

THUCYDIDES AT SEA: CHINESE PERSPECTIVES ON INTERNATIONAL LAW AND THE SOUTH CHINA SEA DISPUTE IN AN EVOLVING INTERNATIONAL ORDER*

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ABSTRACT

Five years after *Philippines v. China*, China's great power domination in the South China Sea ("SCS") remains a reality. Chinese maritime aggression has returned in full force, with repeated provocations heightening insecurities in the world's most contested maritime region. This Article dives into the People's Republic of China's evolving great power approach to international law and its implications for the SCS disputes that significantly threaten international economic and security interests. It first sketches the role and constraints posed by China's historical approaches to international relations and party-state politics, before describing the key developments that led to the SCS Arbitration and discussing salient points of the Arbitral Award on the legal status of certain maritime features. Finally, the Article examines China's reception of and compliance with the Award and shows why emergent Chinese legalism and global leadership ambitions may prove insufficient in promoting pacific resolution of these disputes.

“[T]he strong do what they can and
the weak suffer what they must.”
—Thucydides¹

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¹ THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 397 (Richard Crawley trans., 1874) (431 B.C.).

INTRODUCTION

More than five years after the landmark Arbitral Award in *Philippines v. China*,² the People's Republic of China (PRC) continues to reject it with impunity.³ Even as the COVID-19 pandemic gripped the world to a standstill, and despite deepening regional tensions because of it, China ramped up its sustained aggressive stance in the South China Sea ("SCS"),⁴ employing a full range of naval power projection,⁵ maritime intimidations,⁶

² South China Sea Arbitration (Phil. v. China), Merits [hereinafter "*Award on Merits*"], PCA Case No. 2013-19 (Perm. Ct. Arb. July 12, 2016), available at <http://www.pccases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>.

³ See *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA WEBSITE, July 12, 2016, available at https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201607/t20160712_679470.html.

The PRC's official position on the Arbitral Award rendered on July 12, 2016 in the South China Sea ("SCS") Arbitration remains that "the award is null and void and has no binding force. China neither accepts nor recognizes it." (*Id.*)

⁴ See Yen Nee Lee, *Beijing may be using the coronavirus pandemic to advance its interests in the disputed South China Sea*, CNBC, Apr. 13, 2020, at <https://www.cnbc.com/2020/04/14/china-advances-claims-in-south-china-sea-despite-coronavirus-pandemic.html>; Robert Manning & Patrick Cronin, *Under cover of pandemic, China steps up brinkmanship in South China Sea*, FOREIGN POLICY, May 14, 2020, at <https://foreignpolicy.com/2020/05/14/south-china-sea-dispute-accelerated-by-coronavirus/>.

⁵ See *By Air, Land, and Sea: China's Maritime Power Projection Network*, ASIA MARITIME TRANSPARENCY INITIATIVE, at <https://amti.csis.org/power-projection-network>.

⁶ The list of Chinese maritime intimidations affecting all claimants in the South China Sea is long. For a preview of aggressions affecting several claimants in early 2020, see Sofia Tomacruz & JC Gotinga, *Beijing continues South China Sea aggression during pandemic*, RAPPLER, May 13, 2020, at <https://www.rappler.com/newsbreak/iq/260766-china-continues-aggression-south-china-sea-coronavirus-pandemic>. For a list of incursions in Philippine waters in 2019, see also Sofia Tomacruz & JC Gotinga, *China's incursions in Philippine waters*, RAPPLER, Aug. 22, 2019, at <https://r3.rappler.com/newsbreak/iq/238236-list-china-incursions-philippine-waters>. PRC-linked ships have been accused of provocative actions in contested portions of the SCS, including, more recently, the sustained tailing of ships exercising innocent passage in Chinese-claimed waters, the sinking of a Vietnamese fishing boat, the sinking of a Philippine fishing boat within Philippine Exclusive Economic Zone ("EEZ"), and the targeting a Philippine naval vessel patrolling Philippine territorial sea. China also launched its largest deployment of militia vessels to date by surrounding Philippine-controlled Thitu (Pag-asa) Island, blocking resupplies to the inhabited feature with an average of 30 to 40 vessels at a time for almost three years since 2018. See *The Long Patrol: Stare-down at Thitu Island Enters its Sixteenth Month*, ASIA MARITIME TRANSPARENCY INITIATIVE, Mar. 5, 2020, at <https://amti.csis.org/the-long-patrol-stare-down-at-thitu-island-enters-its-sixteenth-month>.

