

China's South China Sea Claims as "Unprecedented": Sceptical Remarks

La nature "sans précédent" des revendications chinoises en mer de Chine méridionale: réflexions sceptiques

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Abstract

A solely legalistic analysis of China's South China Sea claims has given way to speculation regarding their exact nature. Scholars and the tribunal in *Philippines v China* have collectively described China's position as "ambiguous" and "vague." For others, China's regulatory framework sets dangerous new precedents in the areas of effective occupation, historic rights, and exclusive economic zones. This article seeks to nuance these assessments. Contextualizing China's framework within a broader geopolitical project reveals a China exploiting historic legal precedents in a manner reminiscent of imperial America. This should cast doubt on those too quick to see China as a rule-breaking new power eager to upset international norms. Rather, China's "Caribbean" is a microcosm for a new great power coming into its own following an existing model.

Résumé

Une analyse strictement juridique des revendications chinoises en mer de Chine méridionale a provoqué des spéculations quant à la nature précise de ces revendications. Des juristes et même la Cour permanente d'arbitrage dans *Philippines c Chine* ont qualifié la position chinoise d'"ambigüe" et de "vague." D'autres estiment que le cadre de réglementation de la Chine établit de dangereux précédents en matière d'occupation effective, de droits historiques et de zones économiques exclusives. Cet article cherche à nuancer ces analyses. Lorsqu'évalué en lumière des plus grands objectifs géopolitiques de la Chine, ce cadre de réglementation révèle que la Chine tente d'exploiter quelques précédents historiques juridiques d'une façon qui rappelle la politique impériale des États-Unis. Ceci devrait remettre en question les qualifications hâtives décrivant la Chine en tant que nouvelle puissance voulant perturber les normes internationales. En effet, la mer de Chine méridionale est plutôt un microcosme d'une nouvelle grande puissance suivant un modèle déjà existant.

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Keywords: China's rise; effective occupation; exclusive economic zones; historic rights; law of the sea; lawfare; legal warfare; maritime claims; South China Sea; territorial claims.

Mots-clés: Droit de la mer; droits historiques; guerre juridique; "lawfare"; mer de Chine méridionale; mer de Chine du Sud; montée de la Chine; occupation effective; revendications maritimes; revendications territoriales; zones économiques exclusives.

INTRODUCTION

For journalist Robert Kaplan, the South China Sea will be "the 21st century's defining battleground" and the "throat of global sea routes."¹ This assessment is primarily based upon the economic, geopolitical, and military significance of the South China Sea. It is one of the world's busiest trade routes, with more than half of the world's annual merchant fleet tonnage and a third of all maritime traffic traversing its waters.² The Sea is at the centre of the maritime route (or "Road") of China's Belt and Road Initiative, an infrastructure development project totalling US \$4–8 trillion in investments that some have described as a twenty-first-century Marshall Plan.³ The Sea is also important for the fishing industries of its coastal states such as Vietnam, Malaysia, and the Philippines.⁴ The Sea, moreover, contains vast quantities of hydrocarbon deposits (estimated to be between 28 and 213 billion barrels), making it an attractive destination for resource development.⁵

¹ Robert D Kaplan, "The South China Sea Is the Future of Conflict: The 21st Century's Defining Battleground Is Going to Be on Water," *Foreign Policy* (15 August 2011), online: <<http://foreignpolicy.com/2011/08/15/the-south-china-sea-is-the-future-of-conflict>>.

² Robert D Kaplan, *Asia's Cauldron: The South China Sea and The End of a Stable Pacific* (New York: Random House, 2014) at 9.

³ For comparison's sake, the Marshall Plan amounted to US \$130 billion in current US dollars; "Our Bulldozers, Our Rules," *The Economist* (2 July 2016), online: <<https://www.economist.com/news/china/21701505-chinas-foreign-policy-could-reshape-good-part-world-economy-our-bulldozers-our-rules>>; Willy Lam Wo-lap, "Getting Lost in 'One Belt, One Road'," *Ejnsight* (16 April 2016), online: <<http://www.ejnsight.com/20160412-getting-lost-one-belt-one-road/>>; see generally Yiping Huang, "Understanding China's Belt & Road Initiative: Motivation, Framework and Assessment" (2016) 40 *China Economic Review* 314 at 318.

⁴ Leszek Buszynski, "The South China Sea: Oil, Maritime Claims, and US–China Strategic Rivalry" (2012) 35:2 *Washington Quarterly* 139 at 143–44; Ian James Storey, "Creeping Assertiveness: China, the Philippines and the South China Sea Dispute" (1999) 21:1 *Contemporary Southeast Asia* 95 at 97–98; Hui Zhong & Michael White, "South China Sea: Its Importance for Shipping, Trade, Energy and Fisheries" (2017) 2:1 *Asia-Pacific Journal of Ocean Law and Policy* 9 at 21–23.

⁵ This figure is based on a 2008 estimate, "Analysis: China Unveils Oil Offensive in South China Sea Squabble," *Reuters* (1 August 2012), online: <<http://www.reuters.com/article/us-southchinesea-china/analysis-china-unveils-oil-offensive-in-south-china-sea-squabble-idUSBRE8701LM20120801>>.

To the dismay of other coastal states, China's attempt to control the South China Sea could translate into regional hegemony and advance its great power ambitions.⁶ As a result, China, the Sea's coastal states, the United States, and its allies all vie to protect their respective interests in the region.⁷

China's involvement in the South China Sea dispute is also a microcosm for the ways in which China defines its role within the international legal order. The South China Sea, much like the Caribbean during America's imperial age, serves as a stage for a rivalry between "new" and "old" powers. Historically, such a rivalry is often cast as a debate between "new power" notions of sovereignty and "old power" conceptions of freedom of navigation.⁸ In the nineteenth century, the United States sought to protect its nearby sea from British influences.⁹ Similarly, in the South China Sea, China wants to defend a certain degree of sovereignty over a "core interest," while the United States, a more established power, seeks to advance a regional agenda focused on freedom of navigation.¹⁰

While scholars have drawn this historical analogy, and referred to the South China Sea as "China's Caribbean," they have often overlooked the legal similarities between nineteenth-century America and

⁶ E.g. Associated Press, "China Seeks to Control East Asia, US Commander Tells Senators," *The Guardian* (23 February 2016), online: <<https://www.theguardian.com/world/2016/feb/23/south-china-sea-east-asia-control-us-military>>; Dean Cheng, *Sea Power and the Chinese State* (Washington, DC: Heritage Foundation, 2011) at 2; Joseph YS Cheng & Stephanie Paladini, "China's Ocean Development Strategy and Its Handling of the Territorial Conflicts in the South China Sea" (2014) 35:2 *Philippine Political Science Journal* 185 at 193–95.

⁷ David Rosenberg & Christopher Chung, "Maritime Security in the South China Sea: Coordinating Coastal and User State Priorities" (2008) 39:1 *Ocean Dev & Intl L* 51 at 52; Buszynski, *supra* note 4 at 145.

⁸ Tommy TB Koh, "The Origins of the 1982 Convention on the Law of the Sea" (1987) 2 *Mal L Rev* 1 at 2–3; Andrew Welch, "The History of International Law in the Caribbean and the Domestic Effects of International Law in the Commonwealth Caribbean" (2014) 1 *SOAS LJ* 124; this theme has been the subject of a debate, see e.g. Ruth Lapidoth, "Freedom of Navigation: Its Legal History and Normative Basis" (1975) 6:2 *J Mar L & Com* 259.

⁹ Toshi Yoshihara & James R Holmes, "Can China Defend a 'Core Interest' in the South China Sea?" (2011) 34:2 *Washington Quarterly* 45 at 53.

¹⁰ E.g. Peter Dutton, "Three Disputes and Three Objectives: China and the South China Sea" (2011) 64:4 *Naval War College Review* 42 at 53–55; M Taylor Fravel, "China's Strategy in the South China Sea" (2011) 33:3 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 292 at 296; Joshua P Rowan, "The US-Japan Security Alliance, ASEAN, and The South China Sea Dispute" (2005) 45:3 *Asian Survey* 414 at 429.

post-1992 China.¹¹ Indeed, China is taking advantage of legal precedents and exceptions that have historically benefited Western powers. In particular, China's legal warfare (lawfare) strategy has relied upon historically accepted norms in three areas of law: effective occupation, historic rights, and exclusive economic zones (EEZ). The purpose of this article is not to contest or question the legal value of China's claims; as many commentators have noted, the legal basis of China's claims can be vague and uncertain, which reduces the pertinence of such an inquiry. Rather, this article seeks to illuminate China's longer-term legal strategy and to point out the historical similarities between American and Chinese efforts to shape international law during their respective "rise" periods through the use of strategic vagueness. Following the logical course of this historical analogy should call into question the belief that China is in the process of setting new,¹² "self-created,"¹³ or "dangerous"¹⁴ precedents in these three areas.

The argument proceeds along five interrelated lines of inquiry. The first section defends geopolitics as an appropriate lens from which to

¹¹ E.g., Kaplan writes "China's position vis-à-vis the South China Sea, is akin to America's position vis-à-vis the Caribbean Sea in the 19th and early 20th centuries." Kaplan, *supra* note 1; James R Holmes & Toshi Yoshihara, "China's 'Caribbean' in the South China Sea" (2006) 26:1 SAIS Review of International Affairs 79; Chengxin Pan, "The 'Indo-Pacific' and Geopolitical Anxieties about China's Rise in the Asian Regional Order" (2014) 68:4 Australian Journal of International Affairs 453 at 457; Christopher R Rossi, "Treaty of Tordesillas Syndrome: Sovereignty *Ad Absurdum* and the South China Sea Arbitration" (2017) 50 Cornell Intl LJ 231 at 266; Hung Pham, "Case: *Philippines v. China*: The South China Sea Finally Meets International Law" (2016) 16:2 Chicago-Kent J Intl & Comp L 1 at 2; Stephen M Walt, "Dealing with a Chinese Monroe Doctrine," *New York Times* (2 May 2012), online: <<https://www.nytimes.com/roomfordebate/2012/05/02/are-we-headed-for-a-cold-war-with-china/dealing-with-a-chinese-monroe-doctrine>>; for some sceptical thoughts on this analogy, see e.g. Amitav Acharya, "Power Shift or Paradigm Shift? China's Rise and Asia's Emerging Security Order" (2014) 58 International Studies Quarterly 158 at 158–62.

¹² E.g. Clive R Symmons, "Historic Waters and Historic Rights in the South China Sea: A Critical Appraisal" in S Wu & M Valencia, eds, *UN Convention on the Law of the Sea and the South China Sea* (London: Routledge, 2015) 191 at 206.

¹³ E.g. Robert T Kline, "The Pen and the Sword: The People's Republic of China's Effort to Redefine the Exclusive Economic Zone through Maritime Lawfare and Military Enforcement" (2013) 216 Military L Rev 122 at 135.

¹⁴ E.g. Charles R Wright, "Security in the Asia-Pacific Region" (1994) Brown Journal of World Affairs 331 at 335; Conrad D David, *Lawfare in the Near Seas: How China's Maritime Claims Impact Regional Security* (Newport, RI: Naval War College, 2010) at 27 [unpublished]; Stacey Solomone, "Sino-US Security Relations: The PLA Factor" (1996) 5:11 Journal of Contemporary China 81 at 87; Ralph A Cossa, "Security Implications of Conflict in the South China Sea: Exploring Potential Triggers of Conflict," *Pacific Forum* (March 1998) at 9.

contextualize the legal manifestations of the South China Sea dispute. The second section explains how China's lack of clear formal legal argumentation has led scholarly speculation as to the legal basis of its claims. The third section will examine China's historical legal claims and military activities in relation to the South China Sea dispute following its implementation of the *United Nations Convention on the Law of the Sea (UNCLOS)* in 1992.¹⁵ The fourth section sketches out the similarities between China's regulatory framework and America's embrace of Mahanian approaches to naval strategy. The article will conclude in the fifth section with a discussion of how China has extended, or simply applied, the law of effective occupation, historic rights, and EEZs to suit its geopolitical interests.

GEOPOLITICS, LAWFARE, AND CHINA

This article adopts an interdisciplinary approach to international law. This approach is premised upon the bidirectional (or inter-relational)¹⁶ nature of international law and international relations, described by Anne-Marie Slaughter Burley as "law informed by politics" and "politics informed by law."¹⁷ Indeed, geopolitics can provide a means to better contextualize, understand, and predict state behaviour. This basic premise is particularly applicable to the South China Sea dispute in two regards. First, China's legal actions in the South China Sea dispute have been described as vague, ambiguous, contradictory, and abstruse.¹⁸ The inadequacy of China's official legal statements in providing a complete and intellectually satisfying account of China's claim confirms the need for a more interdisciplinary approach that embraces the importance of geopolitical studies and underscores the poverty of a strictly legal analysis.¹⁹ Second, this premise is justified by China's own instrumental approach to international law.²⁰ Partly a reaction to more Western ideals of universal international law and

¹⁵ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) [*UNCLOS*].

¹⁶ Shirley V Scott, "International Law as Ideology: Theorizing the Relationship between International Law and International Politics" (1994) 5 *EJIL* 1 at 4–5.

¹⁷ Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87:2 *AJIL* 205 at 239.

¹⁸ See notes 124–26 below.

¹⁹ This is particularly true of the South China Sea dispute where China has failed to provide a clear legal basis for its claims; see section "China's Legal Claims" below.

