuous and peaceful display of the functions of state within a given region).\textsuperscript{201}
197. Mira Rapp-Hooper, Parting the South China Sea: How to Uphold the Rule of Law, 95 FOREIGN AFF. 76, 76 (2016).
199. Rapp-Hooper, supra note 197, at 76.\textsuperscript{200}
201. China suffered a series of humiliations during this period, beginning with the Opium War (1840–1842), the Sino-French War (1883–1885), Japan’s defeat of the Qing Dynasty in the Sino-Japanese War (1894–1895), and the resulting independence of tributary states, Korea and Taiwan, along with the suppression of the Boxer Rebellion (by the Eight-Nation Alliance: Austria-Hungary, British Empire, France, Italy, Japan, Russia, and the U.S.). See George P. Jan, The Doctrine of Nationalism and the Chinese Revolution,
Qing Court by Sun Yat-Sen’s rebellious factions in southeastern China threatened political stability. A nationalist Guangdong (Canton Merchants’) Self-Government Society had formed to counter British, Portuguese, and Japanese maritime and riparian intrusions and take part in a coalescing national identity. Facing a deepening legitimacy crisis, the Qing Court unexpectedly confronted a Japanese commercial mining (guano) enterprise on the Pratas Shoal, which the merchant had claimed by right of discovery. Pressured by the Self-Government Society, which collected travelers’ testimonials and oral histories of fishermen “to prove that the islands were historically Chinese,” the Qing Court negotiated a resourceful but expensive buy-out—a key turning point in China’s awakening interests over the South China Sea.

Although based on ancient claims, the line first appeared in a map by Hu Jinjie, a private Chinese cartographer in December 1914, and was thereafter incorporated into a map produced by the Republic of China Land and Water Maps Inspection Committee of 1935. Hu’s map had incorporated “the extent of Chinese state ‘control’ before 1736,” but had included only the Pratas and Paracels, and went no further south than 15° North. Chinese maps subsequently published during the 1920s and 1930s reflected Hu’s rendition, and map publishers began publishing the names of the features of the four major island groups in the Sea. But French imperial claims over six of the Spratlys in 1933 may have sparked a “primordial possessive instinct” to counter the French claims and more broadly, to create a great defensive pelagic wall around its “blue-colored


204. See id. at 140–41.

205. Id. at 141.

206. See Hayton, supra note 26, at 51 (detailing that Japan recognized Chinese sovereignty over the Pratas in exchange for a payment to the Japanese merchant of one hundred and thirty thousand dollars).


208. See Yu, supra note 101, at 407; Hayton, supra note 26, at 52–53.

209. Hayton, The South China Sea, supra note 26, at 53.

210. See Yu, supra note 101, at 407; Zou, supra note 207, at 32.

211. Wu, supra note 14, at 79 (noting the four island groups—Dongsha/Pratas, Xisha/Paracel, Zhongsha/Macclesfield Bank, Scarborough Reef and Nansha/Spratly—as well as the southernmost extension of China’s maritime claim—the James Shoal).

212. Yu, supra note 101, at 407. Zou also attributes importance to the year 1933 and the assertion of French claims over some of the Spratlys as Vietnam’s protector, although Zou claims France claimed nine islands. See Zou, supra note 207, at 32–33.
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land”—the Yellow, East China, and South China Seas. Bai Meichu, a founder of the China Geographical Society, adapted Hu’s map and added the “innovation” of the U-shaped line, which went through iterations until “first published,” “revealed,” or “released” by the Nationalist Government of the Republic of China (ROC, 1912–1949) in 1947, or printed in 1947 and published in 1948. The ROC map “is widely recognized as the first official map showing China’s claims.” It was titled “Map of South China Sea Islands” and presented eleven dashes, with two additional lines snaking into the Gulf of Tonkin.

A 2000 accord between China and Vietnam formally delimited respective boundaries in the Gulf of Tonkin. Two lines were erased in the Tonkin Gulf, resulting in the nine-dash line in the map that China appended to its 2009 note verbale. The Tribunal found that “the line has appeared consistently in that nine-dash form in official Chinese cartography since that date” but “[t]he length and precise placement of individual dashes, however, do not appear to be entirely consistent among different official depictions of the line.”


214. HAYTON, supra note 26, at 56. See also Zou, supra note 207, at 33 (noting the U-shaped line had appeared in privately produced cartography in 1936).


216. Rapp-Hooper, supra note 197, at 76.


218. Li & Li, supra note 26, at 290. U.S. State Department analysts Kevin Baumert and Brian Melchior reviewed variances in publication histories and settled for simplicity’s sake on 1947. See Baumert & Melchior, supra note 27, at 3 n.5. The map was drawn by cartographer Bai Meichu. See Yu, supra note 101, at 407 (discussing Bai’s official drawing prompted by Chinese sovereignty interests stemming from France’s 1933 take-over of six of the Spratly Islands). The Tribunal held the line first appeared on an official Chinese map in 1948. South China Sea Arbitration (Award), supra note 7, ¶ 181.

219. WU, supra note 14, at 79.

220. Baumert & Melchior, supra note 27, at 3.


222. Note Verbale from China to the U.N. Secretary General (May 7, 2009).

223. South China Sea Arbitration (Award), supra note 7, ¶ 181. In January 2013, China introduced a ten-dash line, with the additional line projecting eastward of Taiwan into the East China Sea, purportedly emphasizing Taiwan’s status as a Chinese province. The new map has been transposed as a background in new Chinese passports. See Euan Graham, China’s New Map: Just Another Dash? RUSI Newsbrief (Sept. 3, 2013), https://rusi.org/publication/newsbrief/china%E2%80%99s-new-map-just-another-dash [https://perma.cc/H9LX-MEYZ]; see also Baumert & Melchior, supra note 27, at 6 (depicting a graphic presentation of changes to the dashed line presented in 2009 and 1947 Chinese maps).

F. China’s Historical Narrative

While the map does not appear to be ancient at all, historical narratives also are proffered to buttress insufficient cartographic evidence estab-
lishing China’s historical claim over the South China Sea. Chinese scholars are unable to agree on when the Spratlys were discovered but various claims range from the Spring and Autumn period of the Eastern Zhou dynasty (770–256 B.C.E.), to references in classical literature (for instance, poems in the Book of Songs, the Commentaries of Zuo, and the Discourses of the States) and to archeological evidence found on the Xisha Islands.²²⁴ But this evidence, wrapped up in historical narratives, is equally problematic. It stimulates complaints that China deploys historical arguments to escape from the legal commitments required by UNCLOS.²²⁵ Historical narratives can be compelling in an area so rich in dynastic tradition—the Funan and Khmer in Cambodia, the spread of the Sanskrit cosmopolis,²²⁶ the Champa in the Mekong and the Mac in northern Vietnam, the sultanates of Malacca and Indonesia, and, of course, the Han and Ming dynasties in China—but they contribute to “South Asia’s luxuriant cultural polymorphism”²²⁷ more so than a definitive, indivisible, and uninterrupted claim of dominum over the pelagic highway that contributed to such polymorphism. In its finding that Scarborough Shoal has been a traditional fishing ground of many nationalities,²²⁸ the Tribunal concluded the interpretation of historical narratives needed to be “approached with sensitivity.”²²⁹ Artisanal practices passed down through generations had “not been considered of interest to official record keepers or to the writers of history” but the selective recordings of this history “[d]id not make them less important to those who practice them.”²³⁰ This sense of parochialism abounds in the history of the South China Sea and is reminiscent of the Portuguese claim that they were the first navigators of the sea leading to the Indians (East Asian trade routes)—a claim Hugo Grotius labeled “absurd” in Mare Liberum more than four hundred years ago.²³¹ China’s assertions seem equally absurd to the other South China Sea coastal states and have spawned new maritime narratives. For instance, in Vietnam, formerly “marginal” islands in the South China Sea are now at the center of “a re-imaged map of the nation’s territory . . . a figurative cartographic navel of the national geo-body,”²³² projecting Vietnamese sovereignty claims over