and economic coercion techniques to insist on its hardline position of “indisputable sovereignty” over a deeply contested maritime region. China is widely accused of using a maritime militia⁷ and, in recent years, has also turned to a sophisticated use of domestic law⁸ and ostensibly domestic maritime enforcement activities to promote and expand its maritime claims.⁹ In April 2020, China staked its claim on 80 other maritime features, 55 of them submerged, and divided its claims into two districts under the administrative jurisdiction of Sansha, Hainan.¹⁰ In January 2021, it passed a new Coast Guard Law that authorized the China Coast Guard (CCG) to use

⁷ China’s use of “maritime militias,” i.e., a paramilitary fleet composed of hundreds of fishing trawlers manned by military-trained sailors and modified for ramming and spying, is well-documented. China has employed this maritime militia to take advantage of plausible deniability and serve its expansionist purposes without sparking over conflict with other claimant states. For an in-depth analysis of the Chinese maritime militia and its aggressive activities that fall short of *causus belli* in international law, see Gregory Poling, Tabitha Grace Mallory, Harrison Prétat & the Center for Advanced Defense Studies, *Pulling Back the Curtain on China’s Maritime Militia*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, Nov. 2021, at https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/211118_Poling_Maritime_Militia.pdf. See also Jonathan Manthorpe, *Beijing’s maritime militia, the scourge of South China Sea*, ASIA TIMES, Apr. 28, 2019, at <https://asiatimes.com/2019/04/beijings-maritime-militia-the-scourge-of-south-china-sea/>.

⁸ Nguyen Thanh Trung & Le Ngoc Khanh Ngan, *Codifying Waters and Reshaping Orders: China’s Strategy for Dominating the South China Sea*, ASIA MARITIME TRANSPARENCY INITIATIVE, Sept. 27, 2021, at <https://anti.csis.org/codifying-waters-and-reshaping-orders-chinas-strategy-for-dominating-the-south-china-sea>.

⁹ Diane A. Desierto, *China’s Maritime Law Enforcement Activities in the South China Sea*, 96 INT’L L. STUD. 257 (2020). Desierto notes that between 2010 and 2020, “approximately seventy major incidents occurred in the South China Sea, with ‘at least one Chinese maritime law enforcement vessel [...] involved in 73 percent of incidents.’” (*Id.* at 258–59). Desierto summarizes these incidents below:

1. China Coast Guard conducted “regular patrols” into Indonesia’s exclusive economic zone off the coast of the northern islands of Natuna;
2. The flanking of Malaysian state oil company Petronas’ oil exploration vessel by Chinese vessels, including those from the Coast Guard;
3. China Coast Guard vessels rammed Philippine fishing boats and frequently seized Filipino fishermen’s catch off Scarborough Shoal;
4. China Coast Guard vessels blocked the passage of three Philippine civilian vessels on a resupply mission to Second Thomas (Ayungin) Shoal;
5. China’s maritime militia and Coast Guard intermittently swarmed Philippine-occupied Thitu (Pag-asa) Island; and
6. The collision with and sinking of a Vietnam fishing vessel by a Chinese patrol vessel in the vicinity of the Paracel Islands, reportedly due to the fishing vessel’s “illegal entry” and refusal to leave after being ordered to do so by China’s Coast Guard (*Id.* at 259–260). (Citations omitted).

¹⁰ Agence France-Presse, *Beijing names islands in disputed South China Sea*, RAPPLER, Apr. 21, 2020, at <https://www.rappler.com/world/regions/asia-pacific/258609-beijing-names-islands-disputed-south-china-sea>.

force on foreign vessels supposedly infringing “jurisdictional waters” covered by “Chinese sovereignty,”¹¹ i.e., waters covered by its repudiated nine-dash line.¹² In September 2021, China’s amended Maritime Traffic Safety Law came into force, beefing up the law enforcement powers of China’s Maritime Safety Administration to potentially interfere with the innocent passage of foreign ships over contested “jurisdictional waters,” and require all foreign vessels entering these waters, virtually the entire SCS, to notify Chinese maritime authorities, carry required permits, and submit to Chinese command and supervision.¹³

China’s historical and recent provocations in the world’s most contested maritime region, even as the rest tackles a debilitating public health crisis, is fueling a sharp and growing distrust of its role and vision as a world leader in an evolving international order.¹⁴ The debate over China’s approach to international law, and the extent to which its reliance on great power prerogatives to reject a universalist application of international law norms mirrors the United States’ exceptionalism, are not new.¹⁵ International actors have long recognized the importance of understanding China’s attitudes

¹¹ Shigeki Sakamoto, *China’s New Coast Guard Law and Implications for Maritime Security in the East and South China Seas*, LAWFARE, Feb. 16, 2021, at <https://www.lawfareblog.com/chinas-new-coast-guard-law-and-implications-maritime-security-east-and-south-china-seas>.