²⁰ Ben Saul, "China, Natural Resources, Sovereignty and International Law" (2013) 37:2 *Asian Studies Review* 196 at 197–98; Jacques deLisle, "China's Approach to International Law" (2000) *Proceedings of the Annual Meeting (American Society of International Law)* 267 at 273.

to China's seventeenth-century contact with the Western world,²¹ there is a Chinese perception that international law was imposed upon China.²² This perception (whether it is founded or not) has profoundly impacted its perception of international law and state sovereignty. In particular, "it explains why China always attaches such importance to sovereign equality in international affairs."²³ China's strong (or, according to some, absolutist²⁴) conceptions of sovereignty (especially in its post-colonial period)²⁵ are not only related to its dissatisfaction with the international order but also to its relative weakness to change it.²⁶ These experiences have pushed China towards more realist and legalistic schools of thought, which perceive of international relations in terms of power and state interest.²⁷

China's instrumentalist approach to international law is also evident in its embrace of "lawfare" as a tool to advance its foreign policy objectives.²⁸ Simply stated, lawfare (a portmanteau of legal warfare) is a form of asymmetric warfare that instrumentalizes law to pursue a military or foreign policy objective. Major General Charles J. Dunlap, who first coined the term, defines lawfare as "the strategy of using — or misusing — law as a substitute for traditional military means to achieve an operational objective."²⁹

²¹ Anne Hsiu-An Hsiao, "China and the South China Sea 'Lawfare'" (2016) 52:2 *Issues and Studies: A Social Science Quarterly on China, Taiwan, and East Asian Affairs* 1 at 20–21; Jeanette Greenfield, *China's Practice in the Law of the Sea* (Oxford: Clarendon Press, 1992) at 4; deLisle, *supra* note 20 at 271.

²² Simon Chesterman, "Asia's Ambivalence about International Law and Institutions: Past, Present and Futures" (2017) 27:4 *EJIL* 945 at 962; Daniel J Hoffheimer, "China and the International Legal Order: An Historical Introduction" (1979) 11:2 *Case W Res J Intl L* 251 at 254.

²³ Hanqin Xue, *Chinese Contemporary Perspectives on International Law, History, Culture and international Law* (The Hague, Netherlands: The Hague Academy of International Law, 2012) at 28, 71–72.

²⁴ Saul, *supra* note 20 at 196.

²⁵ Barry Buzan, "China in International Society: Is 'Peaceful Rise' Possible?" (2010) 3 *Chinese Journal of International Politics* 5 at 30.

²⁶ DeLisle, *supra* note 20 at 272.

²⁷ *Ibid* at 269; in the South China Sea dispute, see Kline, *supra* note 13 at 168. China's embrace of realism may explain the predominance of the neo-realist approach in security studies of the region, see Mikael Weissmann, "The South China Sea Conflict and Sino-ASEAN Relations: A Study in Conflict Prevention and Peace Building" (2010) 34:3 *Asian Perspective* 35 at 36.

²⁸ Hsiao, *supra* note 21 at 21.

²⁹ Charles J Dunlap, "Lawfare Today: A Perspective" (2008) 3 *Yale Journal of International Affairs* 146 at 146; various definitions of lawfare exist, see e.g. Orde Kittrie, *Lawfare: Law as a Weapon of War* (Oxford: Oxford University Press, 2016) at 5–8.

Roughly since the 1990s, China has embraced legal warfare (*falü zhan*) as a main component of its strategic doctrine.³⁰ In 1996, China's then President Jiang Zemin advised a group of Chinese international lawyers that China "must be adept at using international law as a weapon."³¹ In 1999, *Unrestricted Warfare*, a treatise written by two Chinese colonels (and published by the Chinese military), repeatedly referred to "legal warfare" as a means to use international law to primarily benefit a certain country.³² This book was followed by at least three treatises detailing the ways in which international law may be used by the People's Liberation Army to advance its objectives.³³ These works are manifestations of the legalistic (*Fajia*) tradition, which seeks to create and protect international power through the use of incentives and sanctions.³⁴ Even today, the Chinese People's Liberation Army lists "legal warfare" as one of the three main types of warfare.³⁵

For China, the use of lawfare presents several advantages over other forms of warfare. Lawfare is often less costly than traditional warfare.³⁶ It can also be used to exploit the West's affection for the rule of law. In strategic terms, the rule of law is regarded as a source of strength (or a Clausewitzian centre of gravity)³⁷ for the United States and the West. Seen under this light, undermining the legal foundations of American strength is an important objective for China if it wants to change the international order. As one of the authors of *Unrestricted Warfare* remarked in an interview, "[w]e are a weak country, so do we need to fight according to your rules? No."³⁸ Moreover, lawfare can be an efficient alternative to other military tactics. In their 2007 annual report to Congress, Chinese military

³⁰ Kittrie, *supra* note 29 at 162; Andrea Beck, "China's Strategy in the Arctic: A Case of Lawfare?" (2014) 4:2 Polar Journal 306 at 307–08.

³¹ Dong Wang, *China's Unequal Treaties: Narrating National History* (New York: Lexington Books, 2005) at 128.

³² Qiao Liang & Wang Xiangsui, *Unrestricted Warfare* (Beijing: PLA Literature and Arts Publishing House Arts, 1999), an abridged translation is available at <<http://fas.org/nuke/guide/china/doctrine/WEBRES3.htm>>.

³³ Kittrie, *supra* note 29 at 162 cites three examples (*Analysis of 100 Cases of Legal Warfare* (2004); *Legal Warfare in Modern War* (2005); and *Under Informatized Conditions: Legal Warfare* (2007)).

³⁴ DeLisle, *supra* note 20 at 269.

³⁵ Cheng, *supra* note 6 at 2.

³⁶ Kittrie, *supra* note 29 at 3.

³⁷ William Eckhardt, "Lawyering for Uncle Sam When He Draws His Sword" (2003) 4 Chicago J Intl L 431 at 444; David, *supra* note 14 at 12–14.

³⁸ Thanos P Dokos, *Countering the Proliferation of Weapons of Mass Destruction: NATO and EU Options in the Mediterranean and the Middle East* (New York: Routledge, 2014) at 21.

strategists noted that the use of international law can help deter adversaries prior to conflict.³⁹

CHINA'S LEGAL CLAIMS

While China has generally been consistent as to the territories it claims within the South China Sea, it has thus far been reluctant to clarify the legal basis for its claims.⁴⁰ The arbitral tribunal also noted this lack of clarity in China's claims: "The Tribunal has found, however, ... that there is no legal basis for any Chinese historic rights, or other sovereign rights and jurisdiction beyond those provided for in the Convention, in the waters of the South China Sea encompassed by the 'nine-dash line'."⁴¹ As a result, jurists have been compelled to speculate on the legal basis for China's claims. This search has concentrated on China's official state declarations, domestic laws, and academic legal literature during five key periods of the South China Sea dispute: 1933–51, 1956–96, 1998–2005, 2009–11, and 2013–16.⁴² These periods roughly correspond to different phases of tension in the South China Sea.

1933–51

The year 1933 marks the beginning of the modern South China Sea dispute when France claimed sovereignty (on behalf of Vietnam) over the Parcel and Spratly islands.⁴³ While France laid claims on the Spratlys,

³⁹ US Office of the Secretary of Defense, *Annual Report to Congress, Military Power of the People's Republic of China* (2007) at 13, online: <<https://fas.org/nuke/guide/china/dod-2007.pdf>>.

⁴⁰ E.g. Florian Dupuy & Pierre-Marie Dupuy, "A Legal Analysis of China's Historic Rights Claim in the South China Sea" (2013) 107:1 AJIL 124 at 128; Jian Zhang, "China's South China Sea Policy: Evolution, Claims and Challenges" in Leszek Buszynski & Christopher B Roberts, eds, *The South China Sea Maritime Dispute: Political, Legal and Regional Perspectives* (New York: Routledge, 2014) at 60; Zou Keyuan, "China's U-Shaped Line in the South China Sea Revisited" (2012) 43:1 Ocean Dev & Intl L 18 at 29; although some commentators have argued that China claims full sovereignty over the entirety of the South China Sea, rather than over certain features of the Sea, see Choon-ho Park, "The South China Sea Disputes: Who Owns the Islands and the Natural Resources?" (1978) 5:1 Ocean Dev & Intl L 27 at 54.

⁴¹ *In the Matter of the South China Sea Arbitration (Republic of the Philippines v People's Republic of China)*, PCA Case no 2013-19, Award on Merits (12 July 2016) at para 692 [*South China Sea (Merits)*].

⁴² Varying divisions have been presented in the academic literature. See e.g. Dupuy & Dupuy, *supra* note 40 at 129–31, who prefer to divide the South China Sea dispute timeline into three periods: 1958–96, 1998, 2009–11.

⁴³ Harry H Roque, "China's Claim to the Spratly Islands under International Law" (1997) 15:3 J Energy & Natural Resources L 189 at 192.

Japan rejected this claim in 1938 as “unjustifiable.”⁴⁴ In 1951, Japan renounced all of its claims to the South China Sea in the *Treaty of San Francisco*.⁴⁵ In the same year, the Soviet Union appealed to recognize China’s “full sovereignty” over (notably) Taiwan and the Spratlys.⁴⁶ Despite these acts of recognition, China did not occupy any of the features in the Sea in 1951.⁴⁷

1956–96

During this period, China made various attempts to demarcate its territories in the Sea. In 1956, China asserted its territorial claim over the Spratlys in response to the Philippines’ claim over some of the islands in the group.⁴⁸ Following the conclusion of *UNCLOS* in 1958,⁴⁹ China presented its first official claim in its 1958 *Declaration on the Government of the People’s Republic of China on China’s Territorial Sea*.⁵⁰ In it, China affirmed sovereignty over the Penghu Islands, Pratas Islands (*Dongsha*), Paracel Islands (*Xisha*), Macclesfield Bank (*Zhongsha*), and the Spratlys (*Nansha*):

The breadth of the territorial sea of the People’s Republic of China shall be twelve nautical miles. This provision applies to all territories of the People’s Republic of China including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas.⁵¹

⁴⁴ Jianming Shen, “China’s Sovereignty over the South China Sea Islands: A Historical Perspective” (2002) 1 *Chinese Intl L J* 94 at 138.

⁴⁵ Art 2 (f) reads: “Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands.” *Treaty of Peace with Japan, signed at San Francisco*, 8 September 1951, 136 UNTS 45 (1952) (entered into force 28 April 1952).

⁴⁶ Shen, *supra* note 44 at 99.

⁴⁷ Fravel, *supra* note 10 at 298.

⁴⁸ Dupuy & Dupuy, *supra* note 40 at 126.

⁴⁹ David L Larson, Michael W Roth & Todd I Selig, “An Analysis of the Ratification of the UN Convention on the Law of the Sea” (1995) 26:3 *Ocean Dev & Intl L* 287 at 288–89.

⁵⁰ Standing Committee of National People’s Congress, *Resolution of the Standing Committee of the National People’s Congress of the Approval of the Declaration of the Government on China’s Territorial Sea* (4 September 1958), an English translation is available online: <<http://www.asianlii.org/cn/legis/cen/laws/rotscotnpcotaotdotgocots1338/>>.

⁵¹ *Ibid* at para 1.

The substance of this declaration was reaffirmed in China's 1992 *Law on the Territorial Sea and the Contiguous Zone* [1992 Law].⁵² Article 2 of the 1992 Law reiterated its sovereignty on the islands in the South China Sea and in the East China Sea (Diaoyu Islands), while leaving the door open for future claims:

The land territory of the People's Republic of China includes the mainland of the People's Republic of China and its coastal islands; Taiwan and all islands appertaining thereto including the Diaoyu Islands; the Penghu Islands; the Dongsha Islands; the Xisha Islands; the Zhongsha Islands and the Nansha Islands; as well as all the other islands belonging to the People's Republic of China.⁵³

While China reaffirmed its sovereignty over these islands and its ability to use military force to protect them, the 1992 Law does not include any coordinates or boundaries for these islands. Upon ratification of UNCLOS in 1996,⁵⁴ China reaffirmed "its sovereignty over all its archipelagos and islands as listed in article 2 [of the 1992 Law]."⁵⁵ None of these sovereignty claims were accompanied by legal justification. Rather, these claims merely affirmed China's sovereignty over these territories as fact.

1998–2005

In contrast to the previous periods, China began to offer some formal hints as to its legal basis. In 1998, China enacted the *Exclusive Economic Zone and Continental Shelf Act* [1998 Law]⁵⁶ to safeguard its "maritime rights and interests."⁵⁷ Article 14 stipulates that "[n]o provisions of this

⁵² In addition to the Penghu Islands, Pratas Islands, Paracel Islands, Macclesfield Bank, and the Spratlys, the law added the Diaoyu Islands found in the East China Sea to its sovereign claim. *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone*, National People's Congress, 25 February 1992, an English translation is available online: <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf> [1992 Law].

⁵³ *Ibid.*

⁵⁴ UNCLOS, *supra* note 15.

⁵⁵ United Nations, *United Nations Convention on the Law of the Sea: Declarations Made upon Signature, Ratification, Accession or Succession or Anytime Thereafter* (29 October 2013), online: <http://www.un.org/depts/los/convention_agreements/convention_declarations.htm>.

⁵⁶ Adopted by the Standing Committee of the Ninth National People's Congress, 26 June 1998, an English translation is available online: <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf> [1998 Law].

⁵⁷ *Ibid.*, art 1.

Law can prejudice historical rights of the People's Republic of China."⁵⁸ This article is China's first formal reference to a historic rights claim. The precise meaning of Article 14 has been the subject of extensive academic debate.⁵⁹ This is due in no small part to the lack of explanation for its inclusion in the *1998 Law*.⁶⁰ At the very least, this article suggests that China enjoys certain rights in virtue of historical facts.⁶¹ These historical rights may refer to China's supposed long history of control over the South China Islands dating back to the twenty-first century BCE.⁶² For one Vietnamese scholar, these "historical rights" refer to sovereignty over 80 percent of the South China Sea and to traditional fishing rights.⁶³ Other scholars have argued that Article 14 makes a stronger claim. Another interpretation holds that Article 14 extends China's sovereignty claims to areas beyond the 200-nautical-mile EEZ limit established in *UNCLOS*.⁶⁴ This academic debate sparked by the varying interpretations of Article 14 contributed to Vietnam's contestation of China's claim, arguing that China's "historical interests" are inconsistent with international law.⁶⁵ This interpretive debate underscores the lack of clarity surrounding the historical and legal bases for China's claims. More precisely, the *1998 Law* does not provide any specification regarding the ways in which history supports its claims. Furthermore, it does not specify which historical rights are being affirmed, nor does it specify precisely their legal form—be it maritime fishing rights, sovereign territory claims, or something else.