²²⁴. WU, supra note 14, at 16.
²²⁸. South China Sea Arbitration (Award), supra note 7, ¶ 805.
²²⁹. Id.
²³⁰. Id.
²³². Edyta Roszko, Geographies of Connection and Disconnection: Narratives of Seafaring in Ly So’n, in CONNECTED AND DISCONNECTED IN VIET NAM: REMAKING SOCIAL RELATIONS IN A POST-SOCIALIST NATION 347, 349 (Philip Taylor ed., 2016) (noting the
portions of the South China Sea. South China Sea coastal states have their own versions of history, but “no one state seems to have actually exercised dominant authority to the exclusion of all others.”

Chinese historical narratives often trace to the maritime Silk Road trade route, dating to the Qin (221-206 B.C.E.) and Han (206 B.C.E.-220 A.D.) dynasties, and flourishing in the Tang (618-907) and Song dynasties (960-1279). This sea route, which had at its center the South China Sea, not only preceded its land counterpart, but also extended farther and endured longer. China’s Admiral Zheng He (1371-1433) set sail on seven fabled voyages across the South China Sea; Ming Dynasty records (the Ming shi-lu) detail other important Chinese commanders and voyages, as well. Zheng’s first armada (1405-1407) of 317 ships provisioned 27,800 mariners, soldiers, and functionaries. The astonishing size of this flotilla totaled two-thirds more than the total European and Eurasian population of Asia Portuguesa at any time during the sixteenth century. The junks alone that supplied the Ming expeditions with water and rice numbered about the same as the largest Portuguese expedition ever sent to Asian waters. Zheng charted the waters connecting China to the disputed islands of the South China Sea while en route to Champa (southern Vietnam), Malacca, India, and later East Africa. Chinese authorities note these charts were published throughout the Ming (1368-1644) and Vietnamese party-state framed sovereignty claims in terms of historical and emotional stories of Vietnamese sailors.

233. Id.
235. Gao & Jia, supra note 16, at 101; Raul (Pete) Pedrozo, China Versus Vietnam: An Analysis of the Competing Claims in the South China Sea, 2014 CNA ANALYSIS & SOLUTIONS 1, 5–6 (2014) (referring to China’s claim that a number of historical accounts trace to China’s discovery of the South China Sea Islands during the Han Dynasty, with additional evidence from the Tang and Song dynasties); see also Jianming Shen, China’s Sovereignty Over the South China Sea Islands: A Historical Perspective, 1 CHINESE J. INT’L L. 94, 101–05 (2002) (discussing evidence of Chinese discovery centuries before the Qin and Han dynasties).
238. See generally Geoff Wade, The “Ming shi-lu” as a Source for Thai History: Fourteenth to Seventeenth Centuries, 31 J. SOUTHEAST ASIAN STUD. 249–94 (2000) (canvassing such voyages to and from Siam with detailed appendices).
240. See Finlay, supra note 239, at 4.
241. See id.
242. Li Dexia & Tan Keng Tat, South China Sea Disputes: China Has Evidence of Historical Claims, 165 RSIS COMMENT. NO. 1, 2 (2014); see also Geoff Wade, The Zheng He
Qing (1644–1912) dynasties, claiming that this evidence demonstrates how China’s maritime and military power extended to the Indian Ocean, but not necessarily its desire to exercise dominium over the South China Sea. Historians debate the hegemonic, defensive, exploratory, and propagandistic intentions of the voyages, but they largely agree that these voyages were structured for trade and were “overwhelmingly military in composition.” In addition to the unsettled debate as to China’s intentions for dispatching the voyages, historians debate why the Confucian controllers of the Ming Court suddenly recalled these voyages, thus opening the way for successive waves of European advancement into Southeast Asian waters in search of emporia. “China didn’t possess another naval ship capable of reaching the islands of the South China Sea until it was given one by the United States [five hundred] years later,” leading to the general conclusion that “in no sense did any state or people ‘own’ the Sea.” According to Greg Austin, “the PRC [People’s Republic of China] has highlighted the fact that on each [Zheng] voyage, the ships passed through the Spratly Islands,” but that there is no evidence of China exercising sovereign authority. “General historical ‘trawling’ to demonstrate that people of a particular nationality visited a locality is not evidence that an international tribunal would regard as material.” Moreover, “dangers posed by the reefs and islands of the Spratlys” indicated they were areas mariners should avoid, given that mariners were more prone to hug the shores to avoid shipwreck and pirates.

Modern English language narratives on the South China Sea have been criticized for overreliance on histories published in 1976 and 1982. These histories relied on three non-neutral Chinese accounts justifying the South China Sea as China’s maritime sphere.
tifying China’s takeover of the Paracel Islands from South Vietnam in 1974.256 Journalist Bill Hayton argues that reliance on this limited scholarship “frame[s] the entire debate about the South China Sea;”257 that China had no discernable interest in the South China Sea before 1909, making its claim modern, not ancient;258 that the claim arose in response to domestic political crises affecting the Qing Dynasty in 1909; that Chinese knowledge about the sea was minimal and confused until the early 1930s (conflating, for example, the Paracels with the Spratlys while transliterating British cartographic charts, errors included),259 and that a national sentiment did not take hold until France annexed the Paracels in 1933.260 Indeed, the first official Chinese presence in the Spratlys occurred on December 12, 1946 with the ROC Taiping landing party.261