¹² The “nine-dash” line is an ambiguous U-shaped demarcation that encapsulates much of the South China Sea, promoted by the PRC as its maritime “boundary.” The PRC claims “indisputable sovereignty” over “the islands [...] and the adjacent waters” enclosed by this nine-dash line. The nature and legal status of the nine-dash line will be discussed in Part II, *infra*.

¹³ See Tsukasa Hadano, *China’s new maritime law fines ships that violate its waters*, NIKKEI ASIA, Apr. 30, 2021, at <https://asia.nikkei.com/Politics/International-relations/Indo-Pacific/China-s-new-maritime-law-fines-ships-that-violate-its-waters>.

¹⁴ See, generally, Peter Martin, *Why China is Alienating the World*, FOREIGN AFFAIRS, Oct. 6, 2021, at <https://www.foreignaffairs.com/articles/china/2021-10-06/why-china-alienating-world>. Citing a recent Pew Research Survey, Martin points to a growing trend of negative perception against China in the developed world (the worst backlash since the 1989 Tiananmen Square Massacre), and China’s inability or refusal to recalibrate its foreign policy direction despite growing negative sentiments. See also Laura Silver et al., *Unfavorable Views of China Reach Historic Highs in Many Countries*, PEW RESEARCH CENTER, Oct. 6, 2020, at <https://www.pewresearch.org/global/2020/10/06/unfavorable-views-of-china-reach-historic-highs-in-many-countries/>.

¹⁵ See, generally, Jerome A. Cohen, *Law and Power in China’s International Relations*, 52 N.Y.U.J. INT’L L. & POL. 123 (2019); Thomas E. Kellogg, *News of a Kidnapping: The Gui Minhai Case and China’s Approach to International Law*, 41 FORDHAM INT’L L. J. 1215 (2018); Alastair Iain Johnston, *Is China a Status Quo Power?*, 27 INT’L SEC. 5 (2003); Scott L. Kastner & Philip C. Saunders, *Is China a Status Quo or Revisionist State? Leadership Travel as an Empirical Indicator of Foreign Policy Priorities*, 56 INT’L STUD. Q. 163 (2012).

toward international law, as its rise to great power status necessarily makes its engagement with international law consequential.¹⁶ Since the 1970s, the PRC has consistently expressed a generalized belief in the importance of rules-based international law and approached it with an attitude largely similar to other major powers.¹⁷ However, recent Chinese engagements in the law of the sea, human rights, and bilateral and multilateral treaty relations inspire an increasing lack of confidence in China as a responsible world power,¹⁸ with Canadian ambassador to China David Mulroney remarking that the country is “one that feigns compliance with international norms only when it is convenient to do so.”¹⁹

This Article seeks to understand China’s evolving approach to international law by examining its engagement in a specific issue that is central to Chinese economic and security interests: the competing maritime claims in the SCS. Part I briefly examines the role and constraints posed by the PRC’s historical narratives and party-state politics as it relates to the SCS. It sketches modern China’s approach to international law post-Qing dynasty in the context of its “century of humiliation” that has shaped present approaches to international law. Part II provides a background on the SCS maritime disputes, focusing on key developments that led to the SCS Arbitration, as well as salient points of the Award that clarified the application of the United Nations Convention on the Law of the Sea (“UNCLOS”) to certain maritime features and entitlements, while also touching on the historical underpinnings of China’s nine-dash claim. Part III examines China’s compliance with the *dispositif* in *Philippines v. China*, describes domestic reception of the Award, and identifies reasons why emergent Chinese legalism and global leadership ambition may still prove insufficient in providing workable opportunities for recognition and compliance with the Award. Finally, the Article concludes with a prescription that other powers in the Asia-Pacific region cannot remain spectators to the SCS disputes, especially as authoritarian powers such as China and Russia

¹⁶ See, generally, CONGYAN CAI, THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY (2019). Cai notes that in the 21st century, scholars have increasingly made pessimistic observations on the effectivity of international law in engaging a rising China, with international law not seen as a reliable tool to manage power competitions between China and the West (*Id.* at 5–6).