⁵⁸ *Ibid.*

⁵⁹ Zou Keyuan, "Historic Rights in International Law and in China's Practice" (2001) 32 *Ocean Dev & Intl L* 149 at 162.

⁶⁰ *Ibid* at 160; *1998 Law*, *supra* note 56.

⁶¹ Dupuy and Dupuy, *supra* note 40 at 129;

⁶² For a review of the historical evidence, see Shen, *supra* note 44; Jianming Shen, "International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands" (1997) 21 *Hastings Intl & Comp L Rev* 1; Shen's review of this historical evidence and his assessment of Admiral Zheng He's activities should be nuanced, as scholars have pointed out that several non-Chinese dynasties had a presence in these waters and that China's historical interest in the Sea may be a recent phenomenon. See e.g. Bill Hayton, *The South China Sea: The Struggle for Power in Asia* (New Haven: Yale University Press, 2014) at 11–28.

⁶³ Nguyen Hong Thao, "China's Maritime Moves Raise Neighbors' Hackles" (1998) 4:47 *Vietnam L & Legal Forum* 1 at 21–22; Nguyen Hong Thao, "Vietnam and the Code of Conduct for the South China Sea" (2001) 32:2 *Ocean Dev & Intl L* 105 at 107.

⁶⁴ Keyuan, *supra* note 59 at 162; *UNCLOS*, *supra* note 15, art 57.

⁶⁵ United Nations, "Vietnam: Dispute Regarding the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China Which Was Passed on 26 June 1998" (1998) 38 *UN Law of the Sea Bulletin* 54 at 55.

Following 1998, there were signs of progress in state relations among the South China Sea's coastal states. In 2002, China and ten members of the Association of Southeast Asian Nations (ASEAN) signed the *Declaration on the Conduct of Parties on the South China Sea*.⁶⁶ In it, the signatories affirm their good faith in securing peace in the region and their commitment to peaceful dispute resolution.⁶⁷ Some considered this declaration to be the "political foundation" for future collaboration in the region.⁶⁸ This hope was further justified by a secret 2005 joint tripartite petroleum exploration agreement between China, Vietnam, and the Philippines.⁶⁹

2009–11

In 2009, Vietnam passed a law outlining its baselines in conformity with the provisions in *UNCLOS* regarding archipelagic baselines.⁷⁰ In contrast to Chinese domestic legislation, Vietnam's law lists precise geographic coordinates for its baselines.⁷¹ According to this same Vietnamese law, the Scarborough Shoal and the Kalayaan Island Group (located in the Spratlys) are to be treated as islands, pursuant to *UNCLOS*.⁷² The Philippines also indicated that they intended to present a submission regarding their

⁶⁶ The ten members of the Association of Southeast Asian Nations (ASEAN) are: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. See ASEAN, *Declaration on the Conduct of Parties in the South China Sea* (4 November 2002), online: <http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2> [2002 Declaration].

⁶⁷ *Ibid.*, preamble.

⁶⁸ Wendy Duong, "Following the Path of Oil: The Law of the Sea or Realpolitik — What Good Does Law Do in the South China Sea Territorial Conflicts Chinese Law in the Global Context" 30 *Fordham Intl LJ* 1098 at 1110; in retrospect, 2002 Declaration seems to be a part of ASEAN's approach to regional integration that may be described as "long on rhetoric and short on implementation." David Martin Jones & Michael LR Smith, "Making Process, Not Progress: ASEAN and the Evolving East Asian Regional Order" (2007) 32:1 *International Security* 148 at 175; see also Quang Minh Pham, "The South China Sea Security Problem: towards Regional Cooperation" (2010) 8 *Asia Europe Journal* 427 at 429–30.

⁶⁹ Duong, *supra* note 68 at 1174–80; Ministry of Foreign Affairs of the People's Republic of China, *Oil Companies of China, the Philippines and Vietnam Signed Agreement on South China Sea Cooperation* (15 March 2005), online: <<http://ph.china-embassy.org/eng/zt/nhwt/t187333.htm>>.

⁷⁰ *Act no 9522 to Amend Certain Provisions of Republic Act no 3046, as Amended by Republic Act no 5446, to Define the Archipelagic Baselines of the Philippines and for Other Purposes*, Fourteenth Congress Second Regular Session, The Philippines (10 March 2009), online: <http://www.lawphil.net/statutes/repacts/ra2009/ra_9522_2009.html>.

⁷¹ *Ibid.*, s 1.

⁷² *Ibid.*, s 2; *UNCLOS*, *supra* note 15, art 121.

continental shelf.⁷³ That same year, the Philippines filed joint submissions with Malaysia to the UN Commission on the Limits of the Continental Shelf, explaining their position on the territorial boundaries of the South China Sea.⁷⁴ In response, China filed *Note Verbale no. CML/17/2009 (2009 Note Verbale)* with the UN Secretary-General.⁷⁵ In it, China claimed to have “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 (*see attached map*).”⁷⁶ This 2009 *Note Verbale* did not elaborate on the legal justification of the claim but, rather, affirmed that the Philippine–Malaysia joint submissions “seriously infringed China’s sovereignty, sovereign rights and jurisdiction in the South China Sea.”⁷⁷

The map attached to the 2009 *Note Verbale* has been described as one of the “pillar(s)” of China’s claim.⁷⁸ It seems to indicate that China controls areas of the South China Sea falling within the “nine-dashed line” (roughly accounting for 80–90 percent of the Sea).⁷⁹ The map was

⁷³ The Philippines “expressly reserves its right to make other submissions for such other areas of the continental shelf beyond 200 M at a future time in conformity with the provisions of Annex I to the Rules of Procedure of the Commission.” Philippines, *A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of the Republic of the Philippines Pursuant to Article 76(8) of the United Nations Convention on the Law of the Sea* (21 April 2009) at 12, online: <http://www.un.org/Depts/los/clcs_new/submissions_files/ph122_09/ph1_eshummary.pdf>.

⁷⁴ *Joint Submission by Malaysia and the Socialist Republic of Vietnam to the Commission on the Limits of the Continental Shelf* (6 May 2009), online: <http://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm>.

⁷⁵ *Note Verbale no CML/17/2009 from the Permanent Mission of the People’s Republic of China to the UN Secretary-General* (7 May 2009), online: <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf>.

⁷⁶ *Ibid* at para 2 [emphasis added].

⁷⁷ See *Note Verbale no CML/17/2009*, *supra* note 75; see also *Note Verbale no. CML/18/2009 from the Permanent Mission of the People’s Republic of China to the UN Secretary-General* (7 May 2009), online: <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf>.

⁷⁸ For a more detailed discussion of the map’s probative and legal value and for varying perspectives on the map, see e.g. Dupuy and Dupuy, *supra* note 40 at 131–36; Zhiguo Gao & Bing Bing Jia, “The Nine-Dash Line in the South China Sea: History, Status and Implications” (2013) 107:1 AJIL 98; Li Jinming & Li Dexia, “The Dotted Line on the Chinese Map of the South China Sea: A Note” (2003) 34:3–4 Ocean Dev & Intl L 287 at 291–93.

⁷⁹ For historical reasons, various terms have been used to describe the line, such as the U-shaped line and the eleven-dotted line; for a more detailed explanation of these terms, see Michael Sheng-Ti Gau, “The U-Shaped Line and a Categorization of the Ocean Disputes in the South China Sea” (2012) 43:1 Ocean Dev & Intl L 57.

originally published by the Republic of China in 1947,⁸⁰ although these details have been disputed.⁸¹ This map is controversial on a number of fronts, especially among several ASEAN countries.⁸² If the map originated from the Chinese government, it alone amounts to little more than a unilateral illustration of China's sovereign territory.⁸³ Even if the map were to be accepted, the map itself does not indicate ownership.⁸⁴ Besides its origins, the map's contents are controversial. As commentators have noted, the map itself is ambiguous and lacks precision.⁸⁵ The map does not contain any coordinates or precise measurements for the delimitation of territory and does not indicate all of the features found in the South China Sea.⁸⁶ As such, some believe that China's claims merely concern geographic features found in the South China Sea rather than the entirety of the nine-dash line.⁸⁷ Furthermore, it is not clear whether the map should be understood as evidence supporting China's claim (thus giving it probative value) or merely as a geographic depiction of it (thus giving it informative value).⁸⁸ In response to these concerns, Chinese⁸⁹ and Taiwanese⁹⁰ scholars emphasize the

⁸⁰ Chris PC Chung, "Drawing the U-Shaped Line: China's Claim in the South China Sea, 1946–1974" (2016) 42:1 *Modern China* 38 at 39; Jinming & Dexia, *supra* note 78 at 293; Robert Beckman, "The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea" (2013) 107:1 *AJIL* 142 at 154.

⁸¹ Some believe the map was published in either 1947 or 1948 (Dupuy and Dupuy, *supra* note 40 at 131); others believe the map was published in 1946 or earlier (Shen, *supra* note 44 at 128–30; Zou Keyuan, "The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands" (1999) 14 *Intl J Mar & Coast L* 27 at 32–33).

⁸² Beckman, *supra* note 80 at 154.

⁸³ Dupuy & Dupuy, *supra* note 40 at 134.

⁸⁴ Beckman, *supra* note 80 at 154.

⁸⁵ Dupuy & Dupuy, *supra* note 40 at 131–34; Fravel, *supra* note 10 at 294–95; Dutton, *supra* note 10 at 50.

⁸⁶ Dupuy & Dupuy, *supra* note 40 at 132.

⁸⁷ Beckman, *supra* note 80 at 153; Shen, *supra* note 44 at 129.

⁸⁸ Dupuy & Dupuy, *supra* note 40 at 132; for a sceptical assessment of its probative value and other legal uncertainties, see Erik Franckx and Marco Benatar, "Dots and Lines in the South China Sea: Insights from the Law of Map Evidence" (2012) 2 *Asian J Intl L* 89 at 103–16.

⁸⁹ Jinming & Dexia, *supra* note 78 at 291.

⁹⁰ Yann-Huei Song & Peter Kien-hong Yu, "China's 'Historic Waters' in the South China Sea: An Analysis from Taiwan, ROC" (1994) 12:4 *American Asian Review* 83.

map's probative value and its key role in establishing their respective legal titles over the claimed territories.⁹¹

After the Philippines contested the 2009 *Note Verbale*, China reiterated its claims in *Note Verbale no. CML/8/2011 (2011 Note Verbale)*.⁹² In it, China indicated that "China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence"⁹³ and added that,

[s]ince [the] 1930s, the Chinese government has given publicity several times the geographic scope of China's Nansha [Spratly] Islands and the names of its components. China's Nansha Islands is therefore clearly defined. In addition, under the relevant provisions of the [1992 *Law*, the 1998 *Law*, and *UNCLOS*], China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.⁹⁴

Again, much like the 2009 *Note Verbale*, the 2011 *Note Verbale* does not elaborate on the alleged "historical and legal" evidence for its claim.⁹⁵ Moreover, it conflates territorial claims with legal justifications for its claims. The mere act of affirming "abundant evidence" without elaboration does not make it so. However, unlike the earlier *Note Verbale*, the 2011 *Note Verbale* does not contain any references to the nine-dash line or to the map, casting doubt on the importance of these pieces of evidence.⁹⁶ Rather than clarifying the nature of China's claims, the two *Note Verbales* reinforced their ambiguity.

⁹¹ Jinming & Dexia, *supra* note 78 at 290 observe "[u]pon the declaration of the nine-dotted line, the international community at no time expressed dissent. None of the adjacent states presented a diplomatic protest. This silence in the face of a public declaration may be said to amount to acquiescence, and it can be asserted that the dotted line has been recognized for half a century"; also in support of the estoppel view, see Shen, *supra* note 62 at 57.

⁹² *Note Verbale no CML/8/2011 from the Permanent Mission of the People's Republic of China to the UN Secretary-General* (14 April 2011), online: <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf>.

⁹³ *Ibid* at para 2.

⁹⁴ *Ibid* at para 4.

⁹⁵ Nguyen-Dang Thang & Nguyen Hong Thao, "China's Nine Dotted Lines in the South China Sea: The 2011 Exchange of Diplomatic Notes between the Philippines and China" (2012) 43:1 *Ocean Dev & Intl L* 35 at 46; Dupuy & Dupuy, *supra* note 40 at 131.

⁹⁶ Admittedly, China's reference to "publicity" since the 1930s could include the various iterations of the map, although such an interpretation would still minimize the relative importance of the map.

2013–16

In response to China's two *Notes Verbales* and to increased tensions in the Scarborough Shoal,⁹⁷ the Philippines commenced an arbitration procedure against China pursuant to *UNCLOS*.⁹⁸ The tribunal was then established in 2013, despite China's formal refusal to take part in the arbitration procedure.⁹⁹ In keeping with its strategy of non-participation, China did not send legal representation to the case, nor did it provide clear argumentation on the merits of the case.¹⁰⁰ As the tribunal noted,

China has consistently rejected the Philippines's recourse to arbitration and has adhered to a position of non-acceptance and non-participation in the proceedings. China did not participate in the constitution of the Tribunal, it did not submit a Counter-Memorial in response to the Philippines's Memorial, it did not attend the Hearings on Jurisdiction or on the Merits, it did not reply to the Tribunal's invitations to comment on specific issues of substance or procedure, and it has not advanced any of the funds requested by the Tribunal toward the costs of the arbitration. Throughout the proceedings, China has

⁹⁷ The tensions were provoked on 8 April 2012 when the Philippine navy apprehended eight mainland Chinese fishing vessels in the Scarborough Shoal. Hong Zhao, "Sino-Philippines Relations: Moving beyond South China Sea Dispute?" 26:2 *Journal of East Asian Affairs* 57 at 60–61.

