

# 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)<sup>1</sup> to resolve a dispute with China over maritime entitlements in the South China Sea.<sup>2</sup> The Philippines alleged China improperly claimed underlying seabed extending

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. Part XV of UNCLOS provides for two means of dispute settlement, consensual means (such as conciliation, negotiation, and diplomacy) and compulsory settlement. Four kinds of compulsory dispute settlement are allowed under Article 287: the International Tribunal for the Law of the Sea, the International Court of Justice, arbitration in accordance with UNCLOS Annex VII, or creation of a special arbitral tribunal in accordance with UNCLOS Annex VIII. Where parties cannot agree on a compulsory form of settlement, Annex VII arbitrations prevail.

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%20and%20Statement%20of%20Claim%20on%20West%20Philippine%20Sea.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 south-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<sup>3</sup>—to within fifty nautical miles of the Philippine islands of Luzon and Palawan<sup>4</sup>—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,<sup>5</sup> and to determine that the Spratly Islands were rocks, low tide elevations, submerged reefs, or banks<sup>6</sup>—but not actually islands, as China claimed.<sup>7</sup> Numerous hydrographic reports indicate that the Spratlys neither form a natural or physical unit, nor conform to an accepted definition.<sup>8</sup> 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.<sup>9</sup> 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).

4. See *id.* ¶ 2. Portions of the Chinese claim came within thirty-nine miles of Luzon and thirty-four miles of Palawan. See Final Transcript Day 1—Merits Hearing at 57–58, *In re South China Sea Arbitration*, PCA Case Repository 2013–19 (Perm. Ct. Arb. 2016), <http://www.pccases.com/web/sendAttach/1547> (testimony of Professor Oxman) [<https://perma.cc/D8DG-9D7H>].

5. See Yu Mincai, *China’s Responses to the Compulsory Arbitration on the South China Sea Dispute: Legal Effects and Policy Options*, 45 OCEAN DEV. & INT’L L. 1, 2 (2014) (noting that China ratified UNCLOS in 1996, and the Philippines ratified it in 1984).

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.

8. Melissa H. Loja, *The Spratly Islands as a Single Unit Under International Law: A Commentary on the Final Award in Philippines/China Arbitration*, 47 OCEAN DEV. & INT’L L. 309, 312 (2016) (reviewing hydrographic reports from Richard Spratly’s reported sighting in 1843 up to 2014).

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-YJZ2>]. 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).<sup>10</sup> Islands, however, carry much greater weight. They generate two hundred nautical mile EEZs<sup>11</sup> and additional rights relating to the subjacent continental shelves,<sup>12</sup> which possibly can be extended.<sup>13</sup> 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.<sup>14</sup> China claimed expansive maritime rights over these features,<sup>15</sup> 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> [https://perma.cc/ZC3J-EYSP].

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).

13. See *Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982*, UNITED NATIONS: OCEANS & L. SEA, [http://www.un.org/depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/depts/los/clcs_new/commission_submissions.htm) (last updated Oct. 17, 2016) (listing submissions to the U.N. Commission on the Limits of the Continental Shelf for continental shelf extensions beyond two hundred nautical miles from any baselines) [https://perma.cc/C2ZE-DXCX]; see also UNCLOS art. 76 (defining the outer limit of the continental shelf and definitions where the outer edge of the continental margin extends beyond two hundred nautical miles). China's presentation of its claim to almost the entire South China Sea, in the form of the U-shaped line, was made in immediate response to Malaysia and Vietnam, which "jointly lodged a submission to the U.N.'s Commission on the Limits of the Continental Shelf," purporting to claim rights to extended continental shelves in the South China Sea. Yang Fang, *The South China Sea Disputes: Whither a Solution?*, in TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: NAVIGATING ROUGH WATERS 164, 165 (Jing Huang & Andrew Billo eds., 2015).

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](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.<sup>16</sup> In asserting its claim, China prevented Filipino fishermen from engaging in their artisanal craft off Scarborough Shoal (outside the Spratlys),<sup>17</sup> and constructed an artificial island, with installations and structures, within the Philippines' two hundred nautical-mile EEZ<sup>18</sup> on Mischief Reef, Fiery Cross,<sup>19</sup> and Subi Reef,<sup>20</sup> China's actions also interrupted the Philippines' oil exploration off the coast of Palawan (including Reed Bank).<sup>21</sup> Most problematically, China asserted historic sovereignty rights over eighty to ninety percent of the

16. See Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AM. J. INT'L L. 98, 123-24 (2013) (summarizing the Chinese view as being claims to sovereignty over the islands and sovereign rights over the waters and seabed and subsoil adjacent to those islands, while preserving Chinese historic rights in fishing, navigation and other marine activity (such as oil and gas development)). See also Hong Nong, *Interpreting the U-Shape Line in the South China Sea*, CHINA-US FOCUS (May 15, 2012), <http://www.chinausfocus.com/peace-security/interpreting-the-u-shape-line-in-the-south-china-sea/>, (defining China's historic rights as "fishing rights, navigation rights and priority rights of resource development") [<https://perma.cc/6ETH-JSNV>].

17. See Final Transcript Day 2—Merits Hearing at 156-58, 181-85, *In re South China Sea Arbitration*, PCA Case Repository 2013-19 (Perm. Ct. Arb. 2016), <http://www.pccases.com/web/sendAttach/1548> [<https://perma.cc/6F23-529A>]; Final Transcript Day 1—Merits Hearing at 9, *In re South China Sea Arbitration*, PCA Case Repository 2013-19 (Perm. Ct. Arb. 2016), <http://www.pccases.com/web/sendAttach/1547> [<https://perma.cc/7GSZ-DXXD>].

18. Final Transcript Day 1—Merits Hearing at 9, *In re South China Sea Arbitration*, PCA Case Repository 2013-19 (Perm. Ct. Arb. 2016), <http://www.pccases.com/web/sendAttach/1547> [<https://perma.cc/7GSZ-DXXD>].

19. The Chinese have added over six hundred acres to Fiery Cross Reef, which now contains a three thousand meter runway capable of accommodating military planes. See Hannah Beech, *What's New on China's Artificial Islands in the South China Sea? Basketball Courts*, TIME (May 22, 2016), <http://time.com/4341510/south-china-sea-artificial-islands/> [<https://perma.cc/FV54-QHXF>]. Within the Spratly Islands archipelago—which is contested in all or in parts by China, Taiwan, Malaysia, Brunei, the Philippines and Vietnam—China is building artificial islands on Cuarteron Reef, Gaven Reefs, Subi Reef, Hughes Reef, Johnson South Reef, Fiery Cross Reef, and Mischief Reef. In another grouping of islands in the South China Sea—the Paracel Islands (northwest of the Spratlys)—China has constructed another runway on Woody Island and an artificial harbor. See Michael Pilger, *ADIZ Update: Enforcement in the East China Sea, Prospects for the South China Sea, and Implications for the United States*, U.S.-CHINA ECON. & SEC. REV. COMM'N, 8-9 (Mar. 2, 2016), [https://www.uscc.gov/sites/default/files/Research/ADIZ%20Update\\_0.pdf](https://www.uscc.gov/sites/default/files/Research/ADIZ%20Update_0.pdf) [<https://perma.cc/M5WH-CMXN>]. See also *Paracel Islands*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/pf.html> (last updated Sept. 13, 2016) [<https://perma.cc/WZU8-8ZF5>].

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)).

21. See Enrico Dela Cruz, *Philippines' Oil Still in Troubled Waters after South China Sea Ruling*, MANILA BULL. (July 22, 2016), <http://www.mb.com.ph/philippines-oil-still-in-troubled-waters-after-south-china-sea-ruling/> (noting two stalled concessions in the Reed Bank due to surveying interruptions caused by Chinese coastguard vessels) [<https://perma.cc/LJ4Y-TVA8>].

entire South China Sea<sup>22</sup>—a body of water covering three and one-half million square kilometers.<sup>23</sup> Central to China’s claim is a map,<sup>24</sup> which presented a U-shaped nine-dash/dotted line<sup>25</sup> stretching more than 1500 kilometers from its southernmost territory of Hainan Island to James Shoal off the coast of Borneo (the southernmost point of the U-shaped line).<sup>26</sup> China did not nor has yet made explicit “through legislation, proclamation, or other official statements the legal basis or nature of its claim,”<sup>27</sup> noting, in addition to “indisputable sovereignty over the islands in the South China Sea and the adjacent waters,”<sup>28</sup> its oblique enjoyment of sovereign rights over “*relevant waters* as well as the seabed and subsoil thereof.”<sup>29</sup> 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-

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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 Verbale* 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](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf) [https://perma.cc/4488-YP9B]; *Note Verbale* 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](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf) [https://perma.cc/2CCX-PTHP].

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 Jinning & 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 southernmost boundary should reach the 4° northern latitude, including the James Shoal).

27. Kevin Baumert & Brian Melchior, *China: Maritime Claims in the South China Seas*, *LIMITS IN THE SEAS* 1 (No. 143, Dec. 5, 2015) (Bureau of Oceans and International Environmental and Scientific Affairs, United States Department of State), <https://www.state.gov/documents/organization/234936.pdf> [https://perma.cc/SJE9-NPBT].

28. *Id.*

29. *Note Verbale* 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](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf) [https://perma.cc/LK7Z-L22N]; *Note Verbale* 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](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf) [https://perma.cc/LK7Z-L22N].

evant waters” opens up an array of expansive interpretations,<sup>30</sup> 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).<sup>31</sup> 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.<sup>32</sup> An ambiguous “wait and see” negotiating posture accompanied China’s law of the sea negotiations between 1973 and 1982.<sup>33</sup> Similarly, a complaint of “deliberate ambiguity” now attaches to China’s historic claim over the South China Sea.<sup>34</sup> Other analysts note China’s “strategy of incremental action,”<sup>35</sup> or “salami-slicing,”<sup>36</sup> 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.”<sup>37</sup> This ambiguity stimulates concern that China is amassing maritime strength while laying historical markers to include the South China Sea as a future “core interest,” “wording usually reserved for the non-negotiability of Taiwan, Tibet, and Xinjiang.”<sup>38</sup>

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.<sup>39</sup> Indeed, the western legal tradition never inherited a uniform interpretation of sovereignty from

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30. See Stein Tønnesson, *China’s National Interests and the Law of the Sea: Are they Reconcilable?*, in RECENT DEVELOPMENTS IN THE SOUTH CHINA SEA DISPUTE: THE PROSPECT OF A JOINT DEVELOPMENT REGIME 199, 216 (Wu Shicun & Nong Hong eds., 2014).

31. Florian Dupuy & Pierre-Marie Dupuy, *A Legal Analysis of China’s Historic Rights Claim in the South China Sea*, 107 AM. J. INT’L L. 124, 127-28 (noting “China does not distinguish between insular features that qualify as ‘islands: within the meaning of UNCLOS . . . and those qualifying as ‘rocks’ . . .”).

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).

33. THANH-DAM TRUONG & KARIM KNIO, *THE SOUTH CHINA SEA AND ASIAN REGIONALISM: A CRITICAL REALIST PERSPECTIVE* 64 (2016) (referencing China’s negotiating posture during UNCLOS III discussions).

34. Robert Beckman, *‘Deliberate Ambiguity’ and the Demise of China’s Claim to Historic Rights in the South China Sea*, 1 ASIA-PACIFIC J. OCEAN L. & POL. 164-82 (2016).

35. Ronald O’Rourke, *Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress*, in MARITIME TERRITORIAL DISPUTES INVOLVING CHINA 1, 15 (Yuan Sun ed., 2013).

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.<sup>40</sup> Instead, early modern thought twinned imprecise usages of *dominium* (ownership) and *imperium* (rule) into what would transmute over centuries into a public law concept of state sovereignty.<sup>41</sup> The gradual incorporation of these loose usages ambivalently affected the modern law of the sea.<sup>42</sup> 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,”<sup>43</sup> 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*.<sup>44</sup> Sovereignty’s linguistic pre-history blended together a private law concept of ownership with the prerogative power of the king as *dominus*—where the king “was not merely the ruler over his realm” but also the undifferentiated owner of the realm.<sup>45</sup> *Proprietas*, or private property, granted subjects a status, too.<sup>46</sup> This status involved not only title to, but control over, the usufruct, allowing subjects the right to alienate property vis-à-vis the king over limited internal matters as pertaining to the household: “For a man’s house is his castle, *et domus sua cuique est tutissimum refugium* [and each man’s home is his safest refuge].”<sup>47</sup> The extensive rights of the *paterfamilias* within this limited realm of Roman family law extended<sup>48</sup> into medieval Europe and recast the king’s exercise of *dominium* to mean a right of *dominium* over the whole realm, but not necessarily all of its internal parts.<sup>49</sup> This “internal” de-linking contrasted with matters beyond the physical sphere (and later the borders) of the *imperium*, where the spatial prerogative powers of the king as *dominus* remained

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40. Daniel Lee, *Sources of Sovereignty: Roman Imperium and Dominium in Civilian Theories of Sovereignty*, 2 *POLITICA ANTICA* 79, 80 (2012).

41. See generally JENS BARTELSON, *A GENEALOGY OF SOVEREIGNTY* (1995) (discussing sovereignty’s the broad temporal framework); Friedrich Kratochwil, *Sovereignty as Dominium: Is There a Right to Humanitarian Intervention?*, in *BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION* 21 (Gene M. Lyons & Michael Mastanduno eds., 1995) (discussing sovereignty’s conceptual derailment in the early modern age); Nicholas Greenwood Onuf, *Sovereignty: Outline of a Conceptual History*, 16 *ALTERNATIVES* 425 (1991) (tying sovereignty to the career of modernity between 1600 and 1800).

42. BARTELSON, *supra* note 41, at 28–30.

43. See JEAN BODIN, *SIX LIVRES DE LA RÉPUBLIQUE* 122 (1576) (“la puissance absolue & perpetuelle d’une République”) (modernized from the old French).

44. KURT BURCH, “PROPERTY” AND THE MAKING OF THE INTERNATIONAL SYSTEM 143 (1988).

45. See *id.* at 89.

46. *Id.* at 144–45.