¹⁷ Cohen, *supra* note 15, at 161.

¹⁸ *Id.*

¹⁹ David Mulroney, *We must finally see China for what it truly is*, THE GLOBE & MAIL, Dec. 27, 2018, at <https://www.theglobeandmail.com/opinion/article-we-must-finally-see-china-for-what-it-truly-is/>.

forcefully evolve an international order characterized by sharper military power competition.

I. CHINA'S HISTORICAL APPROACHES TO INTERNATIONAL RELATIONS AND INTERNATIONAL LAW

History has a special force on the development of an individual state's practice and conception of international law.²⁰ For China, its long history as a dominant land power in a Sino-centric world order significantly shaped its relations with foreign states. China has a distinct culture, legal system, and philosophy borne from its long history. Due to constraints, the Article will touch only on Imperial China's Sino-centric conception of world order and the westernizing developments that began shortly before the fall of the Qing dynasty. The Article will also discuss the Chinese "century of humiliation" beginning in the mid-19th century, which profoundly affected current Chinese perceptions of the Western-led international order and still strongly informs China's evolving approach to international law and great power politics.

A. Chinese Traditional World Order

In his lecture on historical and contemporary international law in China, eminent Chinese jurist Wang Tieya divides the practice of international law in China between ancient and modern periods. The ancient period can be traced as far back as the Spring and Autumn (722-476 B.C.) and Warring States (476-221 B.C.), while the modern period begins with the decline of the Qing dynasty in the mid-19th century.²¹ "Opinion differs as to whether there was international law in ancient China[.]"²² although Wang Tieya concludes that there were usages of interstate relations prior to unification under the Qin dynasty in 221 B.C.²³ From then on, "interstate practices and usages could not be possible and there were no traces of international law until the middle of the nineteenth century[.]"²⁴ i.e., the decline of the Qing, the last imperial dynasty.

²⁰ Jacques deLisle, *China's Approach to International Law: A Historical Perspective*, 94 PROCEEDINGS OF THE ASIL ANNUAL MEETING, AM. SOC'Y INT'L L., 267, 267-68 (2000).

²¹ Wang Tieya, *International Law in China: historical and contemporary perspectives*, 221 RECUEIL DES COURS 195, 205, 226 (1990).

²² *Id.* at 205.

²³ *Id.* at 213.

²⁴ *Id.*

In the long interim, Chinese practice of international relations was governed by a world-order philosophy best encapsulated by the concept of *tianxia* (“all under the Heaven”), with the Chinese Emperor performing a dual role of *Huang Di* (the temporal Emperor of China), and *Tian Zi* (the spiritual Son of Heaven).²⁵ This idea of Empire as a comprehensive and indivisible whole operates on the principle that “[u]nder the whole heaven, there is no land that is not the Emperor’s, and within the sea-boundaries of the land, there is none who is not a subject of the Emperor.”²⁶ Thus, China, surrounded by countries in the region that were otherwise small, weak, or politically subordinated to it, inhabited a world order that resembled a loose community of nations under the leadership of the Middle Kingdom.²⁷ This order is hierarchical and non-equalitarian, based on cultural rather than political domination,²⁸ with “China as a central power, occupying a superior position based on cultural ascendancy[.]”²⁹

Jacques deLisle characterized China’s practice of international relations during this period by two persistent features: first, a “normative-ideological dimension” that is based on power and interest maximization; and second, an understanding of a link “between the character of the international order [...] and the internal order of states.”³⁰ Surface-level similarities with Western universalistic practices, however, may be misleading, as notions of power and interest, norms and values, and links between internal and external orders have evolved differently in China.³¹ Imperial China’s approach to international relations was informed by the Confucian tradition emphasizing *li* (norms of proper behavior) and *ren* (inner moral force), and the competing Legalist stance stressing *fa* (positive laws) and reliance on *xing* (external, often coercive means) to achieve compliance.³² In the Confucian tradition, securing the political unity of an expansive Chinese domain of shared culture is a normative objective that is possible especially with a righteous Chinese ruler.³³ On the other hand, the Legalist perspective viewed international relations starkly in terms of power and state

²⁵ *Id.* at 214, 217.