⁹⁸ Hsiao, *supra* note 21 at 9; *UNCLOS*, *supra* note 15, art 287: "When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: ... (c) an arbitral tribunal constituted in accordance with Annex VII."

⁹⁹ In conformity with Annex VII of *UNCLOS*, *supra* note 15.

¹⁰⁰ *South China Sea (Merits)*, *supra* note 41. China did present arguments on the tribunal's jurisdiction to hear the case; China essentially argued that the subject matter of the case was beyond *UNCLOS* and that China's declaration in connection with *UNCLOS* ratification and the process goes against the negotiation process. *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* (7 December 2014), online: <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml>; Duncan French, "In the Matter of the South China Sea Arbitration: Republic of Philippines v People's Republic of China, Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Law of the Sea Convention, Case No. 2013–19, Award of 12 July 2016" (2017) 19:1 *Envtl L Rev* 48 at 50; this arbitration could be a part of a larger trend of scepticism regarding *UNCLOS*'s compulsory and binding dispute settlement regime. Øystein Jensen & Nigel Bankes, "Compulsory and Binding Dispute Resolution under the United Nations Convention on the Law of the Sea: Introduction" (2017) *Ocean Dev & Intl L* 1 at 5.

rejected and returned correspondence from the Tribunal sent by the Registry, reiterating on each occasion “that it does not accept the arbitration initiated by the Philippines.”¹⁰¹

The Philippines made a total of fifteen submissions in regard to the merits of the case.¹⁰² These submissions centred on four principal questions: whether China’s maritime claims (based on the “nine-dash line” and the “historic rights claim”) were contrary to *UNCLOS*; whether the nine features occupied by China qualified as “islands” or “rocks” under Article 121 of *UNCLOS*; whether China was in breach of *UNCLOS* by interfering with the Philippines’ sovereign and fishing rights within the Philippines’s EEZ; and whether China had caused irreversible damage to the Sea’s maritime environment.¹⁰³ In the days leading up to the award on the merits, China engaged in a global public relations campaign to discredit the tribunal, claiming that over forty states supported its position.¹⁰⁴

In July 2016, the tribunal rendered its unanimous award on the merits of the case.¹⁰⁵ The tribunal reached a number of important conclusions that effectively undermined the law of the sea aspects of China’s claims. The historic rights claims encompassed by the nine-dash line exceeded the relevant *UNCLOS* maritime rights and were without legal effect.¹⁰⁶ None of the features in the Spratlys and Scarborough Shoal produced an EEZ as they are either “rocks” or “low-tide elevations.”¹⁰⁷ As such, the tribunal concluded that the straight archipelagic baselines cannot apply to the Spratly islands,¹⁰⁸ nor can the Spratly islands collectively generate maritime zones.¹⁰⁹ In regard to the third and fourth questions, the tribunal concluded that China violated the Philippines’ sovereign rights

¹⁰¹ *South China Sea (Merits)*, *supra* note 41 at para 116.

¹⁰² *Ibid* at para 34.

¹⁰³ *Ibid* at paras 7–10.

¹⁰⁴ Greg Torode & Mike Collett-White, “Ahead of Key Court Ruling, Beijing in Propaganda Overdrive,” *Reuters* (3 July 2016), online: <<http://www.reuters.com/article/us-southchinasea-ruling-idUSKCN0ZJ117>>.

¹⁰⁵ A comprehensive analysis of its reasoning and ramifications is beyond the scope of this article.

¹⁰⁶ *South China Sea (Merits)*, *supra* note 41 at para 278.

¹⁰⁷ *Ibid* at paras 643–47.

¹⁰⁸ The tribunal found that archipelagic baselines can only apply to archipelagic states (such as the Philippines). See *South China Sea (Merits)*, *supra* note 41 at para 573; pursuant to art 47.1 of *UNCLOS*, *supra* note 15.

¹⁰⁹ *South China Sea (Merits)*, *supra* note 41 at paras 571–76.

(over non-living resources and fishing)¹¹⁰ and found China responsible for severe harm caused to the Sea's maritime environment.¹¹¹

However, the scope of the award is limited to legal issues within the context of *UNCLOS*. Indeed, the tribunal accepted that the Philippines strategically chose to frame its submissions in *UNCLOS* terms rather than address China's historic rights claims as distinct from *UNCLOS*.¹¹² Moreover, the Philippines repeatedly asked the tribunal not to rule on issues of sovereignty.¹¹³ It has been speculated that the Philippines adopted this tact to avoid possible jurisdictional issues that could be raised by China.¹¹⁴ Consequently, the tribunal did not directly engage with China's historic rights claims in non-*UNCLOS* terms:

This is accordingly not a dispute about the existence of specific historic rights, but rather a dispute about historic rights in the framework of the Convention. A dispute concerning the interaction of the Convention with another instrument or body of law, including the question of whether rights arising under another body of law were or were not preserved by the Convention, is unequivocally a dispute concerning the interpretation and application of the Convention.¹¹⁵

This decision limits the scope of the tribunal's decision to *UNCLOS* historic rights, thereby setting aside land sovereignty claims and non-*UNCLOS* historic rights claims.¹¹⁶ This decision is questionable because *UNCLOS* does not explicitly refer to historic rights, which are generally treated as separate legal regimes.¹¹⁷ Critics will likely appeal to this strategic choice and to the tribunal's questionable reasoning in the Jurisdiction

¹¹⁰ *Ibid* at paras 716, 757, 814.

¹¹¹ *Ibid* at paras 992–93.

¹¹² Sreenivasa Rao Pemmaraju, "The *South China Sea Arbitration (The Philippines v. China)*: Assessment of the Award on Jurisdiction and Admissibility" (2016) 15 *Chinese J Intl L* 265 at 306–07.

¹¹³ *In the Matter of the South China Sea Arbitration (Republic of the Philippines v People's Republic of China)*, PCA Case no 2013–19, Award on Jurisdiction and Admissibility (29 October 2015) at para 152–53 [*South China Sea (Jurisdiction)*].

¹¹⁴ Sophia Kopela, "Historic Titles and Historic Rights in the Law of the Sea in the Light of the *South China Sea Arbitration*" (2017) 48:2 *Ocean Dev & Intl L* 181 at 198; past arbitrations have held that arbitral tribunals do not have jurisdiction in cases where issues of sovereignty over land territories is more than ancillary to the dispute. Keyuan Zou and Qiang Ye, "Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal" (2017) *Ocean Dev & Intl L* 1 at 8–9.

¹¹⁵ *South China Sea (Jurisdiction)*, *supra* note 113 at para 168.

¹¹⁶ French, *supra* note 100 at 50.

¹¹⁷ Kopela, *supra* note 114 at 184, 197–98.

award as a part of a larger effort to undermine the conclusions of the Merits award.¹¹⁸

In response to the tribunal's findings (overwhelmingly) in favour of the Philippines, the Chinese Foreign Ministry dismissed the award as "unjust and unlawful."¹¹⁹ In another statement, China reiterated its historic rights claims over all of the islands in the South China Sea.¹²⁰ Legally speaking, these statements are problematic. Despite China's refusal to participate in the proceedings, the tribunal's award is procedurally final and binding on China and the Philippines as parties to the dispute.¹²¹ From a geopolitical standpoint, full compliance with the award would inevitably lead to a substantial decrease in China's claimed sovereignty and maritime rights within the "nine-dash" region.¹²² The tribunal's restrictive interpretation of archipelagic baselines also undermines China's recent "Four Sha" legal strategy, whereby China is to be considered an archipelagic state (like Indonesia) under *UNCLOS*.¹²³

In its domestic legislation and official statements, China has emphasized the historical dimension of its claims. As the preceding discussion has shown,

¹¹⁸ E.g. Minyou Yu & Qiong Xie, "Why the Award on Jurisdiction and Admissibility of the South China Sea Arbitration Is Null and Void-Taking Article 283 of the *UNCLOS* as an Example" (2017) *China Oceans L Rev* 45. Noting that the tribunal spent relatively little space on elaborating its reasoning, see Stefan Talmon, "The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility" (2016) 15:2 *Chinese J Intl L* 309 at 391.

¹¹⁹ Julie Makinen, "China's Claims in South China Sea Are Invalid, Tribunal Rules, in Victory for the Philippines," *LA Times* (12 July 2016), online: <<http://www.latimes.com/world/asia/la-fg-south-china-sea-ruling-20160712-snap-story.html>>.

¹²⁰ Ministry of Foreign Affairs of China, *Foreign Ministry Spokesperson Lu Kang's Remarks on Statement by Spokesperson of US State Department on South China Sea Arbitration Ruling* (13 July 2016), online: <http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1380409.shtml>.

¹²¹ *UNCLOS*, *supra* note 15, art 296 reads: "1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute. 2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute." For a more detailed discussion on the finality of the award and the role of state practice in accepting the award, see Stefan Talmon, "The South China Sea Arbitration and the Finality of 'Final' Awards" (2017) 8 *Journal of International Dispute Settlement* 388 at 398–401.

¹²² Hsiao, *supra* note 21 at 14.

¹²³ In *South China Sea (Merits)*, *supra* note 41 at para 573, the tribunal noted: "China, however, is constituted principally by territory on the mainland of Asia and cannot meet the definition of an archipelagic State." Julian Ku & Christopher Mirasola, "The South China Sea and China's 'Four Sha' Claim: New Legal Theory, Same Bad Argument," *Lawfare* (25 September 2017), online: <www.lawfareblog.com/south-china-sea-and-chinas-four-sha-claim-new-legal-theory-same-bad-argument>.

China's lack of clarity on these issues has led to a wide variety of interpretations of China's claim and its legal basis. In the academic literature, there is a widespread belief that China's legal claims or elements thereof are "ambiguous,"¹²⁴ "idiosyncratic,"¹²⁵ and "vague."¹²⁶ In its Jurisdiction award and its Merits award, the tribunal reached a similar conclusion: "China has never expressly clarified the nature or scope of its claimed historic rights. Nor has it ever clarified its understanding of the meaning of the 'nine-dash line.'"¹²⁷ This perception can be chiefly attributed to a larger dispute on the value of evidence in support of China's position and to China's lack of formal legal argumentation.¹²⁸ Rather than answer important questions regarding the legal basis of China's claims, the nine-dash line map reinforces the confusion and ambiguity surrounding China's claims. Despite scepticism from several stakeholder states, China has not taken the opportunity to officially clarify the legal basis of its claims.

CHINA'S 1992 TO EARLY 2017 LAWFARE STRATEGY

While a distinctly legalistic inquiry into the nature of China's claims has proven to be inconclusive, an examination of China's domestic legislation and military acts through the lens of lawfare can help illuminate China's larger geopolitical project. China's strategic use of domestic legislation has defined its sphere of influence in the South China Sea. Starting with the

¹²⁴ Beckman, *supra* note 80 at 155; Dutton, *supra* note 10 at 45, 53; Dupuy & Dupuy, *supra* note 40 at 131; Duong, *supra* note 68 at 1111; Lim Kheng Swe, Ju Hailong, & Li Mingjiang, "China's Revisionist Aspirations in Southeast Asia and the Curse of the South China Sea Disputes" (2017) 15:1 *China: An International Journal* 187 at 208–09; Wei-chin Lee, "Taiwan, the South China Sea Dispute, and the 2016 Arbitration Decision" (2017) 22:2 *Journal of Chinese Political Science* 229 at 231.

¹²⁵ Cheng, *supra* note 6 at 10.

¹²⁶ Thomas J Christensen, "The Advantage of an Assertive China" (2011) 90:2 *Foreign Affairs* 54 at 59; Dupuy & Dupuy, *supra* note 40 at 124; William J Dobson and M Taylor Fravel, "Red Herring Hegemon: China in the South China Sea" (1997) 96 *Current History* 258 at 259; Ji Guoxing, "China Versus South China Sea Security" (1998) 29:1 *Security Dialogue* 101 at 103; Brantly Womack, "The Spratlys: From Dangerous Ground to Apple of Discord" (2011) 33:3 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 370 at 379; other claimant states have also been vague in their claims, Dustin E Wallace, "An Analysis of Chinese Maritime Claims in the South China Sea" (2014) 63 *Nav L Rev* 128 at 144; David Rosenberg, "The Rise of China: Implications for Security Flashpoints and Resource Politics in the South China Sea" in Carolyn W Pumphrey, *The Rise of China in Asia: Security Implications* (Collingdale, PA: Diane Publishing, 2002) at 237.

¹²⁷ *South China Sea* (Jurisdiction), *supra* note 113 at para 160; *South China Sea* (Merits), *supra* note 41 at para 180.

¹²⁸ Kline, *supra* note 13 at 147–48; Pham, *supra* note 11 at 5–6; Dupuy & Dupuy, *supra* note 40 at 131.