47. SIR EDWARD COKE, *THE INSTITUTES OF THE LAWS OF ENGLAND* (1628); R. v. Stevens (2011), (2011) 106 O.R. 3d (Can. Ont. Sup. Ct. J.).

48. See GEORGE MOUSOURAKIS, *ROMAN LAW AND THE ORIGINS OF THE CIVIL LAW TRADITION* 103 (2015) (discussing the power of the *paterfamilias*).

49. See *id.* at 90.

supreme.<sup>50</sup> This concept of external sovereignty developed over centuries and remodeled the idea of the *dominus* through custom and convention.<sup>51</sup> 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.<sup>52</sup> The decoupling of sovereignty's medieval portmanteau-like components of *dominium* and *imperium*<sup>53</sup> 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.”<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> The prospect of a Sinocentric Age of Empire arises,<sup>57</sup> akin to that created by nineteenth century European probes to “find the peripheries” of ideological and economic domination in Africa, Asia, and the Pacific.<sup>58</sup> 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.<sup>59</sup> But at the Eighteenth Party Congress in Novem-

50. *Id.* at 5.

51. *Id.* at 90.

52. See, e.g., James Caporaso, *Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty*, in CONTINUITY AND CHANGE IN THE WESTPHALIAN ORDER 1, 2, 10 (2000) (featuring discussions on the “Westphalian Moment” and the modern system of territorially organized states).

53. See *id.* (referencing Stephen Lahey).

54. See MARTIN JACQUES, *WHEN CHINA RULES THE WORLD: THE END OF THE WESTERN WORLD AND THE BIRTH OF A NEW GLOBAL ORDER* 245, 251-52 (2d ed. 2009) (discussing China as a civilization-state as opposed to a nation-state).

55. TRUONG & KNIO, *supra* note 33, at 4-5, 12.

56. See JACQUES, *supra* note 54, at 303-04 (discussing Middle Kingdom mentality); see generally Mohan Malik, *Historical Fiction: China's South China Sea Claims*, WORLD AFF. (May-June 2013), <http://www.worldaffairsjournal.org/article/historical-fiction-china%E2%80%99s-south-china-sea-claims> [<https://perma.cc/EZ8D-MBJD>].

57. The term is borrowed from Eric Hobsbawm's *THE AGE OF EMPIRE: 1875-1914* (1987), which details the period of European worldwide colonial expansion. See E.J. HOBBSAWM, *THE AGE OF EMPIRE: 1875-1914* 9-10 (1987).

58. See Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 3, 5, 6 (1999).

59. See TRUONG & KNIO, *supra* note 33, at 62 (noting China's awareness of the significance of its maritime borders arose only in relation to the formation of China as a

ber 2012, President Hu Jintao called for China to attach great importance to maritime security.<sup>60</sup> Finding the peripheries of China's maritime empire in the South China Sea claim now prompts attempts by scholars<sup>61</sup> and the United States State Department to connect the dots or dashes to decrypt exactly what China's U-shaped broken line means.<sup>62</sup>

Some Chinese scholars argue that the broken line represents sovereignty claims over the features of the South China Sea.<sup>63</sup> 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.<sup>64</sup> Yet others indicate that the line circumscribes historic waters or China's traditional maritime boundary, notwithstanding its broken or non-continuous configuration.<sup>65</sup> 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."<sup>66</sup> 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.<sup>67</sup> However, he noted that "the debate will continue if China remains

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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).

60. Full text of Hu Jintao's Report at 18th Party Congress, XINHUA.NET (Nov. 17, 2012 11:45 PM), [http://news.xinhuanet.com/english/special/18cpcnc/2012-11/17/c\\_131981259\\_10.htm](http://news.xinhuanet.com/english/special/18cpcnc/2012-11/17/c_131981259_10.htm) [<https://perma.cc/MLB4-SE9P>].

61. See, e.g., Chris P.C. Chung, *Drawing the U-Shaped Line: China's Claim in the South China Sea, 1946-1974*, 42 MOD. CHINA 38, 39 (2015); Keyuan Zou, *China's U-Shaped Line in the South China Sea Revisited*, 43 OCEAN DEV. & INT'L L. 18, 21 (2012) (calling the U-shaped line a legal conundrum); Keyuan Zou, *The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands*, 14 INT'L J. MARINE & COASTAL L. 27, 32-33, 49 (1999) (showing the historical development of China's U-Shaped line from its first appearance in 1914 to Beijing's official acknowledgement of the line in 1948).

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

63. See Chung, *supra* note 61, at 39-43 (agreeing with this position based on "virtually unused" government documents, declassified in 2008-09, and housed in Taipei).

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).

66. See Zou Keyuan & Liu Xinchang, *The U-Shaped Line and Historic Rights in the Philippines v. China Arbitration Case*, in ARBITRATION CONCERNING THE SOUTH CHINA SEA: PHILIPPINES VERSUS CHINA 127, 132 (Wu Shicun & Zou Keyuan eds., 2016) (quoting Wu Shicun).

67. *Id.* See also Bill Hayton, *China's 'Historic Rights' in the South China Sea: Made in America?*, THE DIPLOMAT (June 21, 2016), <http://thediplomat.com/2016/06/chinas-historic-rights-in-the-south-china-sea-made-in-america/> (summarizing the view of Wu Shicun) [<https://perma.cc/RH7V-KGF2>].

silent and keeps its claim ambiguous.”<sup>68</sup>

China claimed that “the dotted line came into existence much earlier than” UNCLOS,<sup>69</sup> and that its historic rights were independent of the Convention but protected by it.<sup>70</sup> China also accused other littoral states of encroaching on its historic title.<sup>71</sup> 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.”<sup>72</sup> But China’s flat-out assertion of entitlement prompted diplomatic protests from Indonesia,<sup>73</sup> Malaysia,<sup>74</sup> the Philippines,<sup>75</sup> and Vietnam,<sup>76</sup> and boundary protests from claimants such as Indonesia,<sup>77</sup> Taiwan,<sup>78</sup> and Brunei,<sup>79</sup> and threats by China against med-

68. WU, SOLVING DISPUTES, *supra* note 14, at 83.

69. Remarks by Mr. Xu Hong, Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs, on the Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, MINISTRY FOREIGN AFF. CHINA (Dec. 7, 2014), [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217150.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217150.shtml) [<https://perma.cc/T6YS-LB57>].

70. Supplemental Documents of the Philippines Vol. I at Annex 649, *In re South China Sea Arbitration*, PCA Case Repository 2013-19 (Perm. Ct. Arb. 2016), <https://pcacases.com/web/view/7> (“China’s sovereignty and relevant rights in the South China Sea, formed in the long historical course, are upheld by successive Chinese governments, reaffirmed by Chinese laws on many occasions, and protected under international law including the United Nations Convention on the Law of the Sea False”) [<https://perma.cc/4Q7G-F6FK>].

71. See Zou, *supra* note 61, at 21-23 (noting that China asserted encroachments 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.

73. Memorial of the Philippines Vol. VI at Annex 197, *In re South China Sea Arbitration*, PCA Case Repository 2013-19 (Perm. Ct. Arb. 2016), <https://pcacases.com/web/view/7> (*Note Verbale* from the Permanent Mission of the Republic of Indonesia to the United Nations to the Secretary-General of the United Nations (Jul. 8, 2010)) [<https://perma.cc/4Q7G-F6FK>].

74. Memorial of the Philippines Vol. VI at Annex 194, *In re South China Sea Arbitration*, PCA Case Repository 2013-19 (Perm. Ct. Arb. 2016), <https://pcacases.com/web/view/7> (*Note Verbale* from the Permanent Mission of Malaysia to the United Nations to the Secretary-General of the United Nations (May 20, 2009)) [<https://perma.cc/4Q7G-F6FK>].

75. Memorial of the Philippines Vol. VI at Annex 200, *In re South China Sea Arbitration*, PCA Case Repository 2013-19 (Perm. Ct. Arb. 2016), <https://pcacases.com/web/view/7> (*Note Verbale* from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations (Apr. 5, 2011)) [<https://perma.cc/4Q7G-F6FK>].

76. Memorial of the Philippines Vol. VI at Annex 193, *In re South China Sea Arbitration*, PCA Case Repository 2013-19 (Perm. Ct. Arb. 2016), <https://pcacases.com/web/view/7> (*Note Verbale* from the Permanent Mission of the Socialist Republic of Vietnam to the United Nations to the Secretary-General of the United Nations (May 8, 2009)) [<https://perma.cc/4Q7G-F6FK>].

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-8JUJ>].

dling by non-claimants such as Japan, New Zealand, and Australia.<sup>80</sup> China's sovereignty designs over this sea—Asia's so-called cauldron,<sup>81</sup> or crucible of conflict<sup>82</sup>—portend ominous consequences in the fast-emerging strategic rivalry with the reigning maritime power, the United States.<sup>83</sup> 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,<sup>84</sup> this time “in the new world of the South China

78. Jiye Kim, *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 South-east Asian Nations (ASEAN) Regional Forum) [<https://perma.cc/PNS5-DAE4>]; see Yann-huie Song, *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, *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 1956) [<https://perma.cc/8M24-ZDAT>].

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>].

80. See Gavin Fernando, *China Slams New Zealand, Japan Over South China Sea Involvement*, NEWS.COM.AU (Oct. 12, 2016), <http://www.news.com.au/finance/economy/world-economy/china-slams-new-zealand-japan-over-south-china-sea-involvement/news-story/38274394862f990e40f3a72806633bb8> (reporting on China's warning to New Zealand about complications of “outside involvement,” and China's warning to Japan that joint patrols or drills in these waters “is playing with fire”) [<https://perma.cc/NB3L-NZSL>]; see also Colin Clark, *Chinese Threaten Japan, Australia Over South China Sea; Time for US FON Ops?*, BREAKING DEF., (Aug. 23, 2016), <http://breakingdefense.com/2016/08/chinese-threaten-japan-australia-over-south-china-sea-time-for-us-fon-ops/> (noting China's Ambassador to Japan's admonishment that Japan would “cross a red line” if it took part in freedom of navigation operations in the South China Sea and Chinese government-owned press reports that Australian provocations in South China Sea waters would provide “ideal targets”) [<https://perma.cc/Q3LM-7HSE>].

81. See generally ROBERT D. KAPLAN, *ASIA'S CAULDRON: THE SOUTH CHINA SEA AND THE END OF A STABLE PACIFIC* (2014).

82. HAYTON, *supra* note 26, at xvi.

83. See, e.g., Hugh White, *Would America Really Go to War Over the South China Sea?* NAT'L INT. (Sept. 2, 2016), <http://nationalinterest.org/blog/the-skeptics/would-america-really-go-war-over-the-south-china-sea-17570> (discussing classic questions of power politics facing U.S. policy makers) [<https://perma.cc/QBY7-2DGP>]; Bonnie S. Glaser, *Conflict in the South China Sea*, COUNCIL ON FOR. REL. (Oct. 2016), <https://www.cfr.org/report/conflict-south-china-sea> (noting tensions in the South China Sea are a potential source of conflict) [<https://perma.cc/4VDK-RGLP>].

84. See, e.g., PAUL KENNEDY, *THE RISE AND THE FALL OF THE GREAT POWERS* (1989) (detailing trans-historical confrontations between land and sea powers); see also Mark J.

Sea.”<sup>85</sup>

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*,<sup>86</sup> buttress and counter narratives to establish better title among disputants.<sup>87</sup> 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.”<sup>88</sup> 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.”<sup>89</sup> 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.<sup>90</sup> Opposing arguments in the case dated it formally to May 7, 2009,<sup>91</sup> based on a 1947 map drawn by the

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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, *supra* note 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, e.g., Frontier Dispute (Burkina Faso/Mali), 1986 I.C.J. REP. 554, ¶ 63 (discussing the purpose of *effectivités*).

88. *Eritrea v. Yemen*, 22 R.I.A.A. 268, ¶ 239 (Perm. Ct. Arb. 1998).

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).

90. Teh-Kuang Chang, *China’s Claim of Sovereignty over Spratly and Parcel Islands: A Historical and Legal Perspective*, 23 CASE W. RES. J. INT’L L. 399, 400 n. 4 and accompanying text (1991) (noting China’s discovery and exploitation of South China Sea islands for over two thousand years, beginning with the Han Dynasty); Brian K. Murphy, *Dangerous Ground: The Spratly Islands and International Law*, 1 OCEAN & COASTAL L.J., 187, 200 (1994) (citing Chinese historians’ claim that records of Chinese discovery of the Spratlys date to as early as 206 B.C.E. during the Han Dynasty); LEE LAI TO, *CHINA AND THE SOUTH CHINA SEA DIALOGUES* 9 (2009) (noting the People’s Republic of China’s sovereignty claims date back to the Han dynasty in 200 B.C.E.); WU, *SOLVING DISPUTES*, *supra* note 14, at 16 (noting consensus among Chinese scholars based on textual records and archaeological findings that China first discovered the South China Sea islands); Peter A. Dutton, *An Analysis of China’s Claim to Historic Rights in the South China Sea*, in *MAJOR LAW AND POLICY ISSUES IN THE SOUTH CHINA SEA: EUROPEAN AND AMERICAN PERSPECTIVES* 57, 59-62 (2014) (citing Harbin University of Technology professor Ge Yongping’s claim of Chinese sovereignty dating to the Han Dynasty, along with other Chinese scholars, including Li Mingjiang, Li Guoqiang, and Li Anmin); see also Government of the People’s Republic of China, *Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* Pt. II (4) (Dec. 7, 2014), [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml) [hereinafter China’s Position Paper] (“Chinese activities in the South China Sea date back over 2000 years ago”) [<https://perma.cc/D4GP-B8YG>].

91. Final Transcript Day 1—Merits Hearing at 77, *In re South China Sea Arbitration*, PCA Case Repository 2013-19 (Perm. Ct. Arb. 2016), <http://www.pcacases.com/web/sendAttach/1547> (First-round submissions by Mr. [Andrew B.] Loewenstein) (“[China]

Nationalist Kuomintang Government.<sup>92</sup>

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,"<sup>93</sup> 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.<sup>94</sup> 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,<sup>95</sup> or as with disease naming structures, the event or place where they first appear.<sup>96</sup> 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,<sup>97</sup> Portugal and Spain, acting as *domini*, divided the world in two.<sup>98</sup>

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first claimed the existence of such [historic rights in the waters of the South China Sea] on 7th May 2009.") [<https://perma.cc/3XWW-GR39>].