In the Eritrea v. Yemen Arbitration, the Tribunal conducted a similarly forestalled search for effectivités to decide a territorial dispute over islands in the Red Sea.262 Both sides presented extensive evidence; Eritrea traced its claim to the chain of title beginning with the Italian colonization of its mainland in the latter nineteenth century,263 while Yemen pointed to maps of the Bilad el-Yemen (realm of Yemen) rule dating to the sixth century, and declarations of the Imam of Yemen and third states.264 The Tribunal rejected the idea that the uninhabited islands were within historic waters; as long as the colonial situation prevailed, neither party “was in a position to demonstrate any kind of historic title that could serve as a sufficient basis to confirm sovereignty over any of the disputed islands.”265 “In the end, neither party [was] able to persuade the Tribunal that the history of the matter reveals the juridical existence of an historic title, or of historic titles, of such long-established, continuous and definitive lineage to these particular islands, islets and rocks as would be a sufficient basis for the Tribunal’s decision.”266 Instead, the openness of the Red Sea for fishing and “unrestricted traffic from one side to the other” created “a sort of ‘ser-
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vitute internationale' falling short of territorial sovereignty” but providing a “legal basis for maintaining certain aspects of a res communis that has existed for centuries for the benefit of the populations on both sides of the Red Sea.”267 In the Gulf of Fonseca Case, the ICJ Chamber determined that a similar condominium-like arrangement prevailed over the waters of the Gulf resulting in a curious threefold sovereignty arrangement among El Salvador, Honduras, and Nicaragua.268 The Chamber traced this coparner arrangement to the Central American Court of Justice’s 1917 conclusion, which the Chamber affirmed, that Spanish imperial predecessors had “claimed and exercised continuous and peaceful sovereignty over the waters of the Gulf, without serious . . . contestation” for nearly three centuries,269 making the three Central American states beneficiaries of a seamless conveyance from the Spanish Crown.270 The Chamber’s grasp of history may not have been convincing.271 Its more central objectives may have been to quiet title over disputed waters, avoid the sudden appearance of terra nullius (in this case mare nullius) arguments, and extrapolate features of uti possidetis (as you possess, so you may possess) from its territorial and colonial confines, while also applying its teachings seaward to avoid a dispute over ownership of the waters of the Gulf of Fonseca, and paving the way for a smooth transition from imperial rule to the post-colonial rule of emerging statecraft.272 The judgment distorted Spanish imperial rule over the waters of the South Sea (Pacific) as placid,273 invented and imposed the concept of the pluri-state bay,274 and applied the maligned concept of condominium275 against the express claims of one of the parties,276 thereby forcing a pelagic cohabitation of perfect equality277 among rivals. It also problematized the United States Navy’s designs of securing a Pacific naval station to protect the corridor leading to the newly

267. Id. ¶ 126.
269. Id. at 589 ¶ 385.
270. Id. (discussing the transfer of sovereign rights to the Gulf of Fonseca as an undifferentiated single-state bay from the Spanish Crown to the Federal Republic of Central America, which had the three Central American states as members).
271. See Gulf of Fonseca Case, 1992 I.C.J. Rep. at 752 ¶¶ 36–37 (Diss. Op. Judge Oda) (contesting the majority’s opinion that the Gulf of Fonseca is an historic bay and the historical grounds supporting proof that Imperial Spain or any of the parties had control of the sea-waters off Central America).
273. See id. at 830–35 (questioning the Chamber’s conclusion about the placid waters of the bay).
275. See, e.g., Peter Schneider, Condominium, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 732, 734 (Rudolf L. Bernhardt ed., 1992) (referring to condominium arrangements as “incompatible” with modern international law).
constructed Panama Canal. However, it created a solution desirable to the three Central American states to the extent that it alienated to them control over the waters vis-à-vis the rest of the world—leaving El Salvador, Honduras, and Nicaragua to invent their own course of dealing over their new-found joint ownership of Fonseca’s closed waters.

II. Sovereignty ad Absurdum: Treaty of Tordesillas Syndrome Revisited

Given the Award in the South China Sea Arbitration, such a condominium solution seems remote given the Award in the South China Sea Arbitration, again for the simple reason that the South China Sea is not a bay. The dogma of freedom of the seas prevails, but not perhaps aligned with the liberal Grotian-inspired archetype that has been proclaimed as historically victorious. China’s ongoing attempt to establish its own kind of mare nostrum with the vagaries of the U-shaped line has generated figurative as well as literal speculation about connecting its dots and dashes. There is little sense in China seeking to interfere with the high seas freedom of navigation—as related to trade. China’s economy is export-driven, and threats to navigation for commercial shipping would damage Beijing’s vital interests. A dispute does exist about the activities permitted under the freedom of navigation guarantee within the EEZ of another nation. The U.S. Navy asserts an unimpeded freedom of navigation and overflight, meaning military vessels and aircraft encounter

278. See George A. Finch, The Treaty with Nicaragua Granting Canal and Other Rights to the United States, 10 AM. J. INT’L L. 344, 347 (1916) (noting the strategic importance of a naval station in Fonseca’s waters to protect the western terminus of the Panama Canal).

279. See Rossi, supra note 272, at 826–31.

280. Supra note 114 and accompanying text.


282. See Nicholas Bloom et al., Trade Induced Technical Change? The Impact of Chinese Imports on Innovation, IT and Productivity, 83 REV. ECON. STUD. 87, 87 (2016) (noting Chinese exports grew by over fifteen percent per year for over twenty years leading up to the 2007–2009 recession).

283. Gregory Poling, US Interests in the South China Sea: International Law and Peaceful Dispute Resolution, in POWER, LAW, AND MARITIME ORDER IN THE SOUTH CHINA SEA 61, 64 (Tran Truong Thuy & Le Thuy Trang eds., 2015).

284. See generally George V. Galdorisi & Alan G. Kaufman, Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict, 32 CAL. W. INT’L L.J. 253–302 (2001–2002) (discussing military activities in the EEZ). The authors considered the problem one of the “least well addressed” areas of the Law UNCLOS, which they claim particularly affects enclosed seas such as the Baltic, Black and South China Seas, as well as the Arabian Gulf and the Sea of Okhotsk. Id. at 254.

no restrictions for purposes of transiting, surveilling, engaging in reconnais-
aissance activities in the EEZ.\footnote{286} China maintains that foreign military
vessels operating in the EEZ are subject to Chinese jurisdiction.\footnote{287} UNCLOS Article 58 (3) requires that states exercise “due regard” to the
rights and duties of coastal states in the EEZ;\footnote{288} Article 88 reserves the
high seas for peaceful purposes;\footnote{289} Article 301 mandates that states refrain
from any threat or use of force against the territorial integrity or political
independence of any state—provisions China interprets as precluding
military surveillance and reconnaissance in the EEZ without coastal state
permission.\footnote{281} Dangerous encounters between the Chinese and Ameri-
cans have taken place,\footnote{292} but China’s U-shaped line incorporates more sea
space than an aggregation of imaginary insular EEZs and brings into ques-
tion why China would imperil regional stability among all other littoral
powers of the South and East China Seas over a latent bilateral security
dispute with the United States?