1992 Law, China has used domestic legislation to justify its enforcement over its claimed territories.¹²⁹ Indeed, the 1992 Law restricts foreign activities within China's territories; while "non-military foreign ships enjoy the right of innocent passage," military ships must obtain permission from China to enter its claimed territorial sea.¹³⁰ This restriction limits the general innocent passage rights granted to "ships of all States" under UNCLOS (which does not distinguish between warships and other vessels).¹³¹ This law also affirms that any foreign ships and aircraft must abide by China's laws, especially those conducting scientific research or marine survey work.¹³² Further developing its regulatory framework, China has enacted specific regulations for research and maritime survey activities¹³³ as well as for activities related to "natural resources"¹³⁴ and fishing.¹³⁵ In line with UNCLOS, China affirms that vessels require permission to engage in these four activities within its claimed territories.¹³⁶ China also asserts its "jurisdiction" to construct artificial islands.¹³⁷

China's framework has a distinct national security element. Article 1 of the 1992 Law states that "this law is formulated," *inter alia*, to "safeguard

¹²⁹ This would include the territories defined in the 1992 Law, *supra* note 52, art 2(2): "Taiwan and the various affiliated islands including Diaoyu Island, Penghu Islands, Dongsha Islands, Xisha Islands, Nansha (Spratly) Islands and other islands that belong to the People's Republic of China." The 1992 Law, art 2(3) further defines China's territorial sea as the "waters adjacent to its territorial land" and China's territorial waters as "the waters along the baseline of the territorial sea facing the land."

¹³⁰ *Ibid* art 6 reads: "Non-military foreign ships enjoy the right of innocent passage through the territorial sea of the People's Republic of China according to law. To enter the territorial sea of the People's Republic of China, foreign military ships must obtain permission from the Government of the People's Republic of China."

¹³¹ UNCLOS, *supra* note 15, art 17; Shao Jin, "The Question of Innocent Passage of Warships- after UNCLOS III" (1989) 13:1 Marine Policy 56 at 58.

¹³² 1992 Law, *supra* note 52, arts 8–13. These are areas where a State may regulate under UNCLOS, *supra* note 15, arts 19, 21.

¹³³ State Council of the People's Republic of China, *Regulations of the People's Republic of China on the Management of Foreign-Related Marine Scientific Research* (promulgated 18 June 1996 and effective as of 1 October 1996), online: <http://www.soa.gov.cn/bmzz/jgbmzz2/gjhzsgatbgs/201211/t20121109_14902.html>; Standing Committee of the Seventh National People's Congress, *Surveying and Mapping Law of the People's Republic of China*, Order of the President no 75 (adopted 29 August 2002; effective as of 1 December 2002), online: <http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383865.htm>.

¹³⁴ 1998 Law, *supra* note 56, arts 3, 4, 7.

¹³⁵ *Ibid*, arts 4–5.

¹³⁶ UNCLOS, *supra* note 15, arts 19, 21 for research, survey, and fishing activities; UNCLOS, arts 60, 76–78, 80–81 for natural resources.

¹³⁷ 1998 Law, *supra* note 56, arts 3–4.

State security."¹³⁸ This purpose has resulted in additional regulations for foreign vessels. While *UNCLOS* authorizes states to exercise control in the contiguous zone to "prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea,"¹³⁹ China expands this list of powers to include acts that prevent or punish infringements of its "security."¹⁴⁰ Under a strict reading of *UNCLOS*, China does not have the authority to restrict military or intelligence activities in its EEZ.¹⁴¹ In 2009, China further expanded its legal regime in approving the *Law of the People's Republic of China on Island Protection*, which (for the first time) gave China broad jurisdictional authority over all of its claimed islands to advance its ocean development project.¹⁴² It also protects China's military facilities on the islands in the EEZ and continental shelf.¹⁴³

This regulatory framework legitimizes increased Chinese control over the South China Sea, while simultaneously destabilizing competing claims.¹⁴⁴ Scholars have described this framework as something akin to "historic rights with tempered sovereignty" over the waters and maritime features within the nine-dash line.¹⁴⁵ Under this view, historical facts justify a peculiar notion of sovereignty in the Sea.¹⁴⁶ While China has largely adopted *UNCLOS* notions of EEZ and continental shelf regimes in its domestic legislation, its overall legal infrastructure serves to legitimize an expansive and security-centric notion of sovereignty in the transcending *UNCLOS*. China's claim expands upon the notion of non-exclusive historic

¹³⁸ *1992 Law*, *supra* note 52.

¹³⁹ *UNCLOS*, *supra* note 15, art 33(1).

¹⁴⁰ *1992 Law*, *supra* note 52, art 13 reads: "The People's Republic of China has the authority to exercise powers within its contiguous zone for the purpose of preventing or punishing infringement of its *security*, customs, fiscal sanitary laws and regulations or entry-exit control within its land territories, internal waters or territorial sea" [emphasis added].

¹⁴¹ Raul Pedrozo, "Close Encounters at Sea: The USNS Impeccable Incident" (2009) 62:3 *Naval War College Review* 101 at 105–06, 108; David, *supra* note 14 at 14.

¹⁴² *Law of the People's Republic of China on Island Protection*, Decree no 22 (adopted 26 December 2009), art 1, unofficial translation online: <http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=85808&p_country=CHN&p_count=1097>; Liu Nengye, "Recent Developments: Law on Island Protection of People's Republic of China" (2010) 2 *Environmental Law Network International Review* 1 at 3.

¹⁴³ *Ibid.* arts 22, 52. *UNCLOS*, *supra* note 15, arts 60, 80, allows for the construction of artificial islands under certain conditions.

¹⁴⁴ Matthias Vanhullebusch & Wei Shen, "China's Air Defence Identification Zone: Building Security through Lawfare" (2016) 16:1 *China Review* 121 at 135.

¹⁴⁵ Keyuan, *supra* note 59 at 160; Jinming & Dexia, *supra* note 78 at 293.

¹⁴⁶ China's varying use of the terms "historic" and "historical" have contributed to the ambiguity of China's claims. Dupuy & Dupuy, *supra* note 40 at 128–38; Kline, *supra* note 13 at 144–47.

rights and attributes to itself the right to regulate and control a vast array of resources and activities.¹⁴⁷ China's claims thus expand upon other historic rights claims, such as the non-exclusive rights without full sovereignty (typically applicable to traditional fishing rights). Rather than providing mere fishing rights, the post-1992 legal regime provides China with exclusive rights for the purpose of natural resource development and exclusive jurisdiction for marine scientific research, the installation of artificial islands, and maritime environmental regulation. However, China's claims arguably do not seem to rise to the level of full exclusive sovereignty rights (typically applicable to historic bays).¹⁴⁸

Although subsidized fishing expeditions and natural resource exploration projects support China's *de facto* sovereignty, China's military has been the primary agent supporting China's lawfare strategy.¹⁴⁹ Following its 1992 *Law*, China is arguably the only stakeholder country to resort to force in a significant way.¹⁵⁰ These military efforts have been further advanced by an offshore active defence strategy, designed to dissuade rivals from the Sea.¹⁵¹ These activities seek to demonstrate China's effective control over its claimed area of the South China Sea and to deter rival nations from the area.

Following the adoption of the 1998 *Law*, China started to enforce more actively its maritime claims. Starting in 1998, the Chinese Fisheries Administration and the State Oceanographic Administration began conducting armed maritime security patrols roughly seven or eight times per annum.¹⁵² On 1 April 2001, two Chinese F-8 fighters flew up to an American EP-3

¹⁴⁷ See e.g. *Law of the People's Republic of China on Marine Environmental Protection, Revised* (adopted on 25 December 1999 and came into force on 1 April 2000), online: <http://www.mlr.gov.cn/mlrenglish/laws/200710/t20071012_656329.htm>, where the notion of jurisdiction (rather than sovereignty) is mentioned, it is provided that "the Law shall apply to internal waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf of the People's Republic of China and other sea areas under the jurisdiction of the People's Republic of China" (art 2).

¹⁴⁸ Some regard China's claim as a full sovereignty claim over all of the features in the Sea, despite China's actions suggesting a tempered sovereignty claim. See e.g. Kline, *supra* note 13 at 126.

¹⁴⁹ Fravel, *supra* note 10 at 303–07.

¹⁵⁰ Joshua Rowan, "The U.S.-Japan Security Alliance, ASEAN, and the South China Sea Dispute" (2005) 45:3 *Asian Survey* 414 at 427; Chris Rahman & Martin Tsamenyi, "A Strategic Perspective on Security and Naval Issues in the South China Sea" (2010) 41 *Ocean Dev & Intl L* 315 at 324–29.

¹⁵¹ Alexander Chieh-cheng Huang, "Chinese Navy's Offshore Active Defense Strategy Conceptualization and Implications" (1994) 47:3 *Naval War College Review* 7.

¹⁵² Michael D Swaine & M Taylor Fravel. "China's Assertive Behaviour-Part Two: The Maritime Periphery" (2011) 35 *China Leadership Monitor* 1 at 5–6.

plane on a surveillance mission in the area.¹⁵³ One of these planes collided into it, destroying the Chinese fighter and damaging the EP-3 plane in the process.¹⁵⁴ The EP-3 plane then made an emergency landing on Hainan Island. For China, this incident was a violation of the principle of "free over-flight" within its coastal waters.¹⁵⁵ In response to the incident, China demanded an official apology and released a statement affirming that

[t]he US surveillance plane's reconnaissance acts were targeted at China in the airspace over China's coastal area and ... abused the principle of over-flight freedom. The US plane's action also posed a serious threat to China's security interests, hence it was right for the Chinese military planes to monitor the US spy plane for the sake of China's state security. The US side should bear full responsibility for the incident.¹⁵⁶

The EP-3 incident began a trend of increasing aggressiveness by China in protecting its interests on both military and economic fronts.¹⁵⁷ In 2005, China further developed its maritime patrol program; this time with support from vessels permanently stationed at one of China's largest facilities in the Spratlys.¹⁵⁸ In the summer of 2007, China told a number of international oil and gas firms to stop exploration work with Vietnamese partners in the South China Sea or face "unspecified consequences" in their business dealings with China.¹⁵⁹ In March 2009, five Chinese vessels (including a Chinese frigate and a Y-12 aircraft) harassed the USNS *Impeccable*.¹⁶⁰ A Chinese intelligence ship contacted the ship's bridge informing them that its "operations [were] illegal."¹⁶¹ The US Department of State and the

¹⁵³ Shane Osborn & Malcolm McConnell, *Born to Fly: The Untold Story of The Downed American Reconnaissance Plane* (New York: Broadway Book, 2001) at 8.

¹⁵⁴ John Van Dyke, "Military Ships and Planes Operating in the Exclusive Economic Zone of Another Country" (2004) 28:1 Marine Policy 29 at 33.

¹⁵⁵ Eric Donnelly, "The United States—China EP-3 Incident: Legality and Realpolitik" (2004) 9:1 J Confl & Sec L 25 at 30.

¹⁵⁶ As quoted in Van Dyke, *supra* note 154 at 33.

¹⁵⁷ Vanhullebusch & Shen, *supra* note 144 at 123.

¹⁵⁸ Fravel, *supra* note 10 at 310.

¹⁵⁹ Jason Folkmanis, "China Warns Some Oil Companies on Work with Vietnam, U.S. Says," *Bloomberg* (16 July 2009), online: <<http://www.amchamvietnam.com/china-warns-some-oil-companies-on-work-with-vietnam-u-s-state-department/>>.

¹⁶⁰ See generally Jonathan G Odom, "The True "Lies" of the Impeccable Incident: What Really Happened, Who Disregarded International Law, and Why Every Nation (Outside of China) Should Be Concerned" (2010) 18:3 MSU-DCLJ Intl L 1.

¹⁶¹ Jim Garamone, "Chinese Vessels Shadow, Harass Unarmed US Survey Ship," *Department of the Navy* (9 March 2017), online: <<http://www.defense.gov/news/newsarticle.aspx?id=53401>>.

US Department of Defense filed complaints with the Chinese embassy, after Chinese crews disrobed and started shouting at the American vessel.¹⁶² In response to the American protests, China argued that the presence of the *Impeccable* was a violation of China's domestic laws and international law.¹⁶³

Much like the EP-3 incident, China responded to the *Impeccable* incident with acts that increased friction in the area. In the same month, the Chinese navy harassed an American vessel (the USNS *Victorious*) in the Yellow Sea, claiming that it violated China's EEZ.¹⁶⁴ In March 2010, the Chinese navy deployed one destroyer, three frigates, a tanker, and a salvage vessel to travel through the South China Sea. According to one commander, the purpose of the operation was "to project its maritime territorial integrity through long-distance naval projection."¹⁶⁵ In November 2010, China also held an amphibious landing training exercise with more than 1,200 marines.¹⁶⁶

The United States is not alone in being a victim of China's increased aggressiveness following the *Impeccable* incident. On 22 July 2011, the Indian Navy Ship (INS) *Airavat* departed from a Vietnamese port. When the ship was approximately forty-five miles from the Vietnamese coast, Chinese navy officers informed the ship that it was entering "Chinese waters."¹⁶⁷ Although India did not lodge a formal complaint, China issued a statement condemning India's involvement in the South China Sea.¹⁶⁸ This incident is regarded as a marker of India's increased interest in the Sea.¹⁶⁹ In May and June 2011, Chinese vessels interfered with at least three different Vietnamese ships conducting seismic surveys within Vietnam's claimed EEZ by severing the ship's cables.¹⁷⁰ These incidents come two years after China seized Vietnamese fishing boats operating in China's claimed EEZ.¹⁷¹ In 2011, the Philippines reported seven incidents involving Chinese harassment in the South China Sea.¹⁷²

¹⁶² Kline, *supra* note 13 at 157–58.

¹⁶³ Pedrozo, *supra* note 141 at 102.

¹⁶⁴ Richard Weitz, "China, Russia, and the Challenge to the Global Commons" (2009) 24:3 *Pacific Focus* 271 at 275–76.

¹⁶⁵ Fravel, *supra* note 10 at 309–10.

¹⁶⁶ *Ibid.*

¹⁶⁷ Kline, *supra* note 13 at 159–60.

¹⁶⁸ "China Harasses Indian Naval Ship on South China Sea," *Times of India* (2 September 2011), online: <<http://www.articles.timesofindia.indiatimes.com/2011-09-02/india/301055141south-china-sea-spratlly-ins-airavat>>.