92. Anthony Fensom, *\$5 Trillion Meltdown: What If China Shuts Down the South China Sea?* NAT'L INT. (July 16, 2016), <http://nationalinterest.org/blog/5-trillion-meltdown-what-if-china-shuts-down-the-south-china-16996> [<https://perma.cc/SQ6C-AKU3>].

93. Thomas J. Schoenbaum, *Symposium on the South China Sea: The South China Sea Arbitration Decision: The Need for Clarification*, 110 AJIL UNBOUND 290, 290 (2016).

94. See STEDMAN'S MEDICAL DICTIONARY 1429 (5th ed., 2005) (defining a syndrome as a "combination of signs and symptoms associated with a particular morbid process, which together constitute the picture of a disease").

95. See, e.g., *Eponyms*, DOCTORSLOUNGE, <http://www.doctorslounge.com/stud-lounge/downdirty/eponyms.htm> (listing alphabetically eponymous diseases and syndromes) [<https://perma.cc/J8AZ-7DTZ>].

96. For example, Legionnaires' disease, which first broke out at a convention of American Legionnaires at the Bellevue-Stratford Hotel in Philadelphia in 1976. See Lily Rothman, *This Is How Legionnaires' Disease Got Its Name*, TIME (Aug. 12, 2015), <http://time.com/3994453/legionnaires-disease-name-history-1976/> [<https://perma.cc/S2D5-UW46>]; or Ebola, named after the closest river to where the disease first broke out. See Bahar Gholipour, *How Ebola Got Its Name*, LIVESCIENCE (Oct. 9, 2014), <http://www.livescience.com/48234-how-ebola-got-its-name.html> [<https://perma.cc/96Z4-5WED>].

97. See CHARLES GIBSON, SPAIN IN AMERICA 15-18 (1966) (discussing Alexander VI's papal donations in the three celebrated bulls of 1493, leading to issuance of the fourth bull, *Dudum siquidem* on September 26, 1493, which resulted in the Treaty of Tordesillas in 1494).

98. See *id.* at 18 (acknowledging, although not explicitly stated in the treaty, that the "Tordesillas line should be projected around the world into the Asiatic hemisphere.").

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,<sup>99</sup> with half of China's total shoreline adjacent to it.<sup>100</sup> It is the world's fifth largest body of water,<sup>101</sup> and it accounts for five trillion dollars in annual commercial activity involving one-third of maritime traffic worldwide.<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup> With regard to China's historic claims, UNCLOS Article 298 provides that a state may except from compulsory dispute settlement disputes relating to “sea

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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).

101. See Peter Kien-Hong Yu, *The Chinese (Broken) U-Shaped Line in the South China Sea: Points, Lines, and Zones*, 25 *CONTEMP. SOUTHEAST ASIA* 405, 406 (2003) (noting the South China Sea is the fifth largest body of water in the world).

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.”<sup>105</sup> Because China invoked this exception in 2006,<sup>106</sup> the Tribunal refused to review matters “concerning sovereignty or maritime boundary delimitation.”<sup>107</sup> 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.<sup>108</sup> 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”<sup>109</sup>—also include “a broad and unspecified category of possible claims . . . falling short of sovereignty.”<sup>110</sup> 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.<sup>111</sup> 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,”<sup>112</sup> and rejected China’s historic claims over the South China Sea.<sup>113</sup> It held UNCLOS is a comprehensive agreement and contains no provision preserving or protecting historic rights in variance with it.<sup>114</sup>

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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](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;”<sup>115</sup> 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.”<sup>116</sup> In any event, the Tribunal held the Convention supersedes earlier rights when any incompatibility arises.<sup>117</sup>

#### 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.<sup>118</sup> 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.<sup>119</sup> It adulterated otherwise uninhabitable coral projections barely above the high tide mark (causing substantial, even permanent environmental damage)<sup>120</sup> 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), Sand Clay (9.19 acres reclaimed), Pearson Reef (6.03 acres reclaimed), Central Reef (4.13 acres reclaimed), Grierson Reef (3.52 acres reclaimed), Cornwallis South Reef, Southeast (2.47 acres created from completely submerged reef), Cornwallis 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/6S7D-BBEB>]).

119. MATTHEW SOUTHERLAND, CHINA’S ISLAND BUILDING IN THE SOUTH CHINA SEA: DAMAGE TO THE MARITIME ENVIRONMENT, IMPLICATIONS AND INTERNATIONAL LAW, U.S.-CHINA ECON. & SEC. REV. COMM’N 3 (2016); Derek Watkins, *What China Has Been Building in the South China Sea*, N.Y. TIMES (Feb. 29, 2016), [https://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea-2016.html?\\_r=0](https://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea-2016.html?_r=0) [<https://perma.cc/AC7C-MC4M>]; Christopher Mirasola, *What Makes an Island? Land Reclamation and the South China Sea Arbitration*, ASIA MAR. TRANSPARENCY INITIATIVE (July 15, 2015), <https://amti.csis.org/what-makes-an-island-land-reclamation-and-the-south-china-sea-arbitration/> [<https://perma.cc/2KGX-ZXFL>].

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

accorded to “rocks” under Article 121(3) of UNCLOS.<sup>121</sup> China previously declared that all issues of sovereignty would be excluded from arbitral jurisdiction,<sup>122</sup> invoking the compulsory dispute settlement opt-out provision allowable under UNCLOS,<sup>123</sup> and the Convention itself does not address sovereignty claims by states over land territory in the South China Sea.<sup>124</sup>

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.”<sup>125</sup> The Tribunal agreed.<sup>126</sup> While there was “no question” a dispute existed between the parties as to land sovereignty over maritime features,<sup>127</sup> the Tribunal had not been asked to rule on that question and concluded no implicit determination of sovereignty radiated from its award.<sup>128</sup> Nevertheless, China rejected the Philippines’ *note verbale* announcing the intention to arbitrate,<sup>129</sup> later refused to participate in the proceedings,<sup>130</sup> 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,<sup>131</sup> through a series of bilateral negotiations.<sup>132</sup>

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reef flat habitat permanently, significantly reduced nursery habitat for fish species and caused near-permanent harm to reef habitat] [<https://perma.cc/LF2F-H9X4>].

121. See South China Sea Arbitration (Award), *supra* note 7, ¶¶ 3–4.

122. See *id.* ¶ 8 (referencing China’s Declaration of August 25, 2006)

123. See UNCLOS art. 298 (detailing optional exceptions).

124. South China Sea Arbitration (Award), *supra* note 7, ¶ 5 (noting because the Convention does not address such sovereignty claims over land territory that the Tribunal’s decisions in this Award are not dependent on a finding of sovereignty over disputed islands).

125. See *id.* ¶ 7. The Spratlys are not islands, nor do they appropriately form an archipelago.

126. See *id.*

127. See South China Sea Arbitration (Jurisdiction and Admissibility), *supra* note 6, ¶ 152.

128. See *id.* ¶ 153.

129. Arbitration on the South China Sea: Rulings from The Hague, ASIA MAR. TRANSPARENCY INITIATIVE (Jan. 22, 2013), <https://amti.csis.org/ArbitrationTL/> [<https://perma.cc/A8ND-MVK2>].

130. August 1, 2013. Under Article 9 of Annex VII to the Convention, the “. . . absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.” In its Award on Jurisdiction and Admissibility, October 29, 2015, the Tribunal found that it was properly constituted and that China’s non-appearance did not deprive the Tribunal of jurisdiction.

131. See Government of the People’s Republic of China, *Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (Dec. 7, 2014), [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml) (protesting the Philippines’ dissection of the Nansha Islands to gainsay China’s sovereignty over the whole of the islands) [<https://perma.cc/K2PM-L5ZG>]; see also South China Sea Arbitration (Jurisdiction and Admissibility) ¶¶ 154–55 (noting China’s Position Paper). The Philippines’ argument essentially concentrated on the eight largest features located in the Spratly group, arguing that if none of these features could generate an entitlement to an EEZ or continental

## 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.<sup>133</sup> Sir Charles Russell, co-representative of Great Britain in the case,<sup>134</sup> argued such acquisition of title was possible,<sup>135</sup> but he encountered weighty opposition. Westlake,<sup>136</sup> Oppenheim,<sup>137</sup> and Gidel,<sup>138</sup> 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.<sup>139</sup> Jessup, presciently, held “[i]t 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.”<sup>140</sup>

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shelf then none of the other smaller features of the Spratlys could either. See generally Loja, *supra* note 8 (discussing whether there is a basis to regard the Spratlys as a single unit “whose minor features have the same fate as the principal features”).

132. TRUONG & KARIM, *supra* note 33, at 1–2 (2016). Beijing’s resistance to the “multi-lateralization” of the South China Sea dispute has been interpreted as a desire to avoid ASEAN and U.N. involvement. See Rodolfo C. Severino, *Global Issues and National Interest in the South China Sea*, in *THE SOUTH CHINA SEA: A CRUCIBLE OF REGIONAL COOPERATION*, *supra* note 20, 31, 34–35 (C. J. Jenner & Tran Truong Thuy, eds., 2016). The Chinese Society of International Law released a statement declaring the Award null and void. CHINESE SOC’Y INT’L L., *THE TRIBUNAL’S AWARD IN THE “SOUTH CHINA SEA ARBITRATION” INITIATED BY THE PHILIPPINES IS NULL AND VOID* (2016), *reprinted in* 15 CHINESE J. INT’L L. 457, 457–58 (2016).

133. See JOHN BASSETT MOORE, *HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY* 900–01 (1898) (recounting the *Fur Seal Arbitration*).

134. See J.C. Mathew, rev. Sinéad Agnew, *Charles Arthur Russell, Baron Russell of Killowen (1832–1900), Judge*, *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (2004), <http://www.oxforddnb.com/view/article/24301?docPos=1> (noting his representation of Great Britain together with Sir R. Webster) [<https://perma.cc/X8FY-EXQ9>].

135. See MOORE, *supra* note 133, at 900–01 (“[I]f a light-house is built upon a rock or upon piles driven into the bed of the sea, it becomes . . . part of the territory of the nation which erected it . . . The right to acquire by the construction of a light-house on a rock in mid-ocean a territorial right in respect of the space so occupied is undoubted”).

136. I JOHN WESTLAKE, *INTERNATIONAL LAW (PEACE)* 186 (1904) (“It would be difficult to admit that a mere rock and building, incapable of being so armed as really to control the neighboring sea, could be made the source of a presumed occupation of it, converting a large tract into territorial water.”).

137. I. L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 341 (3d ed., Ronald F. Roxburgh ed., 1920–1921) (“It is tempting to compare such lighthouses with islands . . . Just as a state may not claim sovereignty over a maritime belt around an anchored lightship, so it may not make such a claim in the case of a lighthouse in the open sea.”). Cf. PHILIP C. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 69 (1927) (citing Oppenheim).

138. GILBERT GIDEL, *LE DROIT INTERNATIONAL PUBLIC DE LA MER: LE TEMPS DE PAIX (LA MER TERRITORIALE ET LA ZONE CONTIGUË)* 677 (3d ed. 1934) (“*Le statut juridique d’un phare ne dépend pas de l’existence du phare lui-même, mais de la nature de l’élévation du sol sur laquelle il est construit.*”).

139. *Id.* at 679 (“*Il y a lieu, bien entendu, de réserver le cas où ces phares seraient élevés dans des eaux à considérer comme ‘historiques’.*”).

140. JESSUP, *supra* note 137, at 69.

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.<sup>141</sup> The issue took on “new urgency” due to territorializing questions posed by new structures—such as drilling platforms and oil derricks<sup>142</sup>—created after the birth of the continental shelf doctrine following the 1945 Truman Proclamations.<sup>143</sup> UNCLOS disposed of the territorializing effect of artificial structures, depriving them of the status of islands.<sup>144</sup>

### 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<sup>145</sup> as part of a strategy to neutralize Australia.<sup>146</sup> 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.<sup>147</sup> Chiang Kai-shek’s Kuomintang Government claimed the Paracel Islands in 1945,<sup>148</sup> which had been part of French Indochina,<sup>149</sup> and took hold of the Spratly’s largest islet, Itu Aba, in 1946; however, it abandoned this garrison by 1951, only to return in

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).

142. D.H.N. Johnson, *Artificial Islands*, 4 INT’L L.Q. 203, 203 (1951).

143. See Proclamation No. 2667, 10 Fed. Reg. 12301, 12303 (Oct. 2, 1945), <http://www.presidency.ucsb.edu/ws/?pid=12332> (detailing United States policy with respect to the natural resources of the subsoil and sea bed of the continental shelf in the Truman Era) [<https://perma.cc/6XUB-THU9>]; Proclamation No. 2668, 10 Fed. Reg. 12301, 12304 (Oct. 2, 1945), <http://www.presidency.ucsb.edu/ws/?pid=58816> (detailing United States policy with respect to coastal fisheries in certain areas of the high seas in the Truman Era).

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 Grigoris 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>].

145. Backgrounder, *Understanding China’s Position on the South China Sea Disputes*, INST. SECURITY & DEV. POL’Y 1, 3 (2016).

146. See generally PETER STANLEY, *INVADING AUSTRALIA: JAPAN AND THE BATTLE FOR AUSTRALIA, 1942* (2008) (discussing Japanese war plans and Australian fears of invasion).

147. Leszek Buszynski, *The South China Sea: Oil, Maritime Claims, and U.S.-China Strategic Rivalry*, 35 WASH. Q. 139, 139 (2012).