²⁶ *Id.* at 214. (Citation omitted.)

²⁷ *Id.* at 215.

²⁸ *Id.* at 215–17.

²⁹ *Id.* at 217.

³⁰ deLisle, *supra* note 20, at 268.

³¹ *Id.*

³² *Id.* at 268–69.

³³ *Id.* at 269.

interest, and cautioned that a ruler “must seek to maximize [their] state’s wealth and power.”³⁴ In the words of deLisle:

Conquest was a proper goal and force a proper method. Limits were matters of prudence, not moral principle. Survival and expansion in a hostile environment required accumulating the resources to overcome or intimidate rivals, and using those resources to structure incentives (or, where necessary, to use force) to induce other states to act in accordance with one’s own interests and will. In intra-Chinese and Chinese-barbarian interstate relations alike, the wise and successful ruler followed Legalist techniques for acquiring and using power, and eschewed the recipe for defeat urged by Confucians’ moralistic prattle.³⁵

The Ming and Qing dynasties saw the fruition of this Confucian tradition, “with substantial elements drawn from Legalist analyses,” in the form of the tribute system.³⁶ The tribute system is the main framework by which international relations were conducted in Imperial China.³⁷ It reinforced the orthodox vision of a distinctly Confucian hierarchical order with the Chinese Emperor at the apex, ideally as a manifestation of supreme virtue, emphasizing Chinese moral and cultural superiority.³⁸ This manifestation of Chinese traditional world order succeeded for a long time as it brought mutual benefits for the Emperor and the tributary states: It preserved China’s security and status as the central power, while legitimizing rulers of tributary states and allowing them to conduct profitable trade.³⁹

B. China’s “Century of Humiliation”

Beginning the mid-19th century, however, China’s position in its self-conceived international order deteriorated. Beset by major rebellions and by aggressive trade-seeking Western powers, and with Meiji Japan and tsarist Russia next door, the decaying Qing dynasty presided over China’s sharp fall from imperial center to semi-colony (*banzhimindi*) status.⁴⁰ Following its defeat in the First and Second Opium Wars, the Qing dynasty

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 269.

³⁷ *Id.* at 269–70.

³⁸ *Id.* at 270.

³⁹ Wang, *supra* note 21, at 221–22, 224.

⁴⁰ deLisle, *supra* note 20, at 270–71.

was forced to enter into a series of “unequal treaties,”⁴¹ where China conceded many of its territorial and sovereignty rights to as many as 19 different countries, including Great Britain, the United States, France, Russia, Prussia, and Japan.⁴² Refusing to recognize Imperial China as a “civilized” state, the treaties unbundled certain aspects of sovereign rights and awarded the exercise of such rights to foreign countries, resulting in semi-independent legal, judicial, police, and taxation systems within defined foreign enclaves.⁴³

Crucially, the unequal treaties regime marked the forceful introduction of Westphalian international law in China⁴⁴ and the beginning of the Chinese “century of humiliation.” Qing China suffered major internal fragmentation and social unrest, lost almost all the wars it fought, and consequently, was often forced to give major concessions to the great powers.⁴⁵ Imperial China’s forceful opening broke down its traditional, Sino-centric international world order. However, this was not replaced by the Westphalian system of sovereign equality, but by a system of unequal treaties concluded by force or threat of force that completely rejected the idea of

⁴¹ Stefan Kroll, *The Emergence and Transformation of the International Order: International Law in China, 1860-1949*, 37 *ASIAN PERSPECTIVE* 31, 36 (2013). During the republican period, Chinese international lawyers developed the concept of “unequal treaties” from the principles of nationality and territorial integrity underpinning European international law to challenge the validity of “unequal treaties” entered into during the Qing dynasty. According to Stefan Kroll, “China put the issue of unequal treaties on the agenda of international legal science in the late 1920s and from there it did not disappear.” (*Id.* at 47–48). For a discussion of the nature and effects of the unequal treaties, *see, generally*, Wang, *supra* note 21.