¹⁶⁹ David Scott, "India's Role in the South China Sea: Geopolitics and Geoeconomics in Play" (2013) 12:2 *India Review* 51 at 58.

¹⁷⁰ Beckman, *supra* note 80 at 156; Buszynski, *supra* note 4 at 141.

¹⁷¹ Cheng & Paladini, *supra* note 6 at 195.

¹⁷² Buszynski, *supra* note 4 at 141–42; Cheng & Paladini, *supra* note 6 at 195.

Following the tribunal's 2016 award, China has been able to transform a legal defeat into a political victory through military and diplomatic action.¹⁷³ While the tribunal found that China aggravated the dispute through the construction of artificial islands,¹⁷⁴ China has continued their construction. Since 2013, China has created seven artificial islands in the Spratly Islands, totalling more than 3,200 acres.¹⁷⁵ China has also continued to protect its claims through frequent military missions, despite the tribunal's conclusion that previous missions of this type had violated the Philippines' sovereign rights.¹⁷⁶ Diplomatic efforts have also rendered the award ineffective. As of August 2017, only seven states have called on China to comply with the award (down from forty-one states prior to the ruling), while the rest of the states have either sided with China or remained neutral.¹⁷⁷ This was made possible by the Philippines and the United States who chose not to enforce the award.¹⁷⁸ The Philippines, for instance, could have demanded China's compliance with the award through international forums, such as ASEAN or the UN General Assembly—something it has yet to do. While President Barack Obama called on China to comply with the award, the United States has not taken concrete steps to enforce it.¹⁷⁹

While not explicitly seeking to enforce the award, the United States and its allies have sought to protect navigational rights in the area. In order to counter China's excessive baselines and EEZ claims, the United States has embarked in a series of freedom of navigation operations (FONOP) in the

¹⁷³ China has thus far had a mixed record of compliance, see Julian Ku & Christopher Mirasola, "Tracking Compliance with the South China Sea Arbitral Award" (2017) 9:1 *Asian Politics & Policy* 139 at 149.

¹⁷⁴ *South China Sea* (Merits), *supra* note 41 at paras 757, 1181.

¹⁷⁵ "Country: China," *Asia Maritime Transparency Institute*, online: <<https://amti.csis.org/island-tracker/chinese-occupied-features/>>.

¹⁷⁶ The tribunal concluded that China violated the Philippines's sovereign rights by interfering with Philippine fishing and petroleum exploration. See *South China Sea* (Merits), *supra* note 41 at para 716; Lynn Kuok, "Progress in the South China Sea?" *Foreign Affairs* (21 July 2017), online: <<https://www.foreignaffairs.com/articles/east-asia/2017-07-21/progress-south-china-sea?cid=int-lea&pgtype=hpg>>.

¹⁷⁷ Six states outright oppose the ruling, and 147 states remain neutral as to the award. "Who Is Taking Sides After the South China Sea Ruling?" *Asia Maritime Transparency Institute* (15 August 2016), online: <<https://amti.csis.org/sides-in-south-china-sea/>>.

¹⁷⁸ Julian Ku, "Assessing the South China Sea Arbitral Award after One Year: Why China Won and the U.S. Is Losing," *Lawfare* (12 July 2017), online: <<https://lawfareblog.com/assessing-south-china-sea-arbitral-award-after-one-year-why-china-won-and-us-losing>>.

¹⁷⁹ *Ibid.*

South China Sea near China's artificial islands.¹⁸⁰ In May 2017, the United States conducted its first FONOP mission under President Donald Trump, with the USS *Dewey* sailing within twelve nautical miles of a Chinese artificial island in the Mischief Reef.¹⁸¹ In July 2017, the US navy conducted another FONOP near Triton Island, an artificial island in the Paracel archipelago.¹⁸² A third FONOP mission was conducted in August 2017.¹⁸³ Likewise, the British navy announced in July 2017 that it would deploy two aircraft carriers to protect "freedom of navigation" and "global trade."¹⁸⁴

These missions have prompted a diplomatic debate between the United States and China. In response to one of these missions, China's Ministry of Foreign Affairs expressed "strong dissatisfaction" and "displeas[ure]."¹⁸⁵ In turn, an American Pacific Fleet spokeswoman said that all navy operations "are conducted in accordance with international law and demonstrate that the United States will fly, sail, and operate wherever international law allows."¹⁸⁶ The top US commander in the Pacific, Admiral Harry Harris, denounced China's construction of artificial islands and added: "I believe the Chinese are building up combat power and positional advantage in an attempt to assert de facto sovereignty over disputed maritime features and spaces in the South China Sea."¹⁸⁷ Indeed, this view is also shared by the

¹⁸⁰ Sebastian Biba, "It's Status, Stupid: Explaining the Underlying Core Problem in US-China Relations" (2016) 2:5 *Global Affairs* 455 at 462; Graham Webster, "Would a Military Sail-by at Mischief Reef be a FON Operation?" *Lawfare* (1 November 2016), online: <<https://www.lawfareblog.com/would-military-sail-mischief-reef-be-fon-operation>>.

¹⁸¹ Gordon Lubold, "U.S. Navy Conducts First South China Sea Navigation Operation under President Trump," *Wall Street Journal* (24 May 2017), online: <<https://www.wsj.com/articles/u-s-navy-conducts-south-china-sea-navigation-operation-1495664647>>.

¹⁸² Ryan Brown & Brad Lendon, "US Destroyer Sails Close to Disputed Island in South China Sea," *CNN* (2 July 2017), online: <<http://www.cnn.com/2017/07/02/politics/us-navy-south-china-sea/index.html>>.

¹⁸³ The USS *John S McCain* conducted a freedom of navigation operations (FONOP) mission six nautical miles from the artificial island on the Mischief Reef. "US Destroyer Challenges China's Claims in South China Sea," *Ejnsight* (11 August 2017), online: <<http://www.ejnsight.com/20170811-us-destroyer-challenges-chinas-claims-in-south-china-sea/>>.

¹⁸⁴ James Griffiths, "UK Wants to Send 'Colossal' Warships to Test Beijing's Claims in S. China Sea," *CNN* (28 July 2017), online: <<http://www.cnn.com/2017/07/28/asia/south-china-sea-uk-johnson/index.html>>.

¹⁸⁵ Neil Connor, "China 'Warned' US Warship after It Sailed Near South China Sea Reef Claimed by Beijing," *The Telegraph* (25 May 2017), online: <<http://www.telegraph.co.uk/news/2017/05/25/us-warship-sails-near-south-china-sea-reef-claimed-beijing/>>.

¹⁸⁶ Jim Gomez, "U.S. Warship Sails in South China Sea," *US News* (20 August 2017), online: <<https://www.usnews.com/news/world/articles/2017-08-10/us-warship-sails-close-to-china-held-island-in-disputed-sea>>.

¹⁸⁷ Brown & Lendon, *supra* note 182.

tribunal in its 2016 award: "China has effectively created a *fait accompli* at Mischief Reef by constructing a large artificial island on a low-tide elevation located within the Philippines's EEZ and continental shelf."¹⁸⁸ In the coming years, Western FONOP missions and China's reactions to them will test the acceptability of each party's claims in the area.

CHINA'S LAWFARE STRATEGY AND AMERICAN GEOPOLITICS

China's long-term geopolitical ambitions of establishing itself as a sea power¹⁸⁹ can account for the way in which China has conceptualized and defended its South China Sea claims. Indeed, military forces have provided the means to enforce its legal regime. Recent history (for example, the EP-3 and *Impeccable* incidents) has shown a China unafraid of resorting to force to exert control even to the detriment of powerful Western countries. On the geopolitical level, China is, in many ways, following the American playbook. Much like the United States of the nineteenth and twentieth centuries, China has turned to American naval strategist Alfred Thayer Mahan for inspiration.¹⁹⁰ Roughly since the 1950s, the Chinese military has studied Mahan's works.¹⁹¹ Chinese officers are known to frequently quote Mahan in conferences and strategic literature.¹⁹² This appreciation is in part responsible for a number of similarities between the US strategy (then a "new power") and China's current strategy. From a geographic standpoint, the South China Sea shares several important similarities with other Mahanian bodies of water.¹⁹³ As James Holmes has observed, several land features in the South China Sea resemble ones in the Caribbean; Taiping Island, for example, is said to resemble Jamaica in relative location and appearance.¹⁹⁴ Much like the Mediterranean and the Caribbean, the South China Sea is ringed at its western and northern edges. Furthermore, others have made parallels between the Panama

¹⁸⁸ *South China Sea* (Merits), *supra* note 41 at para 1177.

¹⁸⁹ A "sea power" may be defined as "the sum total of forces and factors, tools and geographical circumstances, which operated to gain command of the sea, to secure its use for oneself and to deny that use to the enemy." William Edmund Livezy, *Mahan on Sea Power* (Norman: University of Oklahoma Press, 1947) at 277.

¹⁹⁰ Robert D Kaplan, "The Geography of Chinese Power: How Far Can Beijing Reach on Land and at Sea" (2010) 89:3 *Foreign Affairs* 22 at 34; James R Holmes and Toshi Yoshihara, "The Influence of Mahan upon China's Maritime Strategy" (2006) 24:1 *Comparative Strategy* 23 at 24–26.

¹⁹¹ Holmes & Yoshihara, *supra* note 11 at 79.

¹⁹² *Ibid* at 82–83.

¹⁹³ *Ibid* at 81–82.

¹⁹⁴ James R Holmes, "Strategic Features of the South China Sea: A Tough Neighborhood for Hegemons" (2014) 67:2 *Naval War College Review* 30 at 40.

Canal and the Strait of Malacca in terms of their geographic location and importance for world trade.¹⁹⁵

Following his analysis of the Gulf of Mexico and the Caribbean Sea, Mahan advocated for increased control over these waters. At the time, the Caribbean was of utmost geopolitical importance due to its strategic location and potential for resource wealth.¹⁹⁶ While the Americans did not possess a navy strong enough to protect its interests, Mahan advocated for a gradual build-up of its navy, much like the British Empire did to gradually control the Mediterranean. Viable military bases and a strong navy, Mahan argued, must have “strategic lines” of support.¹⁹⁷ Mahanian strategy thus recommended the establishment of “bases” of operations that connect “lines” of operation within a body of water.¹⁹⁸ This strategic infrastructure would help defend the naval power from foreign attacks and place it at a strategic advantage. Applied to the South China Sea context, a Mahanian approach would advocate for the development of naval bases and for a protective stance towards foreign vessels.¹⁹⁹ To this end, China has also rapidly expanded its navy and continued its construction of artificial islands (for example, in the Mischief Reef).²⁰⁰ Under a Mahanian framework, these islands serve as important bases of operation and important points on strategic lines of support. This infrastructure affords China the opportunity to enforce its control over large areas of water or to create a hostile environment for foreign vessels. The aforementioned examples of interference serve as reminders of China’s increased capabilities in this regard.

This Mahanian approach is complimented by a strategy of delay, which is used to defuse rival claims and to avoid definitive settlements detrimental to Chinese interests. China seems to be employing a “ripe fruit” strategy in the South China Sea, whereby China bides its time until it develops the necessary military capacity to further control the South China Sea.²⁰¹ This is similar to how the United States sought to protect the Caribbean from

¹⁹⁵ *Ibid* at 43.

¹⁹⁶ *Ibid* at 34.

¹⁹⁷ See generally Alfred Thayer Mahan, *Mahan on Naval Strategy: Selections from the Writings of Rear Admiral Alfred Thayer Mahan* (Annapolis: Naval Institute Press, 2015) at 142–77.

¹⁹⁸ Ian C Hope, *A Scientific Way of War: Antebellum Military Science, West Point, and the Origins of American Military Thought* (Lincoln: University of Nebraska Press, 2015) at lxxxii–lxxxiv.

¹⁹⁹ Holmes, *supra* note 194 at 39–48.

²⁰⁰ Cheng & Paladini, *supra* note 6 at 187–90; “The West Need Not Fear China’s War Games with Russia,” *The Economist* (29 July 2017), online: <<https://www.economist.com/news/leaders/21725560-fact-americas-navy-should-co-operate-more-chinas-too-west-need-not-fear-chinas-war>>.

²⁰¹ Dutton, *supra* note 10 at 56–58; Eric Hyer, “The South China Sea Dispute: Implications of China’s Earlier Settlements” (1995) 68:1 *Pacific Affairs* 34 at 34.

British influences until the United States could develop its own brown water navy.²⁰² This "ripe fruit" strategy has manifested itself in stalled negotiations, delayed settlements with coastal states, and unenforced agreements, which allow China to pursue control of the Sea at a more "leisurely" pace, especially following the *Impeccable* incident.²⁰³ While the ASEAN members hoped that the 2002 ASEAN Guidelines²⁰⁴ would create a shared area and allow for freedom of navigation and overflight, China's acceptance of the agreement did not materialize in any major changes to the status quo.²⁰⁵ In its 2014 position paper,²⁰⁶ China affirmed that "China and the Philippines have agreed, through bilateral instruments and the Declaration on the Conduct of Parties in the South China Sea, to settle their relevant disputes through negotiations."²⁰⁷ However, as the tribunal held in the case, the Philippines had sought to negotiate with China, and it is under no obligation to "continue negotiations when it concludes that the possibility of a negotiated solution has been exhausted."²⁰⁸ This conclusion could be interpreted as an implicit accusation of bad faith in regard to China's efforts to negotiate,²⁰⁹ despite attempts at negotiation.²¹⁰ In 2017, ASEAN, the United States, and some of its allies have called for a new code of conduct in the Sea.²¹¹ China's slow efforts to compromise on this issue

²⁰² David Lei, "China's New Multi-Faceted Maritime Strategy" (2007) 52:1 *Orbis* 139 at 145; Holmes and Yoshihara, *supra* note 11 at 81–84.