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.<sup>150</sup> 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”<sup>151</sup> and the Potsdam Declaration (1945) affirmed these terms.<sup>152</sup> Chinese authorities repeatedly quote these documents as recognition of China’s claim over the South China Sea,<sup>153</sup> but the declarations pertained only to two South China Sea islands. The question of ownership of other features controlled by Japan was not addressed.<sup>154</sup>

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.<sup>155</sup> He reasoned that Japan’s defeat rendered the area *res nullius* and “open to whoever was first on the scene.”<sup>156</sup> After Cloma relinquished his claim in 1974, Philippine President Ferdinand Marcos annexed and then occupied a portion of the islands.<sup>157</sup> 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.<sup>158</sup> Vietnam pressed its claim of sovereignty over the Spratlys at the San Francisco Conference in 1951,<sup>159</sup> occupied them in 1973, and then ceded control to the North Vietnamese in 1975.<sup>160</sup> The People’s Republic of China proclaimed a territorial sea around the Spratly Islands (Nansha) in 1958,<sup>161</sup> and openly skirmished

150. See Murphy, *supra* note 90, at 192–93.

151. *Cairo Conference 1943*, AVALON PROJECT (2008), <http://avalon.law.yale.edu/wwii/cairo.asp> [<https://perma.cc/8FT7-FSBM>].

152. *Potsdam Declaration: Proclamation Defining Terms for Japanese Surrender, Issued July 26, 1945*, NAT’L DIET LIBR. (last visited Mar. 31, 2017), <http://www.ndl.go.jp/constitution/e/etc/c06.html> [<https://perma.cc/BVG5-EVE5>].

153. See Backgrounder, *supra* note 145 (citing the declarations as part of the international recognition of its claim over the South China Sea). Cf. WU, SOLVING DISPUTES, *supra* note 14, at 62–63 (discussing the significance of the Cairo and Potsdam Declarations).

154. Bill Hayton, *South China Sea Disputes: Still No Evidence of Historical Claims*, RSIS COMMENT. (Aug. 2014), <https://www.rsis.edu.sg/wp-content/uploads/2014/08/CO14169.pdf> [<https://perma.cc/F7CP-CF8W>].

155. See Ulises Granados, *Ocean Frontier Expansion and the Kalayaan Islands Group Claim: Philippines’ Postwar Pragmatism in the South China Sea*, 9 INT’L REL. ASIA-PACIFIC 267, 273–74 (2008) (discussing Cloma’s claim of discovery of Freedomland and assertion of title as Head of State and Chairman of the Supreme Council); see also Murphy, *supra* note 90, at 193.

156. Leszek Buszynski, *The Development of the South China Sea Maritime Dispute* 4, 8 (2013).

157. The Marcos regime imprisoned Cloma, where, on December 4, 1974, he signed a Deed of Assignment and Waiver of Rights to the Philippine government for all claims over the area. See Granados, *supra* note 155, at 283. Marcos annexed the Kalayaan Island Group through Presidential Decree 1596 on June 11, 1978. See *id.*

158. See Murphy, *supra* note 90, at 194 (discussing Malaysia’s claims on three of the southernmost Spratlys).

159. See *id.* at 193 (noting the Vietnamese claim of sovereignty over the Spratlys at the San Francisco conference was “uncontested and virtually unnoticed”).

160. See *id.* at 194.

161. *Id.*

with the Vietnamese in 1988.<sup>162</sup> When not hotly contested, the islands—remote and vulnerable to tropical storms—attracted little interest except from enterprising fishermen and phosphate miners.<sup>163</sup> Oil strikes off the coasts of Malaysia and Brunei in the 1970s brought renewed attention to the waters,<sup>164</sup> and the sea’s hydrocarbon reserves created tensions between China and other countries.<sup>165</sup> China promulgated domestic legislation proclaiming ownership of the Spratlys (Nansha), Pratas (Dongsha), Paracel (Xisha), Macclesfield Bank (Zhongsha),<sup>166</sup> and most of the South China Sea in 1992.<sup>167</sup> 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.”<sup>168</sup> Taiwan claims the same islands as China,<sup>169</sup> resulting in one bit of common ground: Taiwan also repudiates the Tribunal’s Award.<sup>170</sup>

All states bordering the South China Sea and claiming overlapping sovereignty over the islands in the South China Sea are parties to UNCLOS.<sup>171</sup> The Convention may have assumed that sovereignty over land and island features were settled issues; “[i]t sets out what maritime

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162. See Stein Tønnesson, *14 March 1988: East Asia’s Last Interstate Battle*, PRIO/BLOGS, <http://blogs.prio.org/2015/07/14-march-1988-east-asias-last-interstate-battle/> (discussing attack of Vietnamese soldiers on a disputed Spratly shoal, resulting in sixty-four Vietnamese deaths) [https://perma.cc/9DHE-K6MW].

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).

166. See Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone (promulgated by Standing Committee of the National People’s Congress, Feb. 25, 1992, effective Feb. 25, 1992) Order No. 55, <http://www.asianlii.org/cn/legis/cen/laws/lotprocottsatz739/> (claiming the islands *inter alia* as land territory belonging to China) [https://perma.cc/UCQ6-Y5UB]; Law of the People’s Republic of China on the Exclusive Economic Zone and the Continental Shelf, (promulgated by Standing Committee of the National People’s Congress, June 26, 1998, effective June 26, 1998) Order No. 6, <http://www.asianlii.org/cn/legis/cen/laws/lotprocoteezatcs790/> (claiming sovereign rights pertaining to the EEZ and continental shelf) [https://perma.cc/GQ2N-DDYQ].

167. See Murphy, *supra* note 90, at 195 (referencing the 1992 domestic legislation).

168. Robert C. Beckman, *The Philippines v. China Case and the South China Sea Disputes*, in TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: NAVIGATING ROUGH WATERS, *supra* note 13, at 54.

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.”<sup>172</sup> UNCLOS does provide for exceptional consideration of historic claims, but the Tribunal found those provisions inapplicable,<sup>173</sup> reasoning, as a matter of plain geography, that “the South China Sea is not a bay.”<sup>174</sup> 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.<sup>175</sup> Walther Schücking led a draft initiative to demarcate the breadth of the territorial sea, which necessarily focused on distinctions between inland and international waters.<sup>176</sup> He initially suggested a ten-mile closing line for the mouth of a bay subject to exceptional cases demonstrated by continuous and immemorial usage.<sup>177</sup> Interestingly, he was focused on the concept of closing off a single-state bay.<sup>178</sup> The draft articles did not contemplate bays bordering on the land of two or more states,<sup>179</sup> 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.<sup>180</sup> 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.<sup>181</sup> 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

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172. Beckman, *supra* note 168, at 55.

173. See *supra* notes 103-05 and accompanying text.

174. South China Sea Arbitration (Award), *supra* note 7, ¶ 206.

175. See Miller, *supra* note 141, at 688 (noting forestalled efforts to find common agreement on historic rights).

176. See Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening, 1992 I.C.J. Rep. 351, 732 ¶¶ 15-16 (Diss. Op. Judge Oda) [hereinafter Gulf of Fonseca Case].

177. See *id.* ¶ 15. The concept of historic waters would also be applied to waters other than bays, for instance straits and archipelagos. See Stefan Talmon, *The South China Sea Arbitration: Is There a Case to Answer?*, in *THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE* 15, 49 (Stefan Talmon & Bing Bing Jia eds., 2014).

178. See Gulf Fonseca Case, 1992 I.C.J. Rep. at 732 ¶ 15 (“[Schücking] had conceived that the legal concept of a bay would be applicable solely to a single-State bay.”).

179. See *id.*

180. John R. Stevenson & Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT’L L. 1, 22 (1975).

181. *Id.*

of the universal rules of the law of the sea.”<sup>182</sup>

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.<sup>183</sup> 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.”<sup>184</sup> 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.<sup>185</sup> Gidel labeled the theory of historic waters necessary but exceptional<sup>186</sup>—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.”<sup>187</sup>

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.<sup>188</sup> 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.”<sup>189</sup> In line with the *Fisheries Case*, and supported by leading authority,<sup>190</sup> 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.<sup>191</sup> Subsequent case law has noted those more frequent usages are tailored to “concrete” and particular cases,<sup>192</sup> in the context of limited and long-standing usages.<sup>193</sup> While the study

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182. Final Transcript Day 1—Merits Hearing at 62, *In re South China Sea Arbitration*, PCA Case Repository 2013-19 (Perm. Ct. Arb. 2016), <http://www.pcacases.com/web/sendAttach/1547> [<https://perma.cc/3XWW-GR39>].

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

184. *Fisheries Case* (U.K. v Nor.), Judgment, 1951 I.C.J. Rep. 116, 130. (Dec. 18, 1951).

185. See Convention on the Territorial Sea and Contiguous Zone art. 7(5), 516 U.N.T.S. 205, Apr. 29, 1958.

186. Gidel, *supra* note 138, at 651.

187. *Gulf Fonseca Case*, 1992 I.C.J. Rep. at 742 ¶ 18 (Diss. Op. Judge Oda).

188. See Secretariat, *Juridical Regime of Historic Waters, Including Historic Bays*, U.N. Doc No. A/CN.4/143 (9 Mar. 1962), in [1962] 2 Y.B. INT’L L. COMM’N 1 ¶1 (1964).

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.*

192. *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, 1982 I.C.J. Rep. 55, 74 (Feb. 24, 1982); *Gulf of Fonseca Case*, 1992 I.C.J. Rep. at 589 ¶ 385 (requiring investigation into the particular history of the purported historic water).

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),<sup>194</sup> proof of such title required rigorous review and exceptionally strong circumstances in order to prevail.<sup>195</sup>

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 *possessio longi temporis*); and it must do so without opposition from other states.<sup>196</sup>

### 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.<sup>197</sup> China has not provided an explanation of the origins of the U-Shaped line,<sup>198</sup> but it is a key consideration in establishing China's historic entitlement.<sup>199</sup> 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.<sup>200</sup> 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.<sup>201</sup> A series of nationalistic challenges to the

the Atlantic seaboard, part of the Bristol Channel, and Conception Bay in Newfoundland). The majority opinion, objected to by Judge Oda, also classified the Gulf of Fonseca as a historic bay, following the finding of a decision rendered by a 1917 Central American Court of Justice decision. See *id.* ¶ 432 (1).

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).

197. Mira Rapp-Hooper, *Parting the South China Sea: How to Uphold the Rule of Law*, 95 FOREIGN AFF. 76, 76 (2016).

198. Keyuan Zou & Xinchang Liu, *The U-Shaped Line and Historic Rights in the Philippines v. China Arbitration Case*, 127, 132, in *ARBITRATION CONCERNING THE SOUTH CHINA SEA: PHILIPPINES VERSUS CHINA* (Shicun Wu & Keyuan Zou eds., 2016) (noting no official explanation for the line); Rapp-Hooper, *supra* note 197, at 76.

199. Rapp-Hooper, *supra* note 197, at 76.

200. Bill Hayton, *The Modern Origins of China's South China Sea Claim*, CSIS ASIA MAR, TRANSPARENCY INITIATIVE 7:10-7:18 (Sept. 22, 2016), <https://amti.csis.org/event-modern-origins-chinas-south-china-sea-claim-bill-hayton/> [<https://perma.cc/2XK8-RDRL>]. Hayton also has noted that other official Chinese maps preceding 1897, whether national, regional, or local, (citing examples of 1760, 1784 and 1866 maps) located Hainan Island as the southernmost point of Chinese territory. HAYTON, *supra* note 26, at 52.

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.<sup>202</sup> 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.<sup>203</sup> 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.<sup>204</sup> Pressured by the Self-Government Society, which collected travelers' testimonials and oral histories of fishermen "to prove that the islands were historically Chinese,"<sup>205</sup> the Qing Court negotiated a resourceful but expensive buy-out—a key turning point in China's awakening interests over the South China Sea.<sup>206</sup>

Although based on ancient claims, the line first appeared in a map by Hu Jinjie, a private Chinese cartographer in December 1914,<sup>207</sup> and was thereafter incorporated into a map produced by the Republic of China Land and Water Maps Inspection Committee of 1935.<sup>208</sup> 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.<sup>209</sup> Chinese maps subsequently published during the 1920s and 1930s reflected Hu's rendition,<sup>210</sup> and map publishers began publishing the names of the features of the four major island groups in the Sea.<sup>211</sup> But French imperial claims over six of the Spratlys in 1933 may have sparked a "primordial possessive instinct" to counter the French claims,<sup>212</sup> and more broadly, to create a great defensive pelagic wall around its "blue-colored

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in SUN YAT-SEN'S DOCTRINE IN THE MODERN WORLD 138, 140-42 (Chu-yuan Cheng ed., 1989) (discussing the emergence of modern Chinese nationalism); see also DONG WONG, CHINA'S UNEQUAL TREATIES: NARRATING NATIONAL HISTORY (2005) (on the mid-nineteenth century emergence of the polemical use of the phrase "unequal treaties" in the formation and expression of Chinese nationalism).

202. See generally HAROLD Z. SCHIFFRIN, SUN YAT-SEN AND THE ORIGINS OF THE CHINESE REVOLUTION ch. IV (1968) (discussing revolutionary activity to seize Canton).

203. See EDWARD J.M. RHOADS, CHINA'S REPUBLICAN REVOLUTION: THE CASE OF KWANG-TUNG, 1895-1913, 130-52 (1975).

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).

207. Keyuan Zou, *The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands*, 14 INT'L J. MARINE & COASTAL L. 27, 32 (1999); *cf.*, WU, *supra* note 14, at 79.

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.

land”—the Yellow, East China, and South China Seas.<sup>213</sup> Bai Meichu, a founder of the China Geographical Society, adapted Hu’s map and added the “innovation” of the U-shaped line,<sup>214</sup> which went through iterations until “first published,”<sup>215</sup> “revealed,”<sup>216</sup> or “released”<sup>217</sup> by the Nationalist Government of the Republic of China (ROC, 1912–1949) in 1947, or printed in 1947 and published in 1948.<sup>218</sup> The ROC map “is widely recognized as the first official map showing China’s claims.”<sup>219</sup> It was titled “Map of South China Sea Islands” and presented eleven dashes, with two additional lines snaking into the Gulf of Tonkin.<sup>220</sup>

A 2000 accord between China and Vietnam formally delimited respective boundaries in the Gulf of Tonkin.<sup>221</sup> 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*.<sup>222</sup> 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.”<sup>223</sup>

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213. Peng Guangqian, *China’s Maritime Rights and Interests*, in *MILITARY ACTIVITIES IN THE EEZ* 15, 15–16 (Peter Dutton, ed., 2010).

