for carbon emission reductions has had a serious impact on the commitments of other large emitters, like the United States.

None of this is to say that China is wrong in any of its actions. Rather, it is simply to illustrate the importance of China to the operation and development of international law. For better or for worse, China will have an outsized influence on the future of international law. Fortunately for us, we have three extremely knowledgeable experts who will share their insights and analysis with us today on this important question.

Remarks by Bing Bing Jia*

First of all, I would like to express my sincere gratitude to the Program Committee of the 107th Annual Meeting of the American Society of International Law for inviting me to this grand gathering of international lawyers, and to speak on this panel.

My talk today under the assigned topic consists of three general points, all drawn from my personal experiences that cover extensive periods of stay in Europe and China. I do not, however, presume to be expressive of any view that is representative of the collective experience of Chinese international lawyers, past or present. More capable minds are left with that challenge. I am content with sharing with this distinguished audience my own view as a lawyer on several matters that fall under the topic.

The first point is that China's approach to international law was, from the very beginning of its contact with the countries that wrought modern international law, a rather positive one. I am referring to the late nineteenth century when the door of China was forced open by war. International law, or the law of nations, provided a modicum of assistance to preserve some dignity and integrity of the anxious but pressurized Middle Kingdom.[1] However, a single legal battle won could not turn back the tide of a losing war. And yet the function of international law was benign. Indeed, this observation is linked with another that the basic tenets of international law—nowadays conveniently embodied in the UN Charter—preserve and uphold statehood on the basis of respect for sovereignty, independence, and territorial integrity. States can thus survive physical destruction by grace of international law. To that extent, the benign effect of this legal order is personally felt by the applier, and objectively seen by others. I revert to my point. The government of the People's Republic of China had its seat in the UN organization restored in 1971, implemented the reform and open-up policy in 1978, and joined the WTO in 2001. Out of the three monumental events in contemporary Chinese history, international law has played an important role in two.

Hence, my second point. It follows from the first point that it is not difficult to see why the integration of China into the international legal order in the years past has been a voluntary but measured process. Symptomatic of this cautious process is China's contemporary attitude towards international law, which is at times quiet and reactive since the country is still learning its trade while adapting to a globalizing world. More importantly, it should be seen that China accepts the basic principles and rules of international law, being by now an active member of over 130 international organizations. It considers itself a developing country, upholding the principles of sovereignty, independence, and territorial integrity. But the partly auspicious beginning of China's association with international law, as mentioned above, has exerted an enduring influence upon it, in that China has been vocal in support of the

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[1] Wang Tieya, *International Law in China: Historical and Contemporary Perspectives*, 221 Recueil des cours 195, 243–44, 354–55 (1990).

international rule of law, during recent debates within the UN General Assembly. In 2009, China was also critical of the negative reaction of some countries towards the Kosovo advisory proceedings before the ICJ (these countries felt that the proposed advisory opinion would serve no practical purpose). China considered that that attitude showed insufficient support for the rule of law, given the importance of the issue in question to many members of the UN. I would not discuss the implementation of international law within China, but rather offer a word of conclusion to the second point. It takes time for a law apprentice to become an expert and, one day, an authority in his or her field of specialty. In many instances of state practice in the past thirty years, however, China has already displayed a penchant to strike a balance between the principle of sovereignty and the ideal of the rule of law in international relations. An interesting example would be the turnover of Hong Kong to Chinese rule in 1997. A legally adroit China can only enhance the rule of law in today's world, and the best is yet to come from that country.

My third point pertains to a specific area of practice of China, in order to illustrate the point that, in such an area, China can feel the full weight of its long history, which may open up new possibilities in the resolution of territorial disputes with its neighbors. This point seeks to show that China's embrace of international law may need to be compensated for in specific areas of practice where the law itself is insufficient. There may be a sense that the integration of China into the international community during the last 30 years has been a somewhat long process, but this is not only due to the size and population of China, but perhaps also due to the sometimes uneasy relationship between international law and China's history. China's practice in the South China Sea is a case in point. After a very preliminary study by a senior colleague of mine, Judge Gao, and myself of the nine-dash line in this area of sea, just published in an Agora on the South China Sea in the January issue of the *American Journal of International Law*,[2] we were struck by the existence of historic rights that Chinese nationals have enjoyed unopposed over the centuries both in the sea and on the islands enclosed by it. Evidence of such rights, including habitation on the islands, is unmatched by that of any of the neighboring countries. This gave rise to our conclusion, at the time of writing, that the 1982 UN Convention on the Law of the Sea, comprehensive and ambitious as it may be, does not exhaust customary law in this area. It does not, for instance, deal with the acquisition of territorial sovereignty over land, including islands and rocks, except for those of its provisions that regulate the status of the territorial sea and the archipelagic waters. The void in this regard is an open invitation for customary law to fill, and it is well known that the law of the discovery and occupation, and the doctrine of historic title, are customary in nature.