²⁰³ E.g. it was reported that China agreed to end its expansion in the South China; it remains to be seen whether this will result in a change in the status quo. Manuel Mogato, "Philippines Says China Agrees on No New Expansion in South China Sea," *Reuters* (15 August 2017), online: <<https://www.reuters.com/article/us-southchinasea-philippines-china-idUSKCN1AVoVJ>>; Holmes, *supra* note 194 at 28; Hyer, *supra* note 201 at 35; Fravel, *supra* note 10 at 296–303.

²⁰⁴ 2002 Declaration, *supra* note 66.

²⁰⁵ Fravel, *supra* note 10 at 310–13; Buszynski, *supra* note 4 at 144; Dutton, *supra* note 10 at 63.

²⁰⁶ Ministry of Foreign Affairs 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* (7 December 2014), online: <www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml>.

²⁰⁷ *South China Sea* (Merits), *supra* note 41 at para 13.

²⁰⁸ *Ibid* at para 160.

²⁰⁹ Pham, *supra* note 11 at 4.

²¹⁰ E.g. Ramses Amer, "China, Vietnam, and the South China Sea: Disputes and Dispute Management" (2014) 45:1 *Ocean Dev & Intl L* 17 at 21–28.

²¹¹ Katrina Domingo, "ASEAN Wants Legally Binding Code on South China Sea," *ABC News* (7 August 2017), online: <<http://news.abc-cbn.com/news/08/07/17/asean-wants-legally-binding-code-on-south-china-sea>>.

may well be another delay tactic²¹² or further evidence of its preference for a bilateral solution to this dispute.²¹³

CHINA'S LAWFARE STRATEGY IS NOT LEGALLY UNPRECEDENTED

There is a trend in the academic literature casting China as a great power intent on setting new and dangerous legal precedents or radically redefining law in its attempts to ground its geopolitical strategy in legal terms.²¹⁴ This general trend is associated with critical assessments of China's specific claims. According to one scholar, China is trying to redefine the "basic navigational and operational freedoms provided for under *UNCLOS*" and change the wording of *UNCLOS*.²¹⁵ For another, China's ancestral claims have sought "to either revise international law or gain a special exception to it."²¹⁶ Others conclude that China is setting new precedents in regard to the superseding nature of its domestic legislation.²¹⁷ However, the history of international law suggests that China is, again, simply following in American footsteps. Rather than rejecting international norms, China has sought to enforce existing exceptions and to selectively preserve elements of existing law in the areas of effective occupation, historic rights, and EEZs.

EFFECTIVE OCCUPATION

Effective occupation refers to the ability and intention to exercise continuous and uninterrupted jurisdiction over a territory without a sovereign title.²¹⁸ While *Island of Palmas*²¹⁹ and the *Legal Status of Eastern Greenland*²²⁰

²¹² "US Calls for Legally Binding Code of Conduct in South China Sea," *CNN* (7 August 2017), online: <<http://ganddaily.com/2017/08/07/us-calls-for-legally-binding-code-of-conduct-in-south-china-sea/>>.

²¹³ Stephen Wakefield Smith, "ASEAN, China, and the South China Sea: Between a Rock and a Low-Tide Elevation" (2016) 29 *USF Mar LJ* 29 at 36.

²¹⁴ See notes 12–14 above.

²¹⁵ Kline, *supra* note 13 at 152, 166.

²¹⁶ Buszynski, *supra* note 4 at 140.

²¹⁷ David, *supra* note 14 at 10.

²¹⁸ Eyal Benvenisti, *The International Law of Occupation* (Oxford: Oxford University Press, 2012) at 3.

²¹⁹ "The title of discovery, if it had not been already disposed of by the Treaties of Münster and Utrecht would, under the most favourable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation. An inchoate title, however, cannot prevail over a definite title founded on continuous and peaceful display of sovereignty." *Island of Palmas (Netherlands v USA)* (1929) 2 *UNRIAA* 829 at 869 [*Island of Palmas*].

²²⁰ *Legal Status of Eastern Greenland (Denmark v Norway)*, (1933) *PCIJ* (Ser A/B) No 53 [*Eastern Greenland*].

were early cases defining the rules for territorial acquisition, the "normal standard" for effective occupation was later synthesized by the arbitral tribunal in the 1998 *Award of the Arbitral Tribunal in the First Stage of the Proceedings between Eritrea and Yemen*:

The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and size of its population, if any.²²¹

Critics (and competing states) frequently point out that China's activities in the South China Sea are redefining the law of effective occupation. They generally conclude that China's claims are contrary to current norms in two respects. First, it has been suggested that the contested nature of its claims prevents China from making an effective occupation claim.²²² Indeed, state controversy can render an effective occupation claim illegitimate by violating the criterion of peaceful occupation.²²³ Second, some commentators and Vietnam question whether a map can, on its own, establish a claim of effective occupation.²²⁴ Under this second critique, China's territorial claim is nominal (and mostly confined to documentary sources) and does not qualify for "actual" occupation, according to the standard set in the *Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island*:

It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there.²²⁵

²²¹ *Award of the Arbitral Tribunal in the First Stage of the Proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute)* (1998) 22 UNRIAA 268 at para 239 [*Eritrea and Yemen*]; Barbara Kwiatkowska, "The Eritrea-Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation" (2001) 32 *Ocean Dev & Intl L* 1 at 14.

²²² E.g. Mark J Valencia, "Spratly Solution Still at Sea" (1993) 6:2 *Pacific Review* 155 at 157; Jacques deLisle, "Troubled Waters: China's Claims and the South China Sea" (2012) 56:4 *Orbis* 608 at 625.

²²³ Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (Leiden: Brill, 2006) at 32.

²²⁴ E.g. Christopher C Joyner, "The Spratly Islands Dispute: What Role for Normalizing Relations between China and Taiwan" (1998) 32 *New Eng L Rev* 819 at 825–26; Michael Bennett, "The People's Republic of China and the Use of International Law in the Spratly Islands Dispute" (1992) 28 *Stan J Intl L* 425 at 436; Dupuy & Dupuy, *supra* note 40 at 133–134.

²²⁵ (1932) 26 *AJIL* 390 at 393–94 [*Clipperton*].

Both of these critiques are predicated upon the normal standard of occupation and normal evidentiary standards. While not contradicting these critiques, it is questionable whether these common rules of effective occupation are applicable in the peculiar context of the South China Sea, as many of the features in the South China Sea can be described as “remote” and/or “uninhabited.”²²⁶ The Pratas and Zhongsha islands are unpopulated.²²⁷ The Paracels and Spratlys with combined population of a little over 1,000 have only recently been populated by the coastal states (likely only to demonstrate control over these islands).²²⁸ Woody Island, the largest island in the Paracels, did not have potable water until 1996.²²⁹ One could argue that state practice and international jurisprudence have shown that a different standard applies in the case of abnormal territories such as these.²³⁰ Indeed, the International Court of Justice (ICJ) confirmed that a lower standard may apply in cases of unpopulated or barely inhabited areas where there is “very little in the way of actual exercise of sovereign rights.”²³¹ Similarly, the *Island of Palmas* case recognizes an exception to the general rule:

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved.²³²

This exception was further defined in the *Eastern Greenland* case for territories that are sparsely populated:

[I]t is impossible to read the records of the decisions in cases on territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.²³³

²²⁶ Shen, *supra* note 44 at 156.

²²⁷ Emmanuel Brunet-Jailly, *Border Disputes: A Global Encyclopedia* (Santa Barbara: ABC-CLIO, 2015) at 730.

²²⁸ Greg Torode & Manuel Mogato, “One Thing People Don’t Realize about the Disputed Islands on the South China Sea,” *Reuters* (29 May 2015), online: <<http://www.businessinsider.com/r-civilians-emerge-as-pawns-in-south-china-sea-legal-chess-game-2015-5>>.

²²⁹ Shen, *supra* note 62 at 73.

²³⁰ *Ibid* at 10–15.

²³¹ *Western Sahara Advisory Opinion of 16 October 1975*, [1975] ICJ Rep 12 at para 92.

²³² *Island of Palmas*, *supra* note 219 at 840.

²³³ *Eastern Greenland*, *supra* note 220 at 46.

In its jurisprudence, the ICJ and at least one arbitral tribunal have consistently referred to this exception (the *Eastern Greenland* standard) in cases of occupation of difficult or inhospitable areas.²³⁴

In light of this lower standard (which does not require extensive evidence or effective administration²³⁵), China's claims become more compelling. Following the standard for sparsely populated areas, acts of discovery and exploration may be sufficient to establish territorial sovereignty. Other states, such as the United States (for example, Johnston Island), France (for example, Clipperton Island), and Mexico (for example, Clarion Island) claim jurisdiction over uninhabited features and are unlikely to oppose higher evidentiary standards.²³⁶ Historic evidence suggests that China may meet this standard, as Chinese exploration or control in the South China Sea occurred before other claimant states.²³⁷ China has conducted maritime surveys of the Spratlys and Parcels since 1279,²³⁸ published maps of the Sea since at least 1330,²³⁹ and ordered maritime patrols in the region since the thirteenth century.²⁴⁰ Moreover, China first discovered many of the South China Sea Islands in the twenty-first century BCE.²⁴¹ In comparison, Vietnam bases its claim on historical evidence dating from the sixteenth to nineteenth centuries.²⁴² While this brief sketch of the historical evidence is not sufficient to support China's claims, it should at least challenge critics holding China to the higher evidentiary threshold, as required under the normal occupation standard.

HISTORIC RIGHTS

While China has asserted rights to its alleged historic waters and islands, the exact nature of this claim has been described as "ambiguous," due to China's lack of consistency regarding its claim.²⁴³ Chinese scholars have

²³⁴ E.g. *Eritrea and Yemen*, *supra* note 221 at para 452; Janice Cavell, "Historical Evidence and the Eastern Greenland Case" (2008) 61:4 *Arctic* 433 at 434.

²³⁵ *Clipperton*, *supra* note 225 at 390.

²³⁶ Jon M Van Dyke & Robert A Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources" (1983) 12:3-4 *Ocean Dev & Intl L* 265 at 267-70.

²³⁷ Teh-Kuang Chang, "China's Claim of Sovereignty over Spratly and Parcel Islands: A Historical and Legal Perspective" (1991) 23 *Case W Res J Intl L* 399 at 420.

²³⁸ Shen, *supra* note 44 at 126.

²³⁹ *Ibid.*

²⁴⁰ *Ibid* at 117-25.

²⁴¹ *Ibid* at 101-07.

²⁴² Zhao Hong, "The South China Sea Dispute and China-ASEAN Relations" (2013) 44:1 *Asian Affairs* 27 at 30.

²⁴³ Dupuy & Dupuy, *supra* note 40 at 128.

suggested that the South China Sea is akin to other historic waters (such as France's Bay of Cancale, Norway's Varangerfjord, Canada's Hudson Bay, and the Soviet Union's Peter the Great Bay) and should therefore be entitled to historic rights.²⁴⁴ At various times, China has referred to the historic dimension of its claims as either "historic rights," "historical rights," "historic title," or "historic waters."²⁴⁵ Despite its ambiguity, China's claim has been criticized for being too expansive. States have been sceptical of China's use of the notion for expanding historic rights beyond mere rights to certain fishing activities.²⁴⁶ In the Merits award, the tribunal dismissed China's historic rights claim as unfounded under *UNCLOS*.²⁴⁷ The tribunal's questionable reasoning is predicated on the view that *UNCLOS* supersedes historic rights:²⁴⁸ "The Tribunal concludes that the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein."²⁴⁹

However, China's ambiguity may be related to the debate surrounding the legal notion of historic rights.²⁵⁰ The lack of clear criteria for historic rights claims is something that has existed at least since the United States claimed the Delaware Bay as a part of its waters.²⁵¹ In fact, most modern historic rights claims tend to be unilateral claims that do not enjoy support from the international community.²⁵² Rather, the notion of historic rights appears to be a contextual notion based on the history of the body of water in question. In the *Land, Island and Maritime Frontier Dispute*, the ICJ noted that it was "clearly necessary ... to investigate the particular history of the Gulf of Fonseca to discover what is the 'regime' of the Gulf resulting there from."²⁵³ Rather than a set of monolithic criteria, historic rights must

²⁴⁴ E.g. Fu Chu, *Concerning the Question of Our Country's Territorial Sea* (Beijing: Knowledge of the World Press, 1959), translated and reprinted in JA Cohen & Hungdah Chiu, *People's China and International Law* (Princeton: Princeton University Press, 1974) at 483.

²⁴⁵ Dupuy & Dupuy, *supra* note 40 at 128.

²⁴⁶ Clive R Symmons, *Historic Waters in the Law of the Sea* (Leiden: Martinus Nijhoff Publishers, 2008) at 15; Jinming & Dexia, *supra* note 78 at 293; Keyuan, *supra* note 59 at 160.

²⁴⁷ *South China Sea* (Merits), *supra* note 41 at para 278.

²⁴⁸ See generally Kopela, *supra* note 114 at 184, 199, who argues that the tribunal neglects the *lex specialis* character of historic rights.

²⁴⁹ *South China Sea* (Merits), *supra* note 41 at para 278; similar reasoning is also found in the *South China Sea* (Jurisdiction), *supra* note 113 at para 168.

²⁵⁰ Dupuy & Dupuy, *supra* note 40 at 136.

²⁵¹ Symmons, *supra* note 246 at 15–16.

²⁵² Leonardo Bernard, "The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation" (Paper presented at the LOSI-KIOST Conference on Securing the Ocean for the Next Generation, Seoul, 21–24 May 2012) 2 at 4.