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).

215. M. Sheng-Ti Gau, *The U-Shaped Line and a Categorization of the Ocean Disputes in the South China Sea*, 43 *OCEAN DEV. & INT’L L.* 57, 58 (2012).

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

217. Kuan-Hsiung Wang, *The ROC’s Maritime Claims and Practices with Special Reference to the South China Sea*, 41 *OCEAN DEV. & INT’L L.* 237, 243 (2010).

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.

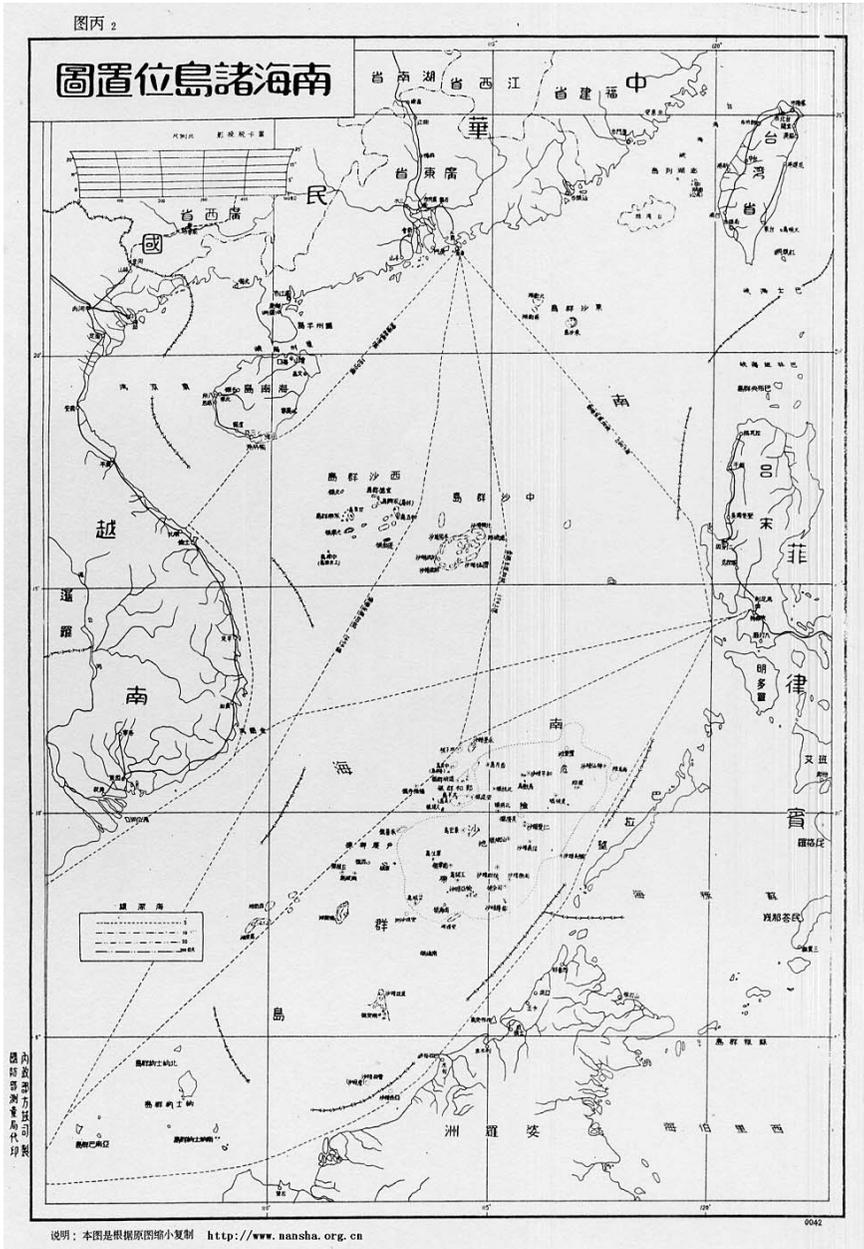
219. WU, *supra* note 14, at 79.

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

221. *List of Geographical Coordinates of Points, The Agreement on the Delimitation of the Territorial Sea, the Exclusive Economic Zone and Continental Shelf in Beibu Bay/Gulf of Tonkin, China-Viet.*, Dec. 25, 2000, 56 *LAW OF THE SEA BULLETIN* 137, 137 (2004).

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).



Nanhai Zhudao Map, 1947 (Map of Chinese Islands in the South China Sea). Wikimedia Commons: [https://upload.wikimedia.org/wikipedia/commons/4/43/1947\\_Nanhai\\_Zhudao.png](https://upload.wikimedia.org/wikipedia/commons/4/43/1947_Nanhai_Zhudao.png) [<https://perma.cc/A489-MBZN>].

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.<sup>224</sup> 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.<sup>225</sup> 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,<sup>226</sup> 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”<sup>227</sup> 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,<sup>228</sup> the Tribunal concluded the interpretation of historical narratives needed to be “approached with sensitivity.”<sup>229</sup> 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 “[did] not make them less important to those who practice them.”<sup>230</sup> 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.<sup>231</sup> 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 reimagined map of the nation’s territory . . . a figurative cartographic navel of the national geo-body,”<sup>232</sup> projecting Vietnamese sovereignty claims over

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224. WU, *supra* note 14, at 16.

225. See, e.g., Bill Hayton, *The Importance of Evidence: Fact, Fiction and the South China Sea*, ASIA SENTINEL (May 25, 2015), <http://www.asiasentinel.com/politics/fact-fiction-south-china-sea/> [https://perma.cc/VD64-75EX].

226. See generally SHELDON POLLOCK, *THE LANGUAGE OF THE GODS IN THE WORLD OF MEN: SANSKRIT, CULTURE, AND POWER IN PREMODERN INDIA* (2006) (on the rise of Sanskrit cosmopolitan culture followed by the establishment of vernacular expression).

227. VICTOR LIEBERMAN, *STRANGE PARALLELS: SOUTHEAST ASIA IN GLOBAL CONTEXT, C. 800–1830: VOLUME 2, MAINLAND MIRRORS: EUROPE, JAPAN, CHINA, SOUTH ASIA, AND THE ISLANDS 680* (2009).

228. South China Sea Arbitration (Award), *supra* note 7, ¶ 805.

229. *Id.*

230. *Id.*

231. HUGO GROTIUS, *MARE LIBERUM 1609–2009*, at 85 (Robert Feenstra ed., 2009) (1609).

232. Edyta Roszko, *Geographies of Connection and Disconnection: Narratives of Seafaring in Lý 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.<sup>233</sup> 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.”<sup>234</sup>

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).<sup>235</sup> 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.<sup>236</sup> China’s Admiral Zheng He (1371–1433) set sail on seven fabled voyages across the South China Sea;<sup>237</sup> Ming Dynasty records (the *Ming shi-lu*) detail other important Chinese commanders and voyages, as well.<sup>238</sup> Zheng’s first armada (1405–1407) of 317 ships provisioned 27,800 mariners, soldiers, and functionaries.<sup>239</sup> 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.<sup>240</sup> 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.<sup>241</sup> 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.<sup>242</sup> Chinese authorities note these charts were published throughout the Ming (1368–1644) and

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Vietnamese party-state framed sovereignty claims in terms of historical and emotional stories of Vietnamese sailors).

233. *Id.*

234. Peter A. Dutton, *An Analysis of China’s Claim to Historic Rights in the South China Sea*, in *MAJOR LAW AND POLICY ISSUES IN THE SOUTH CHINA SEA: EUROPEAN AND AMERICAN PERSPECTIVES* 57, 73 (Yann-Huei Song & Keyuan Zou eds., 2014).

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).

236. Gao & Jia, *supra* note 16, at 101.

237. See Sue Gronewald, *The Ming Voyages*, ASIA FOR EDUCATORS, [http://afe.easia.columbia.edu/special/china\\_1000ce\\_mingvoyages.htm](http://afe.easia.columbia.edu/special/china_1000ce_mingvoyages.htm) [<https://perma.cc/RBL3-7TA3>]; MAR. MUSEUM, *Admiral Zheng He and the Chinese Treasure Fleet*, <http://education.maritime-museum.org/training/north-gallery-2/asian-history/admiral-zheng-he-and-the-chinese-treasure-fleet/> [<https://perma.cc/3F9T-KT5S>].

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).

239. Robert Finlay, *The Treasure-Ships of Zheng He: Chinese Maritime Imperialism in the Age of Discovery*, 23 TERRAE INCOGNITAE 1, 7–8 (1991) (noting the size and composition of the flotilla); Gronewald, *supra* note 237; see also MARINERS’ MUSEUM, *Zheng He: The First Voyage of the Treasure Fleet*, <http://ageofex.marinersmuseum.org/index.php?type=explorersection&id=51> [<https://perma.cc/6LMA-SZBE>].

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,<sup>243</sup> claiming that this evidence demonstrates how China’s maritime and military power extended to the Indian Ocean,<sup>244</sup> but not necessarily its desire to exercise *dominium* over the South China Sea.<sup>245</sup> Historians debate the hegemonic, defensive, exploratory, and propagandistic intentions of the voyages,<sup>246</sup> but they largely agree that these voyages were structured for trade and were “overwhelmingly military in composition.”<sup>247</sup> 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,<sup>248</sup> 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,”<sup>249</sup> leading to the general conclusion that “in no sense did any state or people ‘own’ the Sea.”<sup>250</sup> 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.<sup>251</sup> “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.”<sup>252</sup> Moreover, “dangers posed by the reefs and islands of the Spratlys” indicated they were areas mariners should avoid,<sup>253</sup> given that mariners were more prone to hug the shores to avoid shipwreck and pirates.<sup>254</sup>

Modern English language narratives on the South China Sea have been criticized for overreliance on histories published in 1976 and 1982.<sup>255</sup> These histories relied on three non-neutral Chinese accounts jus-

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*Voyages: A Reassessment*, 78 J. MALAYSIAN BRANCH ROYAL ASIATIC SOC’Y 37–58 (2006) (assessing the proto-colonial implications of Zheng’s voyages).

243. China’s Position Paper, *supra* note 90.

244. See Finlay, *supra* note 239, at 7–8 (noting the overwhelming military composition of the Zheng’s Treasure-fleet inclining “their hosts to consider that a client relationship with the Ming emperor was an offer that they could not refuse.”).

245. *Id.* at 4–11.

246. See *id.* at 5–6 (discussing various motivations for the launch of the Treasure-ships, including to search for a deposed emperor, to protect against invasion by the army of Timur, to suppress pirates, to cultivate goodwill and embrace of the Middle Kingdom, and to promote commerce or impose vassalage).

247. *Id.* at 8.

248. See *id.* at 12.

249. BILL HAYTON, *THE SOUTH CHINA SEA—THE STRUGGLE FOR POWER IN ASIA* 26 (2014).

250. *Id.* at 28.

251. AUSTIN, *supra* note 59, at 38.

252. *Id.* at 37.

253. Michael Flecker, *Early Voyaging in the South China Sea: Implications on Territorial Claims* 48 (Nalanda-Sriwijaya Centre Working Paper No. 19, 2015), [https://www.iseas.edu.sg/images/pdf/nscwps19\\_early\\_voyaging\\_south\\_china\\_sea\\_implications\\_territorial\\_claims.pdf](https://www.iseas.edu.sg/images/pdf/nscwps19_early_voyaging_south_china_sea_implications_territorial_claims.pdf) [<https://perma.cc/3ASU-R7ZD>].

254. *Id.* at 44.

255. See HAYTON, *supra* note 26, at xvii (2014) (referencing DIETER HEINZING, *DISPUTED ISLANDS IN THE SOUTH CHINA SEA* (1976); and MARWYN SAMUELS, *CONTEST FOR THE SOUTH CHINA SEA* (1982)).

tifying China's takeover of the Paracel Islands from South Vietnam in 1974.<sup>256</sup> Journalist Bill Hayton argues that reliance on this limited scholarship "frame[s] the entire debate about the South China Sea;"<sup>257</sup> that China had no discernable interest in the South China Sea before 1909, making its claim modern, not ancient;<sup>258</sup> 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),<sup>259</sup> and that a national sentiment did not take hold until France annexed the Paracels in 1933.<sup>260</sup> Indeed, the first official Chinese presence in the Spratlys occurred on December 12, 1946 with the ROC Taiping landing party.<sup>261</sup>

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.<sup>262</sup> 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,<sup>263</sup> 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.<sup>264</sup> 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."<sup>265</sup> "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."<sup>266</sup> 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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256. See *id.* (noting three articles published by the Chinese Communist Party following the Chinese invasion of the Paracel Islands in 1974); LEE LAI TO, CHINA AND THE SOUTH CHINA SEA DIALOGUES 13 (1999) (discussing the Chinese eviction of the South Vietnamese from the Paracels); see also Hayton, *supra* note 225 (noting undue reliance by foundational papers on the South China Sea dispute on Chinese media articles).

257. HAYTON, *supra* note 26, at xvii (2014).

258. Bill Hayton, *The Modern Origins of China's South China Sea Claim*, CSIS (Sep. 22, 2016) (video: 30:19 mark), <https://www.youtube.com/watch?v=egMHf6fNbzA> [<https://perma.cc/J3P6-B7PP>].

259. Bill Hayton, *Who Owns the South China Sea?* COMMONWEALTH CLUB (Aug. 26, 2016), (video: 21:42-2:22 mark) (discussing Chinese cartographic transliterations and errors).

260. Hayton, *supra* note 259, at 21:24 mark.

261. *Id.* at 29:37 mark.

262. *In re Territorial Sovereignty and Scope of the Dispute (Eritrea v. Yemen)*, Reports of International Arbitral Awards XXII, Award of the Arbitral Tribunal in the First Stage of the Proceedings between Eritrea and Yemen ¶¶ 209-332 (1998).