China’s timing is perplexing, and bears elements of a self-inflicted pol-
icy dilemma contrasting sovereignty and security interests.\footnote{293} Construed
other than as a probe, its actions may indicate increasing designs over the
natural resources of the South China Sea,\footnote{294} and/or a re-directed role for
China as an ascending worldwide economic and military power. In 2013,
China initiated an ambitious four trillion dollar plan to unite dozens of
economies of Eurasia and East Africa through a series of infrastructure
investments known as the Belt and Road Initiative (also known as One Belt,
One Road).\footnote{295} This initiative amounts to China’s third attempt in three

\footnotesize{286. UNCLOS art. 58, ¶ 1.}
\footnotesize{287. Maritime Disputes and Sovereignty Issues in East Asia: Hearing Before the Sub-
comm. on E. Asian & Pac. Affairs of the Comm. on Foreign Relations, 111th Cong. (2009)
(statement of Peter Dutton, Associate Professor, China Maritime Studies Institute, U.S.
Naval War College, Washington, DC).}
\footnotesize{288. UNCLOS art. 58, ¶ 3.}
\footnotesize{289. UNCLOS art. 88.}
\footnotesize{290. UNCLOS art. 301.}
\footnotesize{291. See Raine & Le Mi`ere, supra note 100, at 51 n.4 (2013) (noting China’s opposi-
tion to military surveillance in the EEZ).}
\footnotesize{292. See Ronald O’Rourke, Cong. Research Serv., R42784, Maritime Territorial
And Exclusive Economic Zone (EEZ) Disputes Involving China: Issues For Congress
12 (2016) (detailing eight incidences between 2001 and 2016 involving activities of U.S.
military forces operating within China’s EEZ). Perhaps the two most reported incidents
involved the April 2001 collision between a U.S. Navy EP-3 surveillance aircraft approxi-
mately seventy miles off China’s island province of Hainan, and the March 2009 inter-
ruption of U.S.N.S. Impeccable’s survey operations, approximately in the same area. See
Peter Dutton, Introduction, in Military Activities in the EEZ, supra note 234, at 1, 2.}
\footnotesize{293. Jian Zhang, China’s South China Sea Policy: Evolution, Claims and Challenges, in
The South China Sea Maritime Dispute, supra note 2, at 60, 73 (2015).}
\footnotesize{294. See Keyuan Zou, The South China Sea, in The Oxford Handbook of the Law of
the Sea 626, 628 (Donald R. Rothwell et al., eds., 2015) (noting descriptions of the
mineral reserves of the South China Sea as a second “Persian Gulf,” although noting less
optimistic estimates outside China, as well).}
\footnotesize{295. Gal Luft, China’s Infrastructure Play: Why Washington Should Accept the New Silk
Road, 95 FOREIGN AFF. 68, 68–69 (2016). See generally Zeng Lingliang, Conceptual Anal-
ysis of China’s Belt and Road Initiative: A Road towards a Regional Community of Common}
millennia to project its economic power westward. The proposal combines a series of land-based economic corridors (the Silk Road Economic Belt) with the twenty-first century Maritime Silk Road, which connects the South China Sea, the Indian Ocean and the Mediterranean Sea. Conceived as the antechamber to the greater Indian Ocean, the South China Sea may become China’s naval footprint in a possibly decades-long drama for dominance, much like how the Greater Caribbean provided the United States with a seafaring foothold for hemispheric and, soon thereafter, world dominance. Employing a so-called “cabbage strategy” of wrapping individual features of the South China Sea in layers of incremental appropriation, China’s attempt to “further consolidate claims” now intensifies through law enforcement patrols within the U-shaped line.

A. Sovereignty ad Absurdum and Freedom of the Seas

The South China Sea Arbitration has generated a debate over the Tribunal’s rejection of effectivités supporting Chinese dominium over the South China Sea. But a more turbulent discussion awaits consideration, one that has long weakened the international project to secure the open, rule-based, reciprocal (cooperative), institutional liberal order on which the freedom of the seas is based. This discussion involves the less than complete embrace of freedom of the seas even among some of liberal internationalism’s ardent supporters—a syndromic consequence of Treaty of Tordesillas thinking, now undergoing Sinicized interpretation.

Freedom of the seas is one of the great shibboleths of liberal international law. It dates to the grand seventeenth century debate between Hugo Grotius and John Selden over free versus closed seas, with increasing recognition of Vázquez de Menchaca’s influence on Grotius and ripostes to Grotius’ view from other publicists such as Destiny.
Welwood, Freitas, and Pereira Mare Liberum described the oceans as a global commons, and in it Grotius defended the right of the Dutch East India Company to ply Asian waters Portugal had claimed for itself. This dogma surfaced in arguments presented by the Philippines before the Tribunal: “from the time of Grotius through the widespread acceptance of the United Nations Convention on the Law of the Sea, international law has not preserved, admitted or accepted claims to control vast areas of the sea in derogation of either the freedom of the seas or the rights of the immediately adjacent coastal state.”

Embedded in this dogma is the idea that Grotius began the process of decoupling the concept of ownership (dominium) from that of rule/sovereignty (imperium), thus quieting disputes over control of vast swathes of the sea. He has been portrayed as appearing at the cusp of a new age, an age stylized by Richard Falk and many others as the arrival of international law’s Grotian Moment, which then transformed into the eponymous Grotian Tradition. This Moment and Tradition represent the conceptual

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303. See, e.g., William Welwood, An Abridgement of All Sea-Lawes Tit. XXVII (Colin Mackenzie ed., 2011); William Welwood, De Dominio Maris (1615) (rejecting Grotius’ claim that the seas were indivisible, particularly regarding coastal state authority).


305. See, e.g., Juan de Solorzano Pereira, de Indiarum Iure (1672). International legal historian and antiquarian Edward Gordon noted that Pereira’s attack against Grotius was regarded by Spanish scholars as the most systematic juridical formulation of Spanish and Portuguese seventeenth century claims based on prescription and Roman and customary law, but that it has been scarcely studied by English-speaking scholars. See Edward Gordon, Freedom of the Seas: Part 4, Yale L. Sch. Lillian Goldman L. Libr. (Oct. 22, 2009), http://library.law.yale.edu/news/freedom-seas-part-4 [https://perma.cc/XE3L-XTDV].

306. Grotius, Mare Liberum, supra note 231, at XIV-XV (enjoining proprietary claims over the oceans).

307. Id.


310. The Grotian Tradition in international law and relations is among the most sustaining and powerful perspectives. The tradition dates to enthusiastic portrayals of Grotius. See, e.g., Cornelis Van Vollenhoven, De Drie Treden Van Het Volkenrecht
birth certificate for transformative liberal internationalism and the advancement of the doctrine of freedom of the seas.\textsuperscript{311} It represents the repudiation of the Treaty of Tordesillas syndrome and the ending of closed seas mentality.

The Treaty of Tordesillas divided the world in two.\textsuperscript{312} Based on the famous fourth papal bull of Alexander VI,\textsuperscript{313} itself a revision of previous papal donations from the Spanish Borgia that were overly generous to the Castilian Crown,\textsuperscript{314} the treaty split the Atlantic approximately midway between the Azores and the West Indies along a meridian 370 leagues west of the Cape Verde Islands.\textsuperscript{315} Criticized as a display of sovereignty \textit{ad absurdum},\textsuperscript{316} the treaty nevertheless significantly altered history: newfound territory and peoples west and south of the meridian became property of the Castilian Crown (essentially, most of the physical and human geography of the Americas); territory to the east—Brazil, Africa, the Indian Ocean to Bombay, Goa, and the Spice Islands leading to the Moluccas—fell into the realm of the Portuguese king.\textsuperscript{317} Its most telling consequence reflected super-power willingness to appropriate and divide that which could not be seized outright.\textsuperscript{318} This tendency has been displayed problematically in the history of the law of the sea, where liberalism’s twin connections to freedoms of navigation and commerce have never been as solidly or consistently upheld as supporters of the liberal ethos would like to believe.