²⁵³ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, [1992] ICJ Rep 351 at para 384.

be evaluated in terms of context-specific history as the notion of historic rights is not confined to a single set of geographies. As the ICJ stated in the *Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*, there is no single "regime" for historic rights; they are generally recognized on a case-by-case basis.²⁵⁴ This necessity for a contextual analysis is associated with the lack of clear rules regarding the notion of historic rights. As the expert Zou Keyuan argues, "the concept of historic rights is not clearly defined in international law ... there are no definite rules in international law which govern the status of historic maritime rights."²⁵⁵ As such, the claim that China is in clear violation of these rules should be regarded with some scepticism.

EEZ

Through domestic legislation and military enforcement, China's regulatory framework does expand the concept of EEZ to encompass protection against military activities.²⁵⁶ Various commentators have alleged that the addition of this component is precedent setting.²⁵⁷ According to one scholar, China's concept of EEZ "presents a direct challenge to the long-standing freedoms provided by the Law of the Sea; if realized, it would set a dangerous precedent that could have a destabilizing effect in the region and throughout the broader maritime world."²⁵⁸ As James Kraska has argued, China is attempting to transform EEZs "from simple areas of resource rights and jurisdiction into something akin to territorial seas, restricting foreign military operations in more than one third of the world's ocean area through assertions of sovereignty."²⁵⁹ This perception is also shared by American navy attorneys, who believe China's lawfare strategy seeks to deny access to warships and aircraft of other states in the region.²⁶⁰ If true, China could be the gatekeeper for maritime and airspace traffic in the South China Sea and prevent foreign vessels from accessing the region.²⁶¹

²⁵⁴ [1982] ICJ Rep 18 at 74.

²⁵⁵ Keyuan, *supra* note 59 at 163.

²⁵⁶ E.g. Carl Thayer, "China's Oil Rig Gambit: South China Sea Game-Changer?" *The Diplomat* (12 May 2014), online: <<http://www.iacspsea.com/wp-content/uploads/2014/07/Chinas-Oil-Rig-Gambit-May-12-2014.pdf>>.

²⁵⁷ Symmons, *supra* note 12 at 206; Buszynski, *supra* note 4 at 140; Kline, *supra* note 13 at 149-50.

²⁵⁸ David, *supra* note 14 at 1, 14.

²⁵⁹ James Kraska "Sovereignty at Sea" (2009) 51:3 *Survival* 13 at 14.

²⁶⁰ Raul Pedrozo, "The Building of China's Great Wall at Sea" (2011) 17:2 *Ocean & Coastal LJ* 253 at 254.

²⁶¹ Kittrie, *supra* note 29 at 2.

However, this depiction of China's actions as being precedent setting does not account for its various precedents in international law. In 1973, Libya claimed that the Gulf of Sidra was its own internal waters and asserted its right to conduct military activities,²⁶² despite Libya's controversial claim that it was a historic bay.²⁶³ Much like the South China Sea, the Gulf of Sidra has been the stage of standoffs involving the United States wanting to protect navigation rights.²⁶⁴ Furthermore, several states have adopted a military approach to EEZs in times of conflict. During the Falklands War, the United Kingdom declared a 200-nautical-mile military exclusion zone and banned ships of all nations from entering the zone. Argentina responded in turn by creating their own military exclusion zone along its coast.²⁶⁵ In January 2002, Israel seized a Tongan-flagged vessel on the Red Sea for carrying a reported fifty to eighty tons of armaments into Palestine.²⁶⁶ Precedents also exist in times of relative peace. In December 2002, Yemeni authorities stopped a North Korean vessel near its coast after discovering Scud missiles on board.²⁶⁷ During the summer of 2000, Japan filed seventeen official complaints to states for undertaking naval intelligence operations along its coast.²⁶⁸ Similarly, one scholar notes that Russia has employed strategies of "creative legal ambiguity" and instrumentalized its domestic legislation to advance its own controversial EEZ claims in the northern sea route area.²⁶⁹ While China has been aggressive in enforcing its military EEZs, states are increasingly using the EEZ concept to protect them from potentially hostile vessels. The idea that China is setting an entirely new precedent should therefore be nuanced in light of these precedents.

CHINA'S USE OF STRATEGIC VAGUENESS

As some have argued, China has adopted a lawfare strategy of "ambiguity" and sought to exploit legal grey areas in order to advance its geopolitical agenda.²⁷⁰ From a political point of view, the ambiguity surrounding China's legal position may seem less than optimal, as ambiguity surrounding its

²⁶² Van Dyke, *supra* note 154 at 32.

²⁶³ Yehuda Z Blum, "The Gulf of Sidra Incident" (1986) 80 AJIL 668 at 677.

²⁶⁴ Van Dyke, *supra* note 154 at 32.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid* at 34.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ Jan Jakub Solski, "New Developments in Russian Regulation of Navigation on the Northern Sea Route" (2013) 4:1 Arctic Review on Law and Politics 90 at 95–98.

²⁷⁰ Beckman, *supra* note 80 at 156.

claims could lead to confusion or reduce their acceptability in the international arena. However, strategic ambiguity itself is a part of China's greater geopolitical ambitions. Indeed, it is a lawfare tactic intended to further its longer-term ambitions. Two reasons may account for China's embrace of strategic ambiguity. First, ambiguous legal claims afford China the flexibility to modify the legal basis of its claims.²⁷¹ In China's quest to find internationally acceptable language for its geopolitical ambitions, this flexibility could prove to be important, considering the changing nature of international law. Second, this "strategic ambiguity" helps protect its potential sphere of influence from rival claims.²⁷² China wants to maintain control over the South China Sea long enough to fully obtain sovereignty over it. It is a stepladder over competing claims.²⁷³ For the moment, China does not have the necessary military capacities to adequately defend the South China Sea as if it were its own sovereign territory.²⁷⁴ As a result, China has resorted to a long-term strategy to protect the potential of the South China Sea as its zone of influence and consolidate its claims.²⁷⁵ By destabilizing competitors and laying the groundwork for its own claim, China ensures that it can seize upon the opportunity to control the Sea once it develops its capacity. In the long term, China will be able to exploit this ambiguity and make expansive claims to match its increasingly powerful military, allowing it to transform its weak claims into stronger ones.²⁷⁶

China's use of strategic ambiguity (within a greater lawfare strategy) is reminiscent of the United States during its own rising period, when it fashioned (vague) legal norms to advance its geopolitical interests. To take one example, in 1856, Congress passed the *Guano Islands Act*, which enabled citizens of the United States to take possession of any unclaimed island containing guano deposits (seabird, seal, or cave-dwelling bat excrements that are used especially for fertilizing purposes).²⁷⁷ Section 1 of the Act reads:

²⁷¹ Gregory B Poling, *The South China Sea in Focus: Clarifying the Limits of Maritime Dispute* (Lanham, MD: Rowman & Littlefield, 2013) at 2.

²⁷² David, *supra* note 14 at 16–17.

²⁷³ Kline, *supra* note 13 at 165.

²⁷⁴ Vanhullebusch & Shen, *supra* note 144 at 137; Cheng & Paladini, *supra* note 6 at 185; Holmes & Yoshihara, *supra* note 190 at 35–37, 41; Buszynski, *supra* note 4 at 152.

²⁷⁵ Fravel, *supra* note 10 at 297.

²⁷⁶ Kline, *supra* note 6 at 148, 165–66.

²⁷⁷ *Guano Islands Act*, 18 August 1856, 48 USC, ch 8 §§ 1411–19, reprinted in 11 Stat 119; Gregory T Cushman, *Guano and the Opening of the Pacific World: A Global Ecological History* (New York: Cambridge University Press, 2013) at 2.

Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.²⁷⁸

This exceedingly vague law provoked a “guano rush” among expansionist entrepreneurs and resulted in the acquisition of over 100 islands in the Caribbean and Pacific,²⁷⁹ including several islands (for example, Swains Island) where no evidence of guano was ever found.²⁸⁰ The United States has maintained claims to twelve of these islands and their respective EEZs (even though many of them are uninhabited) by virtue of this law.²⁸¹

Even though the law of the sea has substantially developed since the era of the *Guano Islands Act*, it still lacks the strength required to settle such sovereignty-related disputes.²⁸² This relative weakness enables rising powers to advance their geopolitical interests. This is especially evident considering recent developments following the tribunal’s award. Even though the tribunal concluded that *UNCLOS* supersedes any historic rights or sovereignty claim in the South China Sea,²⁸³ China still maintains that its historic claims give it sovereignty over the region. This is a marked contrast with other coastal countries (for example, Vietnam and the Philippines) that base their legal arguments in terms of *UNCLOS*.²⁸⁴ Although some commentators have attempted to ground China’s claims in *UNCLOS* terms,²⁸⁵ a stronger *UNCLOS* could result in it superseding historic rights claims, something that could significantly undermine the legal basis of China’s claims.²⁸⁶ Even if *UNCLOS* were to support the legal basis of

²⁷⁸ *Guano Islands Act*, *supra* note 277, s 1.

²⁷⁹ Jimmy M Skaggs, *The Great Guano Rush: Entrepreneurs and American Overseas Expansion* (New York: St Martin’s Press) at 213.

²⁸⁰ *Ibid.*

²⁸¹ These territories are Baker Island, French Frigate Shoals, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef/Danger Rock, Midway Atoll, Navassa Island, Palmyra Atoll, Bajo Nuevo Bank, Serranilla Bank, and Swains Island. United States Government Department of the Interior, *Acquisition Process of Insular Areas* (9 May 2010), online: <<https://www.doi.gov/oia/islands/acquisitionprocess>>; Jon M Van Dyke, Joseph R Morgan & Jonathan Gurish, “Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ” (1988) 25 *San Diego L Rev* 425 at 431.

²⁸² Saul, *supra* note 20 at 203; Pham, *supra* note 11 at 8.

²⁸³ *South China Sea (Merits)*, *supra* note 41, para 278.

²⁸⁴ Beckman, *supra* note 80 at 153.

²⁸⁵ David, *supra* note 14 at 6–8.

²⁸⁶ Beckman, *supra* note 80 at 163; David, *supra* note 14 at 9–11.

China's claims, *UNCLOS*'s provisions on good faith and equity could substantially reduce the size of China's claimed territory or open up China's territory for its coastal neighbours.²⁸⁷

CONCLUSION

A key theme in China's approach to the South China Sea dispute is China's quest to couch its geopolitical strategy in acceptable legal terms.²⁸⁸ This has not been an easy task, as many of their claims are seemingly based on precedents established to benefit rising powers and other states in an earlier era. Despite this, China's rise on the world stage has resulted in greater weight to enforce the acceptability of its expansive claim. Recent history has shown that China is unafraid of backing up its lawfare tactics with military force.²⁸⁹ This confidence will seem all the more rational once China achieves greater military and economic superiority, much like the United States during the nineteenth and twentieth centuries. Going forward, is China's increasing aggressiveness going to be the start of a Chinese expansionism, as some have suggested?²⁹⁰ Probably not. China's seeming aggressiveness has thus far been confined to territories it sees as a part of China, such as Taiwan, Tibet, and the South China Sea.²⁹¹ In its geopolitical dealings, China has generally been pragmatic and has generally not been driven by long-term diplomatic philosophies.²⁹²

Insofar as its South China Sea claims constitute a microcosm for its general approach to international law, recent history suggests China will take advantage of existing exceptions and precedents rather than completely rewrite international law.²⁹³ China's approach to the South China Sea shows striking similarities to the actions of the United States in the nineteenth and twentieth centuries. As Barry Buzan observes, "[i]ronically, the most obvious comparator for China's peaceful rise ... is the United States" as both countries have favoured economic development over military power

²⁸⁷ Duong, *supra* note 68 at 1138; *UNCLOS*, *supra* note 15, arts 59, 300.

²⁸⁸ Regarding its broader approach to international law, see Congyan Cai, "New Great Powers and International Law in the 21st Century" (2013) 24:3 *EJIL* 755 at 795 argues that China's latest legal practice has been marked by a struggle "to carry out its declared international legal policy."

²⁸⁹ DeLisle, *supra* note 20 at 274.

²⁹⁰ Duong, *supra* note 68 at 1149.

²⁹¹ Saul, *supra* note 20 at 201, 203.

²⁹² Buzan, *supra* note 25 at 29.

²⁹³ Ann Kent, "Compliance v Cooperation: China and International Law" (2006) 13 *Austr Intl LJ* 19 at 31; Jonathan G Odom, "A China in the Bull Shop? Comparing the Rhetoric of a Rising China with the Reality of the International Law of the Sea" (2012) 17 *Ocean & Coastal LJ* 201 at 251.

and adopted a policy of military restraint, until they shifted to a stronger stance.²⁹⁴ In a sense, there is a double standard in the United States defending strong views of freedom of navigation in the South China Sea while fighting against such views during its imperial period. This double standard is made starker by their respective reliance on exploiting legal ambiguities. As Christopher Rossi notes, “China’s sense of entitlement ... is also informed by an underlying sense of inequality, inconsistency, historical sensitivity, and imperial double-dealing.”²⁹⁵

Much like the United States, China has taken advantage of legal “grey areas” to expand its sphere of influence. While China has been criticized for being vague in its claims, one must not forget the vagueness of America’s maritime claims in a previous era. President Harry Truman’s official declaration that “the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coast of the United States (were) subject to its jurisdiction and control”²⁹⁶ sounds shockingly similar to China’s 1998 *Law* that stipulates that China shall “exercise its sovereign rights and jurisdiction over its exclusive economic zone and its continental shelf” and that it “exercises sovereign rights for the purposes in terms of exploring and exploiting, conserving and managing the natural resources of the waters superjacent to the sea-bed and of the sea-bed and its subsoil.”²⁹⁷ History does indeed rhyme.

²⁹⁴ Buzan, *supra* note 25 at 15.

²⁹⁵ Rossi, *supra* note 11 at 279.

²⁹⁶ *Proclamation no 2667*, 3 CFR 67 (1945), reprinted in 59 Stat 884 (1945).

²⁹⁷ 1998 *Law*, *supra* note 56, arts 1, 3.