263. *Id.* ¶¶ 13-14.

264. *Id.* ¶ 31.

265. *Id.* ¶ 125.

266. *Id.* ¶ 449.

*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.”<sup>267</sup> 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.<sup>268</sup> The Chamber traced this coparcener 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,<sup>269</sup> making the three Central American states beneficiaries of a seamless conveyance from the Spanish Crown.<sup>270</sup> The Chamber’s grasp of history may not have been convincing.<sup>271</sup> 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.<sup>272</sup> The judgment distorted Spanish imperial rule over the waters of the South Sea (Pacific) as placid,<sup>273</sup> invented and imposed the concept of the pluri-state bay,<sup>274</sup> and applied the maligned concept of condominium<sup>275</sup> against the express claims of one of the parties,<sup>276</sup> thereby forcing a pelagic cohabitation of perfect equality<sup>277</sup> 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

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267. *Id.* ¶ 126.

268. *Gulf of Fonseca Case*, 1992 I.C.J. Rep. 351, 607–608 418.

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).

272. Christopher R. Rossi, *Jura Novit Curia? Condominium in the Gulf of Fonseca and the “Local Illusion” of a Pluri-State Bay*, 37 *HOUS. J. INT’L L.* 793, 814 (2015).

273. *See id.* at 830–35 (questioning the Chamber’s conclusion about the placid waters of the bay).

274. *Gulf of Fonseca Case*, 1992 I.C.J. Rep. at 733 ¶ 2 (Oda, J., dissenting) (“[T]he concept of a “pluri-State bay” . . . has no existence as a legal institution.”).

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).

276. *Gulf of Fonseca Case*, 1992 I.C.J. Rep. at 379 ¶ 26 (7) (summarizing Nicaragua’s position that “[n]o régime of condominium exists in the Gulf of Fonseca or any part thereof.”).

277. *Gulf of Fonseca Case*, 1992 I.C.J. Rep. at 602 ¶ 407.

constructed Panama Canal.<sup>278</sup> 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.<sup>279</sup>

## 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.<sup>280</sup> 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.<sup>281</sup> 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,<sup>282</sup> and threats to navigation for commercial shipping would damage Beijing’s vital interests.<sup>283</sup> A dispute does exist about the activities permitted under the freedom of navigation guarantee within the EEZ of another nation.<sup>284</sup> The U.S. Navy asserts an unimpeded freedom of navigation and overflight,<sup>285</sup> 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.

281. See Louis Henkin, *International Law: Politics, Values and Functions General Course*, 216 (IV) RECUEIL DES COURS 106 (1989) (noting that Grotius’ *mare liberum* argument prevailed over Selden’s *mare nostrum* argument).

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.

285. *Maritime Disputes and Sovereignty Issues in East Asia: Hearing Before the Subcomm. on E. Asian & Pac. Affairs of the Comm. on Foreign Relations*, 111th Cong. (2009), <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg53022/html/CHRG-111shrg53022.htm> (statement of Robert Scher, Deputy Assistant Secretary of Defense, Asian and Pacific Security Affairs, Office of the Secretary of Defense, Department of Defense, Washington, DC) (“[W]e reject any nation’s attempt to place limits on the exercise of high seas freedoms within an exclusive economic zone”) [<https://perma.cc/F35J-9LS7>].

no restrictions for purposes of transiting, surveilling, engaging in reconnaissance activities in the EEZ.<sup>286</sup> China maintains that foreign military vessels operating in the EEZ are subject to Chinese jurisdiction.<sup>287</sup> UNCLOS Article 58 (3) requires that states exercise “due regard” to the rights and duties of coastal states in the EEZ;<sup>288</sup> Article 88 reserves the high seas for peaceful purposes;<sup>289</sup> Article 301 mandates that states refrain from any threat or use of force against the territorial integrity or political independence of any state<sup>290</sup>—provisions China interprets as precluding military surveillance and reconnaissance in the EEZ without coastal state permission.<sup>291</sup> Dangerous encounters between the Chinese and Americans have taken place,<sup>292</sup> but China’s U-shaped line incorporates more sea space than an aggregation of imaginary insular EEZs and brings into question 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 policy dilemma contrasting sovereignty and security interests.<sup>293</sup> Construed other than as a probe, its actions may indicate increasing designs over the natural resources of the South China Sea,<sup>294</sup> 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).<sup>295</sup> This initiative amounts to China’s third attempt in three

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286. UNCLOS art. 58, ¶ 1.

287. *Maritime Disputes and Sovereignty Issues in East Asia: Hearing Before the Subcomm. 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).

288. UNCLOS art. 58, ¶ 3.

289. UNCLOS art. 88.

290. UNCLOS art. 301.

291. See RAINE & LE MIÈRE, *supra* note 100, at 51 n.4 (2013) (noting China’s opposition to military surveillance in the EEZ).

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 approximately seventy miles off China’s island province of Hainan, and the March 2009 interruption 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.

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).

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).

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 Analysis of China’s Belt and Road Initiative: A Road towards a Regional Community of Common*

millennia to project its economic power westward.<sup>296</sup> 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.<sup>297</sup> Construed 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.<sup>298</sup> Employing a so-called "cabbage strategy" of wrapping individual features of the South China Sea in layers of incremental appropriation,<sup>299</sup> China's attempt to "further consolidate claims" now intensifies through law enforcement patrols within the U-shaped line.<sup>300</sup>

#### 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.<sup>301</sup> 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 (*mare liberum v. mare clausum*), with increasing recognition of Vázquez de Menchaca's influence on Grotius<sup>302</sup> and ripostes to Grotius' view from other publicists such as

*Destiny*, 15 CHINESE J. INT'L L. 517-41 (2016) (assessing challenges facing the implementation of the project).

296. See *id.* at 68 (citing also the Han Dynasty's establishment of the ancient Silk Road in the second century B.C. and the voyages of Admiral Zheng during the Ming Dynasty).

297. See *id.* at 69; see also Tian Shaohui, *Chronology of China's Belt and Road Initiative*, XINHUANET (Mar. 28, 2015, 3:07 PM), [http://news.xinhuanet.com/english/2015-03/28/c\\_134105435.htm](http://news.xinhuanet.com/english/2015-03/28/c_134105435.htm) [<https://perma.cc/S8YX-BX5J>].

298. Robert Kaplan, *China's Budding Ocean Empire*, NAT'L INT. (June 5, 2014), <http://nationalinterest.org/feature/chinas-budding-ocean-empire-10603> [<https://perma.cc/P9SW-S57F>].

299. See Harry Kazianis, *China's Expanding Cabbage Strategy*, THE DIPLOMAT (Oct. 29, 2013), <http://thediplomat.com/2013/10/chinas-expanding-cabbage-strategy/> [<https://perma.cc/99WA-S7VX>].

300. Zou, *supra* note 294, at 636.

301. See G. JOHN IKENBERRY, *LIBERAL LEVIATHAN: THE ORIGINS, CRISIS, AND TRANSFORMATION OF THE AMERICAN WORLD ORDER* 18 (2011) (describing attributes of the distinctive liberal international order).

302. See David Armitage, *Introduction to HUGO GROTIUS, THE FREE SEA* at xv, xvii (Richard Hakluyt trans., David Armitage ed., 2004) (crediting the influence of Vázquez de Menchaca's *Controversiarum illustrium . . . libri tres*, 1572); Mónica Brito-Vieira, *Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the*

Welwood,<sup>303</sup> Freitas,<sup>304</sup> and Pereira.<sup>305</sup> *Mare Liberum* described the oceans as a global commons,<sup>306</sup> and in it Grotius defended the right of the Dutch East India Company to ply Asian waters Portugal had claimed for itself.<sup>307</sup> 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.”<sup>308</sup>

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 swaths 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,<sup>309</sup> which then transformed into the eponymous Grotian Tradition.<sup>310</sup> This Moment and Tradition represent the conceptual

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*Seas*, 64 J. HIST. IDEAS 361, 362 (2003) (noting Grotius cited Vázquez de Menchaca seventy-four times in *De Jure Praeda*).

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).

304. See, e.g., SERAPHIM DE FREITAS, DE IUSTO IMPERIO LUSITANORUM ASIATICO (1625) (defending Portuguese interests in Asia while discounting free trade and navigation as parts of the law of nations); C.H. Alexandrowicz, *Freitas versus Grotius*, 35 BRIT. Y.B. INT’L L. 162 (1959) (discussing Freitas’ *De Justo Imperio Lusitanorum Asiatico*).

305. See, e.g., JUAN DE SOLÓRZANO 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.*

308. Final Transcript Day 1—Merits Hearing at 63, *In re South China Sea Arbitration*, PCA Case Repository 2013-19 (Perm. Ct. Arb. 2016), <http://www.pcacases.com/web/sendAttach/1547> (testimony of Professor Oxman) [<https://perma.cc/D8DG-9D7H>].

309. Falk coined the phrase in 1985. See Richard Falk, *The Grotian Moment*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE (Richard Falk, Friedrich Kratochwil, & Saul H. Mendlovitz eds., 1985). For expressions of the idea of the Grotian Moment, see, e.g., MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS (2014); Boutros Boutros-Ghali, *The Role of International Law in the Twenty-First Century: A Grotian Moment*, 18 FORDHAM INT’L L.J. 1609 (1995); Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DEN. J. INT’L L. & POL. 209 (2011); John T. Parry, *What is the Grotian Tradition in International Law?*, 35 U. PA. J. INT’L L. 299 (2014); Christopher Weeramantry, *The Grotius Lecture Series: Opening Tribute To Hugo Grotius*, 14 AM. U. INT’L L. REV. 1516 (1999).

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.<sup>311</sup> 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.<sup>312</sup> Based on the famous fourth papal bull of Alexander VI,<sup>313</sup> itself a revision of previous papal donations from the Spanish Borgia that were overly generous to the Castilian Crown,<sup>314</sup> 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.<sup>315</sup> Criticized as a display of sovereignty *ad absurdum*,<sup>316</sup> the treaty nevertheless significantly altered history: new-found 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.<sup>317</sup> Its most telling consequence reflected super-power willingness to appropriate and divide that which could not be seized outright.<sup>318</sup> 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.

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(1918). It is perhaps best exemplified by Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 1 (1946), and members of the so-called English School of international relations. See generally HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (1977); MARTIN WIGHT, *INTERNATIONAL THEORY: THE THREE TRADITIONS* (Gabriele Wight & Brian Porter eds., 1991).

311. Kim Browne, *An Equitable International Legal Framework: The Grotian Heritage*, 2011 ASIA-PACIFIC REGIONAL CONFERENCE ON UNDERWATER CULTURAL HERITAGE PROCEEDINGS, <http://www.themua.org/collections/items/show/1199> [https://perma.cc/CH2L-TD78].

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.

313. *Dudum siquidem*, September 26, 1493.

314. *Dudum siquidem* modified earlier papal donations issued between May and September 1492 following Columbus' first voyage to the New World. See C.H. HARING, *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 *Dudum siquidem*, which pushed the divide another two hundred and seventy leagues west (accounting for Portugal's colonial control over Brazil). See Hal Langfur, *Colonial Brazil (1500-1822)*, in *A COMPANION TO LATIN AMERICAN HISTORY* 89, 89 (Thomas H. Holloway ed., 2008).

315. See GIBSON, *supra* note 97, at 17.

316. CHRISTOPHER R. ROSSI, *SOVEREIGNTY AND TERRITORIAL TEMPTATION: THE GROTIAN TENDENCY* (Cambridge University Press, forthcoming).

317. Philip E. Steinberg, *Lines of Division, Lines of Connection: Stewardship in the World Ocean*, 89 GEOGRAPHICAL REV. 254, 255 (1999).

318. *Id.*

Indeed, Hugo Grotius' reworking of a chapter of a previously unpublished work,<sup>319</sup> which famously resulted in *Mare Liberum*, never achieved unassailable status as a universal rule of law. The idea was controversial in its own time,<sup>320</sup> amply contested by centuries of prior state practice,<sup>321</sup> and is now anachronistically praised for its novelty and logic.<sup>322</sup> 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.<sup>323</sup> 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,<sup>324</sup> 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.<sup>325</sup> 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.<sup>326</sup> 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

319. See generally HUGO GROTIUS, *DE JURE PRAEDAE COMMENTARIUS* (1604–1606). See generally Robert Fruin, *An Unpublished Work of Hugo Grotius's*, 5 *BIBLIOTHECA VISSERIANA* 13 (1925).

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).

321. See Christopher R. Rossi, *A Particular Kind of Dominion: The Grotian 'Tendency' and the Global Commons in a Time of High Arctic Change*, 11 *J. INT'L L. & INT'L REL.* 1, 16–19 (2015).

322. See, e.g., PETER HAGGENMACHER, *GROTIUS ET LA DOCTRINE DE LA GUERRE JUSTE* (1983).

323. See DAVID ARMITAGE, *FOUNDATIONS OF MODERN INTERNATIONAL THOUGHT* 9–10 (2013) (noting generally Grotian foundation myths of early modernity advanced by ideologically-minded communities of international lawyers and others).

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

325. Sienho Yee, *The South China Sea Arbitration: Potential Jurisdictional Obstacles or Objections*, 13 *CHINESE J. INT'L L.* 663, 674 (2014).

326. Paul Laurence Saffo, *The Common Heritage of Mankind: Has the General Assembly Created a Law to Govern Seabed Mining?*, 53 *TUL. L. REV.* 492, 492, 496 (1979).

developed out of the *imaginarium* of the European colonial world.<sup>327</sup> Julia Martine Van Ittersum labeled him an apologist for the corporate interests of the Dutch East India Company.<sup>328</sup> 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.<sup>329</sup> 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.<sup>330</sup> This view, according to Karl Zemanek, set Grotius apart from almost all other writers of the early modern age.<sup>331</sup> 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.<sup>332</sup> 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.<sup>333</sup> 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.<sup>334</sup> 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,<sup>335</sup> but the similarities reach back to the seventeenth century, and extend into the twenty-first century as well.<sup>336</sup> Concentration on principles of navigation and commerce has coopted the discussion about the his-

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327. See EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS 38 (2002) (noting the Grotian Tradition's narrow and twisted perspective).