\textsuperscript{312} Although not explicitly stated in 1494, historian Charles Gibson noted “the assumption commonly made in Spain . . . was that the Tordesillas line should be projected around the world into the Asiatic hemisphere.” The matter would have been understood as well in terms of Portuguese interests because of its control over the Spice Islands, of tremendous commercial value in European trade. Gibson, supra note 97, at 18.

\textsuperscript{313} \textit{Dudum siquidem}, September 26, 1493.

\textsuperscript{314} \textit{Dudum siquidem} modified earlier papal donations issued between May and September 1492 following Columbus’ first voyage to the New World. See C.H. Haring, \textit{The Spanish Empire in America} 9 (1947) (noting donations to Spain over all islands and mainland of the Americas toward the Indies). Portuguese diplomats successfully lobbied in favor of a revision, leading to \textit{Dudum siquidem}, which pushed the divide another two hundred and seventy leagues west (accounting for Portugal’s colonial control over Brazil). See Hal Langfur, \textit{Colonial Brazil} (1500–1822), in \textit{A Companion to Latin American History} 89, 89 (Thomas H. Holloway ed., 2008).

\textsuperscript{315} See Gibson, supra note 97, at 17.


\textsuperscript{318} Id.
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Indeed, Hugo Grotius’ reworking of a chapter of a previously unpublished work, which famously resulted in Mare Liberum, never achieved unassailable status as a universal rule of law. The idea was controversial in its own time, amply contested by centuries of prior state practice, and is now anachronistically praised for its novelty and logic. Liberal internationalists elevated freedom of the seas to a position of primacy, placing it as a keystone in the foundation myth of the Grotian Tradition. China’s illiberal challenge to the Grotian perspective may not be surprising, but neither should be the historical ambivalence of western liberalism’s upholding of high seas freedoms. An irony of the modern age is that its ideational embrace has never been complete, nor uniformly deemed as desirable. International law has never come completely to terms with the decoupling of ownership (dominium) from sovereignty (imperium) as the project of liberal internationalism demands and as the tragedy of the Commons suggests. The Treaty of Tordesillas, as absurd as it appears in the modern mind, never paid that decoupling much mind, but it is less of an anachronism than modernists hold. This western ambivalence serves as a basis for China’s expansive claims, a variant of tu quoque (you did it, too) thinking only removed from the battlefield and applied to expansive claims over the oceans. This ambivalence may ultimately shape the practical long-term consequence of the Tribunal’s Award.

B. The Reassessment of Grotius’ Mare Liberum

Cracks in the Grotian conception of freedom of the seas have gained more scholarly attention. Grotius and his luminous tradition have undergone recent and critical reassessments. Only a selection of his body of work fits into liberalism’s mold of advancing freedom of the seas.

1. Doctrinal Criticisms

Edward Keene argues that the Grotian tradition’s narrow perspective


320. For a discussion of the predominance of the mare clausum idea during the western medieval period, see generally Bo Johnson Theutenberg, Mare Clausum et Mare Liberum, 37 Arctic 481 (1984).


324. See Steinberg, supra note 317, at 256–57.


developed out of the *imaginariu*um of the European colonial world. Julia Martine Van Ittersum labeled him an apologist for the corporate interests of the Dutch East India Company. Peter Borschberg criticized him for cloaking freedoms of navigation and commerce (the *jus navigandi* and the *jus mercandi*) in a language that merely substituted Dutch hegemonic control over the commons for the preceding imperial Luso-Spanish rule. Grotius’ peculiar notion of divided sovereignty conferred a public right of war on a comprador class of private agents sailing on Europe’s periphery where no judge existed and no judgment could be given. This view, according to Karl Zemanek, set Grotius apart from almost all other writers of the early modern age. It linked this proto-liberal ethic of war to the extended interests of the dominant power, ironically encased in a small pamphlet devoted to making the seas free. Taken together, Grotius’ work can be read as rhetorically decoupling *dominium* and *imperium*, or as substituting the corporate and colonial interests of the emerging United Provinces as *dominus* for the waning power of the Portuguese. The global systems administered by Britain in the nineteenth century and the United States in the twentieth century grappled with liberal order building and its mixture of imperial command and liberal consent structures. Should expectations for China in the twenty-first century be more demanding?

Critics of China’s South China Sea policy note illiberal parallels with eighteen and nineteenth century imperialist expansions of western powers, but the similarities reach back to the seventeenth century, and extend into the twenty-first century as well. Concentration on principles of navigation and commerce has coopted the discussion about the histo-

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330. Grotius, *Mare Liberum*, supra note 231, at 153 (specifically “where a judgment cannot be given”).


334. Ikenberry discusses the “monstrous disconnect” (quoting Gary Bass) between growing nineteenth century liberalism in Britain and the brutish, illiberal authoritarianism of its Empire, as well as the tensions in the administration of the Pax Americana in the twentieth century—as the title to his book, *Liberal Leviathan*, implies. See Ikenberry, *Liberal Leviathan* 16 n. 17 (‘monstrous disconnect’), and accompanying text 16–27.

335. See, e.g., Malik, supra note 56.

336. *Id.*
The commercial element appears to be a non-issue in the South China Sea, and the navigational element presents a sticking point from a military perspective. But like the Tordesillas divided the world between the Spanish and Portuguese, the South China Sea dispute involves the hegemonic control over the dwindling commons and the fast emerging resources contained therein. This mindset accentuates unresolved tensions embedded in UNCLOS involving the extension of rules regarding resource ownership while limiting coastal state sovereignty and jurisdiction over navigation.

Less critical or more sympathetic twentieth century appraisals of Grotius’ dogma of freedom of the seas also grapple with this tension. In the twentieth century, the freedom of the seas concept was largely reworked to emphasize innocent or inoffensive use. Tullio Scovazzi identified the progressive weakening of the unrestricted freedom of the seas principle and the reworking of the freedom of the seas principle as the main trend of the second half of the twentieth century. This emerging freedom of the seas principle took the form of successive coastal zone extensions over the territorial sea, the continental shelf, the EEZ, and the Common Heritage of Mankind zone applicable to the seabed beyond the limits of national jurisdiction. These restrictions on the freedom of the seas principle provided an enhanced regime structure to counter offensive encroachments on the freedom of the seas principle. But the regime structure, despite its significance, has never been water-tight.