⁴² The first unequal treaty imposed on China was the 1842 Treaty of Nanjing following British victory in the First Opium War. This was followed by the Treaty of Wangxia with the United States and the Treaty of Huangpu with France, both in 1844, which largely followed the British treaty but with the Americans further refining the system of extraterritoriality. Sweden and Norway succeeded in obtaining similar agreements in 1847. The second group of unequal treaties, concluded from 1858 to 1860, were between Qing China and Great Britain, France, the United States, and Russia in 1858, which among others legalized the opium trade, allowed foreign commerce and navigation along the Yangzi River, and allowed warships to be stationed in inland waters. After 1860, some more states entered into treaty relations with China, including Prussia (1861), Portugal (1862), Denmark (1863), the Netherlands (1863), Spain (1864), Italy (1866), Austria-Hungary (1869), Japan (1871), and Peru (1874). Other treaty countries include Mexico, Brazil, and Switzerland. Most-favored-nation clauses usually guaranteed the same sovereignty-infringing rights and privileges to these later countries. (Wang, *supra* note 21, at 237–41, 252). (Citations omitted.)

⁴³ *See* Wang, *supra* note 21; Jacques deLisle, *Remarks by Jacques deLisle*, 107 *PROCEEDINGS OF THE ASIL ANNUAL MEETING (AM. SOC’Y INT’L L.)* 348, 350 (2013).

⁴⁴ *See* Kroll, *supra* note 41.

⁴⁵ Wang, *supra* note 21, at 251–53.

sovereign equality.⁴⁶ For example, the treaties exacted special privileges for foreigners, including: (a) a system of extraterritoriality (which effectively exempted foreigners from Chinese law and jurisdiction); (b) tariff powers; (c) foreign-controlled settlements and concessions at trade ports; (d) territorial cessions disguised as “leased territories”; (e) coastal and inland water navigation rights for foreign commercial vessels and warships; and (f) the right of issuing currency.⁴⁷ Apart from the loss of sovereign rights, the extension of privileges to foreigners, which damaged China’s moral and cultural values.⁴⁸ The right to propagate Christianity threatened Confucian values, which had been the backbone of Imperial China, while the allowance of permanent residence of foreign representatives in Beijing signified an end to the longstanding tribute system.⁴⁹ The variety of these unusual privileges granted to foreign nationals—especially that of extraterritoriality—was bitterly resented by patriotic Chinese.⁵⁰

China’s experience with the Westphalian international order is thus remembered as a narrative of forceful and humiliating imposition, when Chinese sovereignty was systematically carved away, culminating with the effective partition of its territories into foreign zones of operation. Unsurprisingly, this aroused deep “feelings of vulnerability and resentment” toward the West and its rules-based international order.⁵¹ The humiliation narrative became central to modern Chinese nationalism,⁵² which would see uneasy tensions with the Western-led international order that persists to this day. Although China’s 19th-century experiences are now receding memories, much of the contemporary resonance of the humiliation narrative stems from the continuing choice by Chinese authorities to nurture popular indignation.⁵³ As International Court of Justice Judge Xue Hanqin notes, this sense of historical injustice underpins contemporary Chinese understanding of international law: “[T]he one hundred years from the first Opium War in

⁴⁶ *Id.* at 250–51.

⁴⁷ *Id.* at 252–53.

⁴⁸ Jerome Silbergeld et al., *The first Opium War and its Aftermath*, ENCYCLOPEDIA BRITANNICA, at <https://www.britannica.com/place/China/The-first-Opium-War-and-its-aftermath>.

⁴⁹ *Id.*

⁵⁰ *Id.* See also Wang, *supra* note 21; deLisle, *supra* note 20.

⁵¹ deLisle, *supra* note 43, at 348–49.

⁵² See PETER HAYS GRIES, *CHINA’S NEW NATIONALISM: PRIDE, POLITICS, AND DIPLOMACY* (2003).

⁵³ deLisle, *supra* note 43, at 349–50.

1840 till 1949 were always remembered by the Chinese people as a most turbulent, humiliating[,] and miserable period for the nation.”⁵⁴

Following the fall of the Qing dynasty, the Republic of China (ROC) established in 1911 became embroiled in a civil war between the Nationalist Party and the Communist Party. This ended with a military triumph for the Chinese Communist Party (CCP), which emerged with consolidated control over mainland China. The ROC carried a long and partly successful campaign to abolish the unequal treaties, but it was only after the PRC had been founded in 1949 that the unequal treaties were effectively abrogated.⁵⁵ The PRC thus enjoys strong narrative legitimacy for its role in ending the unequal treaties regime.