328. MARTINE JULIA VAN ITTERSUM, PROFIT AND PRINCIPLE: HUGO GROTIUS, NATURAL RIGHTS THEORIES AND THE RISE OF DUTCH POWER IN THE EAST INDIES, 1595-1615, 488 (2006) (labeling Grotius an apologist for the Dutch East India Company).

329. PETER BORSCHBERG, HUGO GROTIUS, THE PORTUGUESE AND FREE TRADE IN THE EAST INDIES 102 (2010) (questioning Grotius' interpretation of free trade).

330. GROTIUS, MARE LIBERUM, *supra* note 231, at 153 (specifically "where a judgment cannot be given").

331. Karl Zemanek, *Was Hugo Grotius Really in Favor of the Freedom of the Seas?*, 1 J. HIST. INT'L L. 46, 50 n.7 (1999) (arguing that with this view, Grotius almost stands alone among writers of the early modern age).

332. See CHRISTOPHER R. ROSSI, SOVEREIGNTY AND TERRITORIAL TEMPTATION: THE GROTIAN TENDENCY (forthcoming) (referencing partially the view of Karma Nabulsi).

333. See Mónica Brito Vieira, *Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas*, 64 J. HIST. IDEAS 361, 369, 371 (2003).

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.*

torical parallels.<sup>337</sup> 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.<sup>338</sup> 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.<sup>339</sup>

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.<sup>340</sup> 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.<sup>341</sup> 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.<sup>342</sup> 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.<sup>343</sup> But the regime structure, despite its significance,<sup>344</sup> 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.<sup>345</sup> Others also described the radical postwar movement

337. See Lee Yong Leng, *Offshore Boundary Disputes in Southeast Asia*, 10 J. SOUTHEAST ASIAN STUD. 175, 176, 189 (1979).

338. *Id.* at 176.

339. See Ivan Shearer, *The Limits of Maritime Jurisdiction*, in *THE LIMITS OF MARITIME JURISDICTION* 51, 51 (Clive Scholfield et al. eds., 2014).

340. Tullio Scovazzi, *The Concept of Common Heritage of Mankind and the Genetic Resources of the Seabed Beyond the Limits of National Jurisdiction*, 14 *AGENDA INTERNAZIONALE* 11, 11–12 (2007).

341. *Id.* at 12.

342. *Id.* at 11; Wolfgang Friedmann, *Selden Redivivus—Towards a Partition of the Seas?*, 65 *AM. J. INT'L L.* 757, 757 (1971).

343. Video: Audiovisual Library of International Law Lecture Series: The United Nations Convention on the Law of the Sea and Beyond 7:38-8:23 (Tullio Scovazzi, U.N. Office of Legal Affairs Apr. 29, 2008), [http://legal.un.org/avl/ls/Scovazzi\\_LS\\_video\\_1.html](http://legal.un.org/avl/ls/Scovazzi_LS_video_1.html) [<https://perma.cc/5QDG-4EEH>].

344. See *Oceans: The Lifeline of Our Planet: Anniversary of the United Nations Convention on the Law of the Sea: 20 Years of Law and Order on the Oceans and Seas (1982-2002)*, [http://www.un.org/Depts/los/convention\\_agreements/convention\\_20years/oceansthe-lifeline](http://www.un.org/Depts/los/convention_agreements/convention_20years/oceansthe-lifeline) (calling UNCLOS “[o]ne of the most significant legal instruments of the 20th Century”) [<https://perma.cc/FCB8-E2TP>].

345. Friedmann, *supra* note 342, at 757–58, 763 (explaining the immediacy of the need for an effective international treaty to prevent the consolidation of vested coastal

toward closed seas.<sup>346</sup> Cecil Hurst located the closed seas movement's beginnings in the 1945 Truman Proclamations, calling them sovereignty by another name.<sup>347</sup> Maritime superpower the United States' sovereignty claims stimulated a multiplication of unilateral claims by lesser powers.<sup>348</sup> Chile and Peru quickly followed suit with two-hundred-mile national sovereignty projections over submarine areas,<sup>349</sup> 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.<sup>350</sup> The zone impeded the resupply of Axis ships in South American ports,<sup>351</sup> and subjected transit through the Panama Canal to more stringent regulation.<sup>352</sup> 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.<sup>353</sup>

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.”<sup>354</sup> Malcolm Shaw observed that the

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state interests); see GEORGES SCELLE PLATEAU CONTINENTAL DE DROIT INTERNATIONAL [Continental Platform of International Law] 762 (1955).

346. See Hubert Thierry, *The Thought of Georges Scelle*, 1 EUR. J. INT'L L. 193, 207–08 (1990); R.Y. Jennings, *A Changing International Law of the Sea*, 3 CAMBRIDGE L.J. 32, 34 (1972); Cecil Hurst, *The Continental Shelf*, 34 TRANSACTIONS OF THE GROTIUS SOC'Y 153 (1948); Hersch Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376 (1950); see also L.D.M. Nelson, *The Patrimonial Sea*, 22 INT'L & COMP. L.Q. 668, 669.

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”).

348. Gemma Andreone, *The Exclusive Economic Zone*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA, *supra* note 294, 159, 160–61.

349. Declaration on the Maritime Zone Signed at Santiago on 18 August 1952, Chile, Ecuador, and Peru, Aug. 18, 1952, 1006 U.N.T.S. 326; S.N. Nandan, *The Exclusive Economic Zone: A Historical Perspective*, FAO CORP. DOCUMENT DEPOSITORY (last visited Feb. 27, 2017), <http://www.fao.org/docrep/s5280T/s5280t0p.htm> [<https://perma.cc/Y3HJ-BTB5>]. Five years later, Ecuador joined with Chile and Peru to enact the Santiago Declaration, which was the first international legal agreement to proclaim the two-hundred-mile limit. See Chile, Ecuador and Peru, Declaration on the Maritime Zone (No. 14758). Signed at Santiago on 18 August 1952, <https://treaties.un.org/doc/Publication/UNTS/Volume%201006/volume-1006-I-14758-English.pdf> [<https://perma.cc/K2KP-KWVX>].

350. Letter from Sumner Welles Am Del., to Cordell Hull, Sec'y of State (Oct. 3, 1939) at 36–38 in FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1939, THE AMERICAN REPUBLICS VOL. V (Matilda F. Axton et al. 1957). Nandan, *supra* note 349.

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.

354. Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM J. INT'L L. 830, 832 (2006).

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.<sup>355</sup> 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.<sup>356</sup> 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*.<sup>357</sup> 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.”<sup>358</sup> Retailed to non-coastal states and developing countries as a “package deal,”<sup>359</sup> 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.<sup>360</sup> The International Seabed Authority administered the area beyond the scope of national jurisdiction for the benefit of all countries.<sup>361</sup> The principles underpinning the Common Heritage concept emphasized redistributive justice in the form of shared resources allocation and technology transfers to the developing world.<sup>362</sup> Consensus failed, due directly to the United States' hegemonic rejection of such “a dramatic step toward world government.”<sup>363</sup> Other important developed states followed and either rejected or

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355. MALCOLM SHAW *INTERNATIONAL LAW* 402 (7th ed., 2014).

356. See Galdorisi & Kaufman, *supra* note 284, at 254 (estimating the EEZ removed “[thirty to thirty-six percent] of the world's oceans from waters traditionally considered high seas”); see also Stephen C. Nemeth et al., *Ruling the Sea: Managing Maritime Conflicts Through UNCLOS and Exclusive Economic Zones*, 40 *INT'L INTERACTIONS* 711, 714 (noting the regime of the EEZ extended worldwide coastal state jurisdiction over thirty-eight square nautical miles of ocean space); ROBERT W. SMITH, *EXCLUSIVE ECONOMIC ZONE CLAIMS: AN ANALYSIS AND PRIMARY DOCUMENTS* 5 (1986) (calculating the extent of the world's aggregate EEZs at almost thirty-two million square nautical miles).

357. DONALD R. ROTHWELL & TIM STEPHENS, *THE INTERNATIONAL LAW OF THE SEA* 88 (2d ed. 2016).

358. Robert Beckman & Tara Davenport, *The EEZ Regime: Reflections After 30 Years* 6 (LOSI Conference Paper, 2012).

359. See Alan Beesley, *The Negotiating Strategy of UNCLOS III: Developing and Developed Countries as Partners—A Pattern for Future Multilateral International Conferences?*, 46 *L. & CONTEMP. PROBS.* 183, 185 (calling the package deal concept “fundamental to the Conference from its outset”).

360. See Scovazzi, *supra* note 343, at 13:08 mark.

361. See UNCLOS arts. 136–37, 156–58.

362. See David Armstrong, *Law, Justice and the Idea of a World Society*, 75 *ROYAL INST. INT'L AFF.* 551–56 (1999) (discussing the Common Heritage of Mankind idea its redistributive implications as applied to the deep seabed mining provisions of UNCLOS).

363. William P. Clark & Edwin Meese III, *Reagan and the Law of the Sea*, HERITAGE FOUND. (Oct. 9, 2007), <http://www.heritage.org/research/commentary/2007/10/reagan-and-the-law-of-the-sea> [<https://perma.cc/CKH9-HX4E>].

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.<sup>364</sup> 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*).<sup>365</sup> 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*.<sup>366</sup> 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.<sup>367</sup>

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.<sup>368</sup> These territorial disputes in the sea are well within the peripheral vision of China.<sup>369</sup> Contemporary scrambles are underway at the beginning of the twenty-first century, one in the High Arctic,<sup>370</sup> the other spanning the globe, but including the High Arctic, and stretching into the outer reaches of the continental shelf.<sup>371</sup> Taken

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364. GA Res. 48/263 (July 28, 1994); see David H. Anderson, *Resolution and Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea: A General Assessment*, 55 ZAOBV 275, 278–79 (1995) (discussing the Implementation Agreement and its key passages the market-based changes Part XI).

365. UNCLOS, art. 137.

366. Marina Tsaribas, *What Does the Nine-Dash Line Actually Mean?*, THE DIPLOMAT (June 2, 2016), <http://thediplomat.com/2016/06/what-does-the-nine-dash-line-actually-mean/> [<https://perma.cc/3T4E-8C8N>].

367. *Id.*

368. Tullio Treves, *Part V: The Law of the Sea After UNCLOS: Open Challenges*, AUDIO-VISUAL LIBR. INT'L L., U.N. OFFICE OF LEGAL AFFAIRS (undated) (video: 19:55–22:05 mark), [http://legal.un.org/avl/lst/Treves\\_LS\\_video\\_2\\_5.html](http://legal.un.org/avl/lst/Treves_LS_video_2_5.html) [<https://perma.cc/6XMJ-GTQR>].

369. Bree Feng, *China Looks North: Carving Out a Role in the Arctic*, ASIA PACIFIC FOUND. CAN. (2016), <https://www.asiapacific.ca/canada-asia-agenda/china-looks-north-carving-out-role-arctic> [<https://perma.cc/8PYQ-2X9Y>].

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://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.

together, these scrambles have been called “one of the biggest territorial grabs in history,”<sup>372</sup> 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.<sup>373</sup> One route sits atop the Eurasian continent and traverses the treacherous Northern Sea Route, part of the Northeast Passage.<sup>374</sup> Another route snakes across the nineteen thousand islands of the Canadian Archipelagic island chain known as the Northwest Passage.<sup>375</sup> 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.<sup>376</sup> But in mirror-image fashion,<sup>377</sup> Russia and Canada claim sovereignty over these respective passageways, holding they are enclosed waters and subject only to Canadian and Russian sovereign decisions.<sup>378</sup> Proximity to chokepoints, control over icebreaking escort services, and the remoteness of the regions, enhance their effective control over the passageways.<sup>379</sup> Moreover, Russia’s Northern Sea Route claim extends into its EEZ, and like the Chinese claim over the integral nature of the insular features of the South China Sea, contends that the fact that “individual portions of it may pass outside of its internal waters” does not affect the integral nature of the Northern Sea Route as an historical national transport route.<sup>380</sup> Vagaries associated with Russia’s sovereign claim include an

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372. Scott J. Shackelford, *Was Selden Right?: The Expansion of Closed Seas and its Consequences*, 47 *STAN. J. INT’L L.* 1, 2 (2011).

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-covered areas. See UNCLOS art. 234.

377. See P. Whitney Lackenbauer, *Mirror Images? Canada, Russia, and the Circumpolar World*, 65 *INT’L J.* 879-97 (2010) (noting problems of mixed messaging involving the adversarial relationship between Canada and Russia given similar jurisdictional and economic positions in the Arctic).

378. See generally DONAT PHARAND, *THE NORTHWEST PASSAGE: ARCTIC STRAITS* (1984) (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*, *BARENTS OBSERVER* (Nov. 15, 2012), <http://barentsobserver.com/en/opinion/northern-sea-route-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 Possidetis (Juris)*, 83 *NORDIC J. INT’L L.* 476, 478 (2014).

Arctic version of China's U-shaped line.<sup>381</sup> 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.<sup>382</sup> 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.<sup>383</sup> 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,<sup>384</sup> presumably if its once-proud Baltic Fleet recovers from persistent challenges since the collapse of the Soviet Union.<sup>385</sup> 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.<sup>386</sup> 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.<sup>387</sup> In the Arctic, this process has been described alternatively as orderly and as wildly capricious, sparking "a highly competitive scramble to stake claims."<sup>388</sup> Such seabed and ocean floor could then be claimed by the coastal state, limited by one or another technical constraint.<sup>389</sup> 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>].

385. *See* Gary K. Busch, *The Roots of the Russian Purge of the Baltic Fleet Admirals*, OCNUS.NET (July 15, 2016), [http://www.ocnus.net/artman2/publish/Editorial\\_10/The-Roots-of-The-Russian-Purge-of-the-Baltic-Fleet-Admirals.shtml](http://www.ocnus.net/artman2/publish/Editorial_10/The-Roots-of-The-Russian-Purge-of-the-Baltic-Fleet-Admirals.shtml) (noting the loss of warm water ports in Latvia, Lithuania, and Estonia and persistent underfunding problems for the Baltic Fleet) [<https://perma.cc/EP4N-QXNK>].