A distinction may be kept in mind here. The law of occupation in terms of acquisition of territorial sovereignty is not identical to the law of belligerent occupation. The legality in the resort to belligerent occupation as a means of war is the key to the latter, whereas a finding of *terra nullius* is the one for the former, which involves no illegal use of force against another sovereign state. Two further comments are offered in connection with the preceding conclusion of our Agora essay. First, the application of the customary law of acquiring territorial sovereignty requires historical evidence of peaceful and effective use and administration, following a discovery of *terra nullius*. Second, without its 1970s' intrusion into the Nansha or Spratly Islands, the Philippines would not have the ground to initiate an

[2] Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AJIL 98 (2013).

arbitration as it did in January 2013 against China, since its notification for arbitration would have been clearly inadmissible from the outset due to its intrinsic relations to maritime delimitation, excluded under Article 298 of the 1982 UN Convention on the Law of the Sea. But in any case, the intrusion of the 1970s, promptly protested by China at the time, has also predetermined the current matter as one of, above all, a dispute of territorial sovereignty. As the ICJ eloquently stated in 1978, continental shelf rights under that convention ''are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State.''[3] Acquisition of territorial sovereignty clearly precedes delimitation of maritime entitlements, and the situation in the South China Sea is thus outside the convention's scope. Ultimately, the 1970s' intrusion could never become legal under the UN Charter and general international law—under which the illegal use of force cannot be recognized in international law and thus produces no legal effect. There appears to be no leg for the Philippine Notification for arbitration to stand on, certainly not by way of an implicit presumption based in that early intrusion's *fait accompli*.

But I come back to my point of the parallelism between customary law and the 1982 UN Convention, which is ancillary to the third point I am making. The two sources of law complement, rather than subsume, each other. The customary law argument advocated in our Agora essay primarily relies upon historical evidence of state activities and acquiescence of other countries from close and afar. China's long history seems, therefore, to open up a new perspective with regard to the current situation in the South China Sea. There have been historical rights vested in Chinese nationals that exist separately from the 1982 UN Convention. It is only reasonable that international law should recognize the fact that its advent in modern times was preceded by other significant events in history, many with a persistent influence down to the present age. Even inter-temporal law would need to consider a proper, inchoate title. However, not to delve into the point for now, I would offer a word of caution to temper the preceding suggestion. By claiming sovereignty over the islands concerned on the basis of customary law, China is actively helping the cause of the international rule of law, while it has explicitly maintained a strong commitment to its obligations under the 1982 UN Convention. The rights it seeks to defend within the nine-dash line are supplementary to what are provided for under the convention.

My discussion of the third point should also be qualified by the fact that, as the editors in chief of the AJIL indicated in their introductory note to the Agora essays, all three essays were prepared before the filing of the Philippine Notification in January 2013 and did not take account of the proceedings of the arbitration.[4] The personal observations discussed above were therefore made in hindsight and in a tentative fashion.

Remarks by Jacques deLisle*

Is the People's Republic of China (PRC) moving away from robust views of sovereignty and rigid opposition to ''interference'' in ''internal affairs''? Common explanations for China's prior positions suggest so. China's support for ''black box'' sovereignty is conventionally attributed to legacies of weakness and distrust. Nineteenth-century experiences with colonial encroachment and foreigners' extraterritorial rights, ''unequal treaties'' that imposed

[3] Aegean Sea Continental Shelf (Greece v. Turk.), 1978 I.C.J. 103 para. 86 (Dec. 19).

[4] Lori Fisler Damrosch & Bernard H. Oxman, *Editors' Introduction*, 107 AJIL 95, 97 (2013).

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