C. Foreign Policy under the Communist Party

After the founding of the PRC in 1949, China’s attitude toward international law followed an orthodox Marxist point of view, where international law was seen as an “instrument of bourgeois nations to perpetuate their favored positions in the world.”⁵⁶ Byron Tzou describes the PRC’s foreign policy as “a mixture of traditional culture, political reality, nationalism[,] and Marxism-Leninism[,]” with nationalism as the most important element.⁵⁷ China’s descent to semi-colony status during its “century of humiliation” was still a living memory, and foreign policy consequently strove for “political independence, territorial integrity, and equality with other nations.”⁵⁸

The early CCP thus adopted a policy of “starting anew,” with the goal of “elimination of all traces of imperial influence over China[.]”⁵⁹ There was sustained emphasis on an independent and sovereign China in the context of the “Five Principles of Peaceful Coexistence,”⁶⁰ which Wang Tiewa describes as “one of the major contributions made by the PRC [...] to the development of international law.”⁶¹ These Five Principles, which have

⁵⁴ XUE HANQIN, CHINESE CONTEMPORARY PERSPECTIVES ON INTERNATIONAL LAW 14 (2012). (Citation omitted.)

⁵⁵ Wang, *supra* note 21, at 260–62.

⁵⁶ BYRON N. TZOU, CHINA AND INTERNATIONAL LAW: THE BOUNDARY DISPUTES 7 (1990).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Zihang Liu, *How the Chinese view International Law*, INT’L POL’Y DIG., Aug. 19, 2016, at <https://intpolicydigest.org/2016/08/29/how-the-chinese-view-international-law>.

⁶⁰ *Id.*

⁶¹ Wang, *supra* note 21, at 263.

formed the pillar of China's engagement with the international community since it was first articulated in the 1954 Panchsheel Treaty, are:

- (a) mutual respect for each other's territorial integrity and sovereignty;
- (b) mutual nonaggression;
- (c) mutual noninterference in each other's internal affairs;
- (d) equality and mutual benefit; and
- (e) peaceful coexistence.⁶²

The Five Principles have strongly informed Chinese foreign policy since the 1950s and well until the 21st century.⁶³ Their core tenets strongly emphasize territorial integrity and sovereignty, i.e., a state's full right and power to "govern itself and control its affairs without any outside interference from any other state."⁶⁴ Although territorial integrity and sovereignty are also found in Article 2 of the United Nations Charter, a key characteristic distinguishing Chinese reliance on the Five Principles is its antagonism toward "liberal interventionism"⁶⁵ which it perceived as "imperial weapons serving the agendas of Western powers."⁶⁶

Mutual wariness characterized PRC-West relations in the Cold War era. The Western Bloc was reluctant to admit the PRC into the international community.⁶⁷ Chiang Kai-Shek's government-in-exile in Taiwan was recognized as the official representative of China's seat in the United Nations (UN), and not Mao's PRC, which was in *de facto* control of the Chinese mainland. The PRC, in turn, not only denounced Western universalistic international law as manipulative and hypocritical, but also pursued institutional and ideological nonconformity by rejecting the concept of a single world community and a single binding public international law.⁶⁸

⁶² *Id.* See also Tzou, *supra* note 56, at 30.

⁶³ See Ankit Panda, *Reflecting on China's Five Principles, 60 Years Later*, THE DIPLOMAT, June 26, 2014, at <https://thediplomat.com/2014/06/reflecting-on-chinas-five-principles-60-years-later>.

⁶⁴ Aarshi Tirkey, *Charting China's approach to international law*, OBSERVER RESEARCH FOUNDATION, May 23, 2018, at <https://www.orfonline.org/expert-speak/charting-chinas-approach-to-international-law>. "These principles have been frequently invoked by China to oppose outside interference in issues such as the Tibetan independence movement, which impinge on her sovereignty and territorial integrity." (*Id.*)

⁶⁵ See *id.* Indeed, as a permanent member of the Security Council, "Beijing has demonstrated extreme reluctance to endorse UN action in response to human rights violations or humanitarian crises. A notable example includes the recent blocking of a UN Security Council Resolution on the humanitarian crisis in Syria in May 2014." (*Id.*)

⁶⁶ Liu, *supra* note 59.

⁶⁷ *Id.*

⁶⁸ Cohen, *supra* note 15, at 125.