Prominent authorities such as Georges Scelle and Wolfgang Friedmann sounded early postwar concerns that—absent an effective regime structure—the historical era of mare liberum would transpose into consolidated claims of sovereignty or vested coastal state interests over dwindling open sea space. Others also described the radical postwar movement...
toward closed seas. Cecil Hurst located the closed seas movement’s beginnings in the 1945 Truman Proclamations, calling them sovereignty by another name. Maritime superpower the United States’ sovereignty claims stimulated a multiplication of unilateral claims by lesser powers. Chile and Peru quickly followed suit with two-hundred-mile national sovereignty projections over submarine areas, based, in part, on the 1939 Panama Declaration. This declaration proclaimed that American republics had an inherent right to exclude non-American belligerents from a broad three-hundred-mile ocean area extending from American coasts. The zone impeded the resupply of Axis ships in South American ports, and subjected transit through the Panama Canal to more stringent regulation. Ten Arab states followed in 1949 and by the early 1970s, a succession of instruments—the Montevideo Declaration (1970), the Lima Declaration (1970), the Santo Domingo Declaration (1972), the Asian-African Legal Consultative Committee (1971), the Yaoundé Conclusions (1972), the Addis Ababa Declaration (1973)—pronounced the right of coastal states to establish exclusive resource zones beyond the territorial sea.

Oxman noted the geographic scope and speed of coastal state territorial assertions seaward placed them on par with “the most ambitious conquerors in human history.” Malcolm Shaw observed that the

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347. Hurst, supra note 346, at 161 (interpreting the distinction between the Truman Proclamation’s exercise of exclusive control and sovereignty as “so small as to be little more than a question of name”).


351. Nandan, supra note 349.

352. ROBERT W. TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 233 n. 80 (1955) (discussing U.S. Executive Orders proclaimed on September 5, 1939, restricting belligerent passage or stay in the waters of the Canal Zone).

353. See Nandan, supra note 349.

enlargement of coastal state jurisdiction reflected an attitudinal change stimulated by resources pursuits beyond the territorial sea and leading to ever greater claims over the high seas.355 The novel introduction of the EEZ in the 1982 Law of the Sea Convention brought upwards of thirty percent of the world’s maritime surface within coastal state control.356 This spatial reconfiguration amounted to an area of Treaty of Tordesillas-like proportion—an almost “inconceivable” extension of coastal state jurisdiction over ocean space falling in the interstice between mare liberum and mare clausum.357 This sui generis regime, geographically located between the territorial sea and the high sea, developed in the shadow of hegemonic state practice, but it ambiguously balanced the interests of Latin American states, which sought to invest in it a residual territorial sea character, and the rights of maritime powers, which wanted the zone to be part of the high seas, provided “that coastal states had the sovereign right to explore and exploit the natural resources in the zone.”358 Retailed to non-coastal states and developing countries as a “package deal,”359 the astonishing jurisdictional allotments UNCLOS accorded to coastal states were to be offset principally by the revolutionary concept of the Common Heritage of Mankind as applied to the deep seabed mining provisions of the Convention.360 The International Seabed Authority administered the area beyond the scope of national jurisdiction for the benefit of all countries.361 The principles underpinning the Common Heritage concept emphasized redistributive justice in the form of shared resources allocation and technology transfers to the developing world.362 Consensus failed, due directly to the United States’ hegemonic rejection of such “a dramatic step toward world government.”363 Other important developed states followed and either rejected or
abstained from the Convention, forcing a 1994 Implementation Agreement that commodified the Common Heritage idea to bring it and the International Seabed Authority in line with market-based principles.364 The now moribund Common Heritage concept as applied to the law of the sea embraced the separation of ownership (dominium) questions from rule-directives (imperium).365 Against this backdrop—a backdrop that allows the freedom limiting regime structure of UNCLOS to be undermined by the prime thalassocratic power that is best able to contribute to its operation, China now begins to push forth its own interpretation of the pliable balance between dominium and imperium.366 Its objective seeks to preserve the freedom of navigation for inoffensive uses while securing for itself future security and economic interests with regard to resource extraction.367

More worrying consequences await the application of the embattled UNCLOS to a new set of grey areas, contributing to fierce competitions over newly emerging resources.368 These territorial disputes in the sea are well within the peripheral vision of China.369 Contemporary scrambles are underway at the beginning of the twenty-first century, one in the High Arctic,370 the other spanning the globe, but including the High Arctic, and stretching into the outer reaches of the continental shelf.371


365. UNCLOS, art. 137.


367. Id.


370. The “High Arctic” region is a term used to distinguish the colder climates of the Arctic, which are closer to the North Pole, than the relatively warmer environs of the lower or subarctic regions. Definitions of the Arctic region differ, but not materially for purposes of this paper. The Arctic Research and Policy Act (ARPA), 15 U.S.C. § 4111 (1984) defines the Arctic as “all United States and foreign territory north of the Arctic Circle and all United States territory north and west of the boundary formed by the Porcupine, Yukon, and Kuskokwim Rivers [in Alaska]; all contiguous seas, including the Arctic Ocean and the Beaufort, Bering, and Chukchi Seas; and the Aleutian chain.” A helpful map of this area can be found at: Allison Gaylord, Arctic Boundary as Defined by the Arctic Research and Policy Act (ARPA), USARC – UNITED STATES ARCTIC RESEARCH COMMISSION (May 27, 2009), https://storage.googleapis.com/arcticgov-static/publications/maps/ARPA_Polar_150dpi.jpg [https://perma.cc/VC4Z-PCRC]. For the definition and map of the Arctic used by a working group of the Arctic Council, the eight-member group formed in 1996 for purposes of promoting cooperation in the region, adopted by the Arctic Monitoring and Assessment Programme (AMAP), see Geographical Coverage, AMPAP, http://www.amap.no/about/geographical-coverage [https://perma.cc/33QW-9BS8].

371. Treves, supra note 368.
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together, these scrambles have been called “one of the biggest territorial
grabs in history,” and they threaten the encroachment on remaining
unsecured space, as implied by the Treaty of Tordesillas more than five
hundred years ago.

2. Arctic Passageways

Rapid ice melt in the Anthropocene age makes plausible the opening
up of Arctic shipping routes linking the Atlantic and Pacific Oceans. One
route sits atop the Eurasian continent and traverses the treacherous
Northern Sea Route, part of the Northeast Passage. Another route
snakes across the nineteen thousand islands of the Canadian Archipelagic
island chain known as the Northwest Passage. Neither one of these
passages occupied much international legal attention until global climate
change made possible the prospect of turning them into Arctic commercial
highways. But in mirror-image fashion, Russia and Canada claim
sovereignty over these respective passageways, holding they are enclosed
waters and subject only to Canadian and Russian sovereign decisions.
Proximity to chokepoints, control over icebreaking escort services, and the
remoteness of the regions, enhance their effective control over the passage-
ways. Moreover, Russia’s Northern Sea Route claim extends into its
EEZ, and like the Chinese claim over the integral nature of the insular fea-
tures of the South China Sea, contends that the fact that “individual por-
tions of it may pass outside of its internal waters” does not affect the
integral nature of the Northern Sea Route as an historical national trans-
port route. Vagaries associated with Russia’s sovereign claim include an