386. *See* UNCLOS art. 76-85.

387. Elizabeth Riddell-Dixon, *Canada and Arctic Politics: The Continental Shelf Extension*, 39 OCEAN DEV. & INT'L L. 343, 344 (2008).

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.<sup>390</sup> They have or will fashion submissions to the CLCS.<sup>391</sup> 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.<sup>392</sup> Aggregate untapped oil and natural gas reserves in this area yield estimates approaching thirty trillion dollars in value.<sup>393</sup> Denmark’s extended continental shelf claim, which conflicts with Russia’s claim, is twenty times larger than Denmark.<sup>394</sup> 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.<sup>395</sup> 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,<sup>396</sup> and seventy-seven have filed submissions with the CLCS.<sup>397</sup> 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-

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390. The Ilulissat Declaration, *Arctic Ocean Conference*, DANISH MINISTRY OF FOREIGN AFFAIRS (May 28, 2008), [http://www.oceanlaw.org/downloads/arctic/Ilulissat\\_Declaration.pdf](http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf) [<https://perma.cc/NVZ9-TWDT>].

391. *Battle over Arctic as Russia, Norway, US, Canada, Denmark Claim it*, MINA (Aug. 5, 2015), <http://macedoniaonline.eu/content/view/27874/53/> [<https://perma.cc/55LF-28MC>].

392. Lisbeth Kirk, *Russia Re-submits Arctic Claims to UN*, EUOBSERVER (Aug. 5, 2015) <https://euobserver.com/news/129834> [<https://perma.cc/5YHZ-WWXX>].

393. *Russia Submits Revised Claims for Extending Arctic Shelf to UN*, R.T. (Feb. 10, 2016), <https://www.rt.com/news/332089-russia-arctic-claim-un/> [<https://perma.cc/LH5N-BEJG>].

394. *See id.*

395. *See National Strategy for the Arctic Region*, May 2013, 1, 9, [www.whitehouse.gov/sites/default/files/doc/nat\\_arctic\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/doc/nat_arctic_strategy.pdf), with a cover letter from President Barack Obama dated May 10, 2013 (noting the U.S. “extended continental shelf claim in the Arctic region could extend more than 600 nautical miles from the north coast of Alaska.”) [<https://perma.cc/82FF-R47X>].

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/V2PP-SSUV>].

397. *See Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982*, UNITED NATIONS: OCEANS & L. SEA, [http://www.un.org/depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/depts/los/clcs_new/commission_submissions.htm) (last updated Oct. 17, 2016) [<https://perma.cc/P5TS-3UMG>].

bly other areas.<sup>398</sup> “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.”<sup>399</sup>

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 *domini* control over diminishing resources amid rapidly advancing prospects to secure them. Liberal international lawyers regard the process as orderly and rule-regulated cartography;<sup>400</sup> 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.<sup>401</sup> 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.<sup>402</sup> 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.<sup>403</sup> While the globalizing interests of commerce and the navigation pertaining to it has helped facilitate consensus over trade-related aspects of UNCLOS,<sup>404</sup> 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

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398. See FAQ, U.S. EXTENDED CONTINENTAL SHELF PROJECT, <https://www.continental-shelf.gov/about/index.htm> [https://perma.cc/S2DA-XE35].

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.

404. *The United Nations Convention on the Law of the Sea (A Historical Perspective)*, UNITED NATIONS: OCEANS & L. SEA (1998), [http://www.un.org/depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm) [https://perma.cc/W79L-2TQC].

shelf extensions, and now, the South China Sea.<sup>405</sup> 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 its 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.<sup>406</sup> But it would be anachronistic to dismiss China's claim as such.

China's sense of entitlement, when not romanticized,<sup>407</sup> is also informed by an underlying sense of inequality, inconsistency, historical selectivity, and imperial double-dealing.<sup>408</sup> 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,”<sup>409</sup> and doubtless, its unwillingness to ratify UNCLOS.<sup>410</sup> 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.<sup>411</sup> Conventional regimes limit the

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405. See, e.g., Clive Schofield, *The El Dorado Effect: Reappraising the 'Oil Factor' in Maritime Boundary Disputes*, in *THE LIMITS OF MARITIME JURISDICTION* 112 (Clive Schofield et al. eds., 2014).

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/ARTI1nhyCBvO8ItpPscx0er160801.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>].

408. See, e.g., Kristine Angeli Sabillo, *PH Calls China Double-Dealing, Asks ASEAN To Assert Leadership*, *INQUIRER* (Apr. 26, 2015), <http://globalnation.inquirer.net/121463/ph-calls-china-double-dealing-asks-asean-to-assert-leadership> [<https://perma.cc/RQ6T-6E7J>].

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).

410. William Gallo, *Why Hasn't the US Signed the Law of the Sea Treaty?*, *VOA*, (June 6, 2016), <http://www.voanews.com/a/united-states-sign-law-sea-treaty/3364342.html> [<https://perma.cc/V79H-U2HQ>].

411. See, e.g., Xia Liping, *Asian Security*, in *CRUX OF ASIA CHINA, INDIA, AND THE EMERGING GLOBAL ORDER* 124 (Tellis & Mirski ed., 2013).

interplay between *dominium* and *imperium* with regard to many of these frontiers,<sup>412</sup> 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.<sup>413</sup> 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.<sup>414</sup> 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.<sup>415</sup> Wild card developments already confound predictions of how the Award will play out.<sup>416</sup> Functional and cooperative management schemes have been

412. Antarctic Treaty, Dec. 1, 1959, 402 U.N.T.S. 71; See Treaty concerning Spitzbergen, Nor.-U.S.-Den. -Fr.-It. -Jap.-Neth.-GB.-Ir.-Br overseas Dom.-Swed., Feb. 9, 1920, <https://m.likumi.lv/doc.php?id=282061> [<https://perma.cc/F4F6-DXFP>]; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 5 1979, 19 I.L.M. 1434; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205.

413. Sreenivasa Rao Pemmaraju, *The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility*, 15 CHINESE J. INT. L. 265, 265 (2016).

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).

415. This idea has been put forth as a U.S. policy revision. See generally Charles L. Glaser, *A U.S.-China Grand Bargain?: The Hard Choice Between Military Competition and Accommodation*, 39 INT'L SEC. 49 (2015).

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.”<sup>417</sup>

The Tribunal, not charged with considering the political implications of its Award, noted it was “beyond dispute that both parties [w]ere obliged to comply.”<sup>418</sup> But China did not comply, and the sweeping rebuke of China’s legal claims raises immediate political concerns.<sup>419</sup> China’s ambassador to the United States warned the award will “intensify conflict”

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philippines (last visited June 30, 2016) [https://perma.cc/7AF9-J32U]; Philippines, *Ambassador Discusses Davao Killings Report with Human Rights Watch*, WIKILEAKS (Mar. 2, 2017, 5:17 PM), https://wikileaks.org/plusd/cables/09MANILA757\_a.html (summarizing U.S. Ambassador Kristie A. Kenny’s meeting with Human Rights Watch Executive Director Kenneth Roth involving reports that “Davao Mayor Rodrigo Duterte . . . appear[s] to be complicit in at least permitting the vigilantism and possibly in arranging actual killings) [https://perma.cc/TT2S-CDZG]; *Pres. Duterte answers a Question from a U.K. Reporter on the Number of People being Killed*, YOUTUBE (Aug. 21, 2016), (taking full responsibility for empowering the police and military to combat drug abuse), https://www.youtube.com/watch?v=zBMRN7CgSwM [https://perma.cc/3KBQ-F9F2]. Additional accounts quote Duterte as admitting that he personally took part in extrajudicial killings. See *Philippines’ Duterte Admits Personally Killing Suspects*, BBCNEWS (Dec. 14, 2016), http://www.bbc.com/news/world-38311655 [https://perma.cc/J7TC-8VW9].

Duterte took office on June 30, 2016, only weeks before the Tribunal’s Award, but a “rash of anti-American outbursts” have called into question the longstanding U.S.-Filipino relationship. Trefor Moss, *Rodrigo Duterte’s Policy Shifts Confound U.S. Allies*, WALL STREET J. (Sept. 15, 2016), http://www.wsj.com/articles/rodrigo-dutertes-policy-shifts-confound-u-s-allies-1473869601 [https://perma.cc/DR6P-WBT4]. In a possibly tectonic shift in relations, Duterte’s first state visit was to China, where the countries agreed to resume direct talks on the South China Sea dispute. See Jane Perlez, *Rodrigo Duterte and Xi Jinping Agree to Reopen South China Sea Talks*, N.Y. TIMES (Oct. 20, 2016), http://www.nytimes.com/2016/10/21/world/asia/rodrigo-duterte-philippines-china-xi-jinping.html?\_r=0 [https://perma.cc/7AAU-KYM3]. A Philippine newspaper reported the Philippines and China are negotiating a deal to jointly explore energy sources in the South China Sea, including Reed Bank (Recto Bank), an area of major contention. See Daxim L. Lucas, *PH to Agree on Joint Oil Exploration with China in Disputed Sea*, PHILIPPINE DAILY INQUIRER (Oct. 19, 2016), http://business.inquirer.net/216959/ph-to-agree-on-joint-oil-exploration-with-china-in-disputed-sea?utm\_content=bufferb8356&utm\_medium=social&utm\_source=twitter.com&utm\_campaign=buffer [https://perma.cc/BFR5-BU6G]. Additional reports have signaled Duterte’s intention to sever the Philippines’ seven-decade alliance with the U.S., abrogate the 2014 Enhanced Defense Cooperation Agreement, and pursue an independent foreign policy—statements that Duterte has seemingly contradicted, thus confounding U.S. policy-makers and calling into question Duterte’s intentions. See Simon Denyer, *Philippine Leader Duterte Now Wants U.S. Troops Out ‘In the Next Two Years’*, WASH. POST (Oct. 26, 2016), https://www.washingtonpost.com/world/philippines-duterte-now-wants-us-troops-out-in-two-years/2016/10/26/32bec8a5-8584-4d95-8e9d-4d7762865055\_story.html [https://perma.cc/A378-XYZH]; Simon Denyer, *Philippine President Creating Uncertainty, Causing Distress*, U.S. DIPLOMAT SAYS, WASH. POST (Oct. 24, 2016), https://www.washingtonpost.com/world/us-diplomat-says-duterte-creating-uncertainty-causing-distress/2016/10/24/6702b186-99c3-11e6-b4c9-391055ea9259\_story.html?tid=a\_inl [https://perma.cc/8KSU-4QEV].

417. Bateman, *supra* note 171, at 201-02.

418. South China Sea Arbitration (Award), *supra* note 7, at ¶1201.

419. Jane Perlez, *Tribunal Rejects Beijing’s Claims in South China Sea*, N.Y. TIMES (July 12, 2016), http://www.nytimes.com/2016/07/13/world/asia/south-china-sea-hague-ruling-philippines.html?\_r=0 (quoting the Philippines’ chief counsel, Paul S. Reichler, as claiming: “It’s an overwhelming victory. We won on every significant point.”) [https://perma.cc/FSD7-HSLW].

possibly resulting in confrontation.<sup>420</sup> A former United States State Department legal adviser wrote despite China's overbroad claims the "litigation has caused far more harm than good."<sup>421</sup> Principal stakeholders in the area have tempered remarks.<sup>422</sup> 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<sup>423</sup> and as a gesture to help China save face.<sup>424</sup> 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."<sup>425</sup> China responded by pledging to dispel interference in South China Sea issues.<sup>426</sup>

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

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420. Dean Cheng, *South China Sea After the Tribunal Ruling: Where Do We Go From Here?* HERITAGE FOUNDATION (July 20, 2016), <http://www.heritage.org/research/commentary/2016/7/south-china-sea-after-the-tribunal-ruling> (quoting Chinese Ambassador to the United States, Cui Tiankai) [<https://perma.cc/47H2-49VJ>].

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

422. Kerry Lynn Nankivell, *South China Sea: Fishing in Troubled Waters*, THE DIPLOMAT (Aug. 18, 2016), <http://thediplomat.com/2016/08/south-china-sea-fishing-in-troubled-waters/> (noting the "deafening silence" among principal powers affected by the ruling) [<https://perma.cc/HQ9J-2QU4>].

423. See *South China Sea Row Tops ASEAN Summit Agenda*, ALJAZEERA (Sept. 8, 2016), <http://www.aljazeera.com/news/2016/09/south-china-sea-row-tops-asean-summit-agenda-160908052213165.html> [<https://perma.cc/TG6D-7WGP>].

424. See J. Berkshire Miller, *Beijing Banks on Fractured ASEAN: At Last Week's Summit in Laos, Phnom Penh Effectively Blocked any Reference to The Hague Ruling*, ALJAZEERA (Aug. 4, 2016), <http://www.aljazeera.com/indepth/opinion/2016/08/beijing-banks-fractured-asean-160803082228974.html> ("The silver lining to the lack of a concrete statement on the South China Sea is that it does provide Beijing with a desperately needed "face-saving" moment after the crushing blow delivered by the PCA") [<https://perma.cc/UUJ4-SXEA>]; Stewart M. Patrick, *Divert Course: Beijing Needs a Way to Save Face in the South China Sea*, DEF. ONE (Apr. 13, 2016), <http://www.defenseone.com/ideas/2016/04/divert-course-beijing-needs-way-save-face-south-china-sea/127449/> (discussing the need to devise a strategy to assist China escape its imprudent South China Sea policy) [<https://perma.cc/QPB3-J4E8>].

425. Remarks of President Obama, to the People of Laos, Lao National Cultural Hall, Vientiane, Laos, WHITE HOUSE, OFF. PRESS SEC. (Sept. 6, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/06/remarks-president-obama-people-laos> [<https://perma.cc/PCH3-F4DD>].

426. See Ben Blanchard, *China Says Wants to "Dispel Interference" in S. China Sea*, REUTERS (Sept. 7, 2016), <http://www.reuters.com/article/asean-summit-southchinasea-china-idUSL3N1BK083> [<https://perma.cc/V5KS-EVG3>].

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