372. Scott J. Shackelford, Was Selden Right?: The Expansion of Closed Seas and its Con-
373. Treves, supra note 368.
374. Id.
375. See UNCLOS, art. 234.
376. Indeed, only one of UNCLOS’ 320 articles and nine annexes deals with ice-cov-
ered areas. See UNCLOS art. 234.
377. See P. Whitney Lackenbauer, Mirror Images? Canada, Russia, and the Circumpo-
adversarial relationship between Canada and Russia given similar jurisdictional and eco-
nomic positions in the Arctic).
(discussing the Canadian view); Willy Østreng, The Northern Sea Route and Jurisdictional
Controversy, ARCTIS (2010), http://www.arctis-search.com/Northern+Sea+Route+and+
Jurisdictional+Controversy (discussing the Russian view) [https://perma.cc/RV8E-K5ZZ].
379. Simon O. Williams, Northern Sea Route: Chokepoint Contingency, BARENTSOb-
chokepoint-contingency-15-11 (discussing Russian interests and advantages associated
with the development of the Northern Sea Route as a viable East-West passageway)
[https://perma.cc/L4HS-RANG]; for similar discussion involving Canada, see generally
MICHAEL BYERS, WHO OWNS THE ARCTIC?: UNDERSTANDING SOVEREIGNTY DISPUTES IN THE
NORTH (2009).
380. Christopher R. Rossi, The Northern Sea Route and the Seaward Extension of Uti
Arctic version of China’s U-shaped line. This version projects a Russian sector theory of sovereignty over the Arctic as measured by meridians of longitude converging at the vertex of the North Pole in pie-sliced wedges. Propounded in 1907 by a Canadian legislator, the idea gained traction in the Central Executive Committee of the Soviet Presidium in 1926, based on a defensive desire to protect against imperialist interventions in its ambiguously described “gravitation” sector. Uncertainty and confusion surround the status of the sector theory in the post-Soviet Russia, and certainly since Russia’s adherence to UNCLOS; but this ambiguity has been described as “creative” and “deliberate” in terms of possibly providing Russia with a “fall-back” plan or flexibility to amend its position, presumably if its once-proud Baltic Fleet recovers from persistent challenges since the collapse of the Soviet Union. Russia’s sector theory implies the lingering presence of Treaty of Tordesillas syndrome, and proponents of liberal internationalism should not profess complete surprise if they witness the theory’s recrudescence in the Arctic or elsewhere in an age of rapid polar ice melt.

3. Continental Shelf Extensions

Articles 76–85 of UNCLOS provide for another extension of sovereign rights. Where the continental shelf extends beyond two hundred nautical miles, states may submit technical evidence to a special commission—the Commission on the Limits of the Continental Shelf (CLCS)—to show that the submerged natural prolongation of the shelf appertains to the coastal state’s land territory. In the Arctic, this process has been described alternatively as orderly and as wildly capricious, sparking “a highly competitive scramble to stake claims.” Such seabed and ocean floor could then be claimed by the coastal state, limited by one or another technical constraint. The five coastal states rimming the Arctic—

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381. Østreng, supra note 378.
382. Id.
383. Id.
384. See id; see also comment of Erik Franckx, Sixth Annual CSIS South China Sea Conference: Legal Issues and Next Steps, CSIS (July 12, 2016) (video: 1:02:35 mark), https://www.youtube.com/watch?v=YGoR0Ygg9Mc (linking the ambiguity of the U-shaped line to Russian sector theory in the Arctic) [https://perma.cc/574W-XKTS].
386. See UNCLOS art. 76–85.
388. Id. at 343.
389. Two formulas involving bathymetric and sediment thickness formula can be used in any combination to determine the outer limit of the extended continental shelf. UNCLOS also provides a distance [350 nautical miles from the baseline] and depth constraint [from the 2500 meter isobaths + 100 nm]. See About, U.S. EXTENDED CONTINENTAL SHELF PROJECT, https://www.continentalshelf.gov/about/index.htm [https://perma.cc/7WET-69D4].
Canada, Denmark (via Greenland), Norway, Russia, and the United States—already have issued a declaration asserting their “unique position” to act as stewards over the Arctic Ocean. They have or will fashion submissions to the CLCS. In February 2016, Russia alone submitted a revised application, covering an underwater space equal to about 1.2 million square kilometers of extended continental shelf, including claims for the Lomonosov Ridge, the Mendeleev-Alpha Rise, the Chukchi Plateau, and more. Aggregate untapped oil and natural gas reserves in this area yield estimates approaching thirty trillion dollars in value. Denmark’s extended continental shelf claim, which conflicts with Russia’s claim, is twenty times larger than Denmark. Norway’s claim extended its continental shelf by the equivalent of seven soccer fields for each of its five million people; Canada’s claim equals the combined size of its three prairie provinces, Alberta, Saskatchewan, and Manitoba; and United States President Barack Obama noted the U.S. claim could extend more than six hundred nautical miles north of Alaska. Although not adjacent to the Arctic Ocean, more than eighty coastal nations worldwide likely have a continental shelf that extends beyond two hundred nautical miles and seventy-seven have filed submissions with the CLCS. The United States alone projects that its extended sovereign rights over the seafloor and sub-seafloor continental shelf may include at least one million square kilometers—an area about twice the size of California or half the size of the Louisiana Purchase—extending over offshore areas in the Arctic, the Atlantic East Coast, the Bering Sea, the Pacific West Coast, the Gulf of Mexico and possi-


394. See id.


396. See Canada’s Extended Continental Shelf, FOREIGN AFF., TRADE & DEV. CAN. (Dec. 9, 2013), http://www.international.gc.ca/arctic-arctique/continental/index.aspx?lang=eng (estimating that eighty-five countries may have extended continental shelf claims) [https://perma.cc/V2PZ-SSUV].

bly other areas. "Given the size of the [U.S. extended continental shelf], the energy, mineral, and living resources may be worth many billions if not trillions of dollars."

Whether the current regime of international law regulating uses of such spaces are strong enough to withstand the temptations of Treaty of Tordesillas syndrome remain to be seen. The Treaty of Tordesillas appears as an anachronism to the modern mind, except when viewed from the expansive claims of powerful states seeking to assert dominion control over diminishing resources amid rapidly advancing prospects to secure them. Liberal international lawyers regard the process as orderly and rule-regulated cartography; China’s embrace of the process appears more circumspect.

Conclusion

The modern history of the law of the sea represents an attempt to decouple dominium, or ownership over resources of the sea, from imperium, or the power to rule and establish sovereignty over the sea. UNCLOS exists to strike that balance and to put an end to Treaty of Tordesillas syndrome, which preceded that division and melded the two concepts into an undifferentiated power of the dominus to rule, exclude, and appropriate. UNCLOS has been praised as an instrument that has successfully managed that separation, as well as multiple other interests pertaining to the environment, security, and the commons. But the separation of the right to own emerging resources of the sea and the power to regulate access to those resources never extinguished the uneasy relationship between coastal and maritime powers. While the globalizing interests of commerce and the navigation pertaining to it has helped facilitate consensus over trade-related aspects of UNCLOS, certainly with regard to access to foreign emporia, large-scale appropriations of resources periodically reinforce Treaty of Tordesillas thinking, where distinctions of ownership and sovereignty become subject to elastic interpretations of UNCLOS, and the shifting power relations of states. Although appearing in a form different from its fifteen-century expression, new found circumstances relating to global climate change, or changing technology, or power relations expose long-established tensions between coastal and maritime states, for instance involving sovereignty claims over High Arctic passageways, continental

399. Id.
400. Henry Jones, Lines In The Ocean: Thinking With The Sea About Territory And International Law, 4 LONDON REV. INT’L. L. 307, 334 (2016) (discussing the striation process of dividing up the sea under UNCLOS).
401. See Shearer, supra note 339, at 52.
402. Id.
403. Id. at 52–53.
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...shelf extensions, and now, the South China Sea. These tensions are not likely to be brought within the less than water-tight regime historically presented by UNCLOS or the proto-liberal progenitors of the dogma of freedom of the seas.

The South China Sea Arbitration is remarkable for the degree of attention drawn to the problem of historical effectivités and the proof of China’s historic title or rights over the South China Sea. The absurdity of the claim that China was the historic dominus over this sea puts it claim on par with fifteen century Luso-Spanish thinking—a point clearly implied by the Tribunal’s sweeping rebuke of China’s reconstructed legal argument. But it would be anachronistic to dismiss China’s claim as such.

China’s sense of entitlement, when not romanticized, is also informed by an underlying sense of inequality, inconsistency, historical selectivity, and imperial double-dealing. The litigation itself has been criticized as ill-considered and insincere, particularly given the United States’ poor track record “against being artificially forced into international adjudications,” and doubtless, its unwillingness to ratify UNCLOS. Even within conventional regime structures, powerful and historical interests of the Pax Americana in the twentieth and twenty-first centuries have exploited vagaries within the regime structure of UNCLOS or the slowly forming ideational expression of high seas freedoms to facilitate episodic extensions of Gargantuan, sovereign-like proportions, first over the territorial sea, then the continental shelf, now possible extensions, the EEZ, the possible passageways ringing the polar North, the shrinking global commons, and a host of speculative or emerging frontiers that await potential resource extractions, for instance, Antarctica, Svalbard, the moon, outer space, the human genome, cyberspace. Conventional regimes limit the

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406. South China Sea Arbitration (Award), supra note 7, at ¶ 263.

407. See Robert Lawrence Kuhn, South China Sea Dispute: My Candid Conversation with General Peng Guangqian [Deputy Secretary-General of China’s National Security Forum], CCTV.COM (Aug. 1, 2016), http://english.cctv.com/2016/08/01/ARTIH11nhyCBv08tPscx0er160801.shtml (quoting General Peng: “For several thousand years, China had fought with winds and waves, pirates and invaders, in the South China Sea. This is our family property that we have earned; it is the heritage created by our ancestors.”) [https://perma.cc/BM35-EJEF].


409. Abraham D. Sofaer, The Philippine Law of the Sea Action Against China: Relearning the Limits of International Adjudication, 15 Chinese J. INT’L L. 393, 394 (2016); see also Schoenbaum, supra note 93, at 290, 293 (noting the Tribunal’s conclusions “retain a whiff of unfairness” particularly as applied to Chinese historic fishing rights).


interplay between *dominium* and *imperium* with regard to many of these frontiers, but as the prospect for harvesting the riches of these frontiers nears, in a geo-space marked by scarcity, so too does the syndromic temptation to appropriate and control.

Within this mix, a rising but insecure maritime China seeks to assert its interpretation of the pliable provisions of UNCLOS to address imbalances from the colonial age, and to safeguard rapidly evolving military and economic security interests. China seeks to except itself from the restrictions imposed on historic claims by UNCLOS. Although a beneficiary and strong supporter of the extension of coastal state sovereignty during the negotiations leading up to UNCLOS, the unsettled tension between *dominium* and *imperium* swirls in the backwater of its hegemonic mindset. The reordering of imposed rules, even rules that in many respects benefit China, suggests an irresistible imperial temptation. Receding in this syndromic convergence of ownership and rule is the recourse to *effectivités*, which are caught in the cross-fire of competing historical narratives.

Perhaps China has overplayed its hand in the South China Sea—a mistake resulting from an intramural policy dispute between soft and hard elements within its authoritarian leadership. Perhaps China is angling to implement a grand bargaining strategy, a willingness to exchange its declaratory policy over sovereignty disputes in the South and East China Seas for concessions involving security interests of the United States in East Asia, especially regarding its security commitment to Taiwan. Wild card developments already confound predictions of how the Award will play out. Functional and cooperative management schemes have been

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414. China scholar David Shambaugh argues China turned away from the reform-minded period launched by Deng Xiaoping and since 2008-2009 has been stagnating relatively under the hard authoritarians, including current leader Xi Jinping. See generally DAVID SHAMBAUGH, CHINA’S FUTURE (2016).


416. One concern was that the Philippines would propagandize the Award to press China to subordinate its interests, and in doing so, force the hand of the United States to act as Manila’s “security guarantor.” Ted Galen Carpenter, *Why the South China Sea Verdict is Likely to Backfire*, NAT’L INT. (July 13, 2016), http://nationalinterest.org/blog/the-skeptics/why-the-south-china-sea-verdict-likely-backfire-16957 [https://perma.cc/98KR-ALZR]. That prospect now seems far from likely. Stunning accounts have surfaced of human rights abuse and extrajudicial killing tracing to Philippine President, Rodrigo Duterte, when he was the former Mayor of Davao City. Reports of his public praise of extrajudicial killings of drug dealers and drug addicts have generated criticism. See, e.g., Philippines, Human Rights Watch (June 30, 2016), https://www.hrw.org/asia/
proffered in the meantime to minimize conflict and to displace nationalistic sentiments promoting border “fences in the sea.” 417

The Tribunal, not charged with considering the political implications of its Award, noted it was “beyond dispute that both parties [were] obliged to comply.” 418 But China did not comply, and the sweeping rebuke of China’s legal claims raises immediate political concerns. 419 China’s ambassador to the United States warned the award will “intensify conflict”
possibly resulting in confrontation. Principal stakeholders in the area have tempered remarks. A draft statement at the September 2016 Vientiane meeting of ASEAN (Association of Southeast Asian Nations) heads of state omitted reference to the Tribunal’s Award, an omission construed as an acknowledgment of China’s displeasure and military and economic might and as a gesture to help China save face. In opening remarks, however, United States President Barack Obama pledged that that “the United States will continue to fly and sail and operate wherever international law allows.” China responded by pledging to dispel interference in South China Sea issues.

The project of circumscribing the law of the sea within the rule-orientation of UNCLOS remains incomplete. The established norms and zones that allow for the appropriation of the resources of the sea remain imperfectly connected to the liberal project to keep the seas free and open, as qualified as that project has been. The liberal thalassocracy finds an illiberal challenger and the coming crisis in the South China Sea will match overlapping insecurities and interests that seek to exploit the resources of the sea while maintaining influence over the rules relating to that exploitation. Treaty of Tordesillas syndrome floats in the wake of the South China Sea

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421. See Sofaer, supra note 409, at 394.


Sea Arbitration, requiring a broader accommodation of litigated historical interests or an acknowledgment of the prospect of coming conflict.