The 1970s marked a turn for Chinese foreign policy, when the country started integrating into the international legal order by acceding to various treaties, agreements, and other legal instruments.⁶⁹ In 1971, the PRC replaced Taiwan as China’s representative to the United Nations. Many countries that formerly recognized the ROC established relations with the PRC.⁷⁰ Mao Zedong’s death in 1976 signaled the end of the Cultural Revolution, and shortly after, in 1978, the PRC launched a “Reform and Open-Up Policy.” The Reform Era saw China steadily integrating into the international legal order by gaining admittance to over 300 international organizations, including the World Trade Organization and the International Monetary Fund, and acceding to important norm-establishing treaties such as the United Nations Convention on the Law of the Sea (“UNCLOS”).⁷¹ In the decades since, China “has not presented an overall challenge to the Western or universal values embodied in public international law,” and “[i]n theory, [...] has come to generally accept public international law [...] and its customs, [...] documents, doctrines, standards, and institutions[.]” at least until Xi Jinping’s current regime.⁷²

D. Contemporary Perspectives on International Law

From the Chinese perspective, international law is a distinctly European product, with origins in Christian civilization and the natural law tradition that was originally confined to Western European states.⁷³ Since its forceful introduction to China in the second half of the 19th century, the country has shown a “love-hate” approach with international law that mirrored its internal political transformation.⁷⁴ In the republican period, China started accepting the norms of international law and using them to protect its national interests.⁷⁵ After the PRC had been established, however, the country adopted a Marxist view hostile toward international law. While

⁶⁹ Tirkey, *supra* note 64.

⁷⁰ Jack L. Dull et al., *International Relations*, ENCYCLOPEDIA BRITANNICA, at <https://www.britannica.com/place/China/Educational-and-cultural-policy-changes#ref71865>.

⁷¹ *Id.* See also Tirkey, *supra* note 64.

⁷² Cohen, *supra* note 15, at 124.

⁷³ Tzou, *supra* note 56, at 7.

⁷⁴ Kong Qingjiang, *Beyond the Love-Hate Approach? International Law and International Institutions and the Rising China*, 15 CHINA: AN INT’L. J. 41, 45–6 (2017).

⁷⁵ For an excellent account of the local adaptation and reinterpretation of international law norms in 19th century China, and how local intellectual elites used and further developed global normative principles such as the equal sovereignty of states and territorial integrity to push back against the “unequal treaties” and protect China’s interests, see Kroll, *supra* note 40.

this view ended abruptly after the CCP had broken up with the Soviet Union,⁷⁶ China's historical experience during its "century of humiliation" led the CCP to regard international law with, at best, caution, considering it a tool for possible exploitation and oppression.⁷⁷

Beginning with Deng Xiaoping's reforms, however, the CCP engaged in a dual campaign of increasing receptiveness to the role of international law, as well as more assertively seeking to shape international rules to better reflect its interests and preference.⁷⁸ DeLisle notes the PRC's transformation from "regime-rejecter" to "regime-taker" during the Reform Era, and now "as regime-shaper and potential regime-maker."⁷⁹ Jerome A. Cohen, a longtime scholar of Chinese law, remarks that contemporary PRC's attitudes to international law, "at a high level of abstraction, do not appear to vary significantly from those of other major powers."⁸⁰ Like other players, the PRC "expresses belief in the importance of international law" and "the utility of this posture for donning the mantle of contemporary legitimacy."⁸¹ However, Cohen also warns that this compliance attitude appears to be in transition, and Beijing has increasingly advocated distinctive readings or formal revision of rules in certain areas of international law, such as law of the sea, human rights, and bilateral or multilateral relationships.⁸² Cohen skeptically regards the prospects of international law significantly restraining the PRC, especially in its current trajectory as a revisionist power intent to reshape relations and rules at least within East Asia.⁸³

With China's emergence as a great power in the 21st century, and especially after the SCS Arbitration brought against it by the Philippines in 2013, its party leaders have become more concerned about international law being an impediment to its rise.⁸⁴ Similar to the United States' resort to international law in its turn-of-the-20th-century rise to global prominence,⁸⁵

⁷⁶ Kong, *supra* note 72, at 46.

⁷⁷ Tirkey, *supra* note 64.

⁷⁸ deLisle, *supra* note 20, at 267.

⁷⁹ deLisle, *supra* note 43, at 349.

⁸⁰ Cohen, *supra* note 15, at 161.

⁸¹ *Id.*

⁸² *Id.* at 161–62.

⁸³ *Id.* at 162–63.

⁸⁴ Cai, *supra* note 16, at 8.

⁸⁵ For a deep account of how US international lawyers and institutions such as the ASIL turned to international law and legal language to shape the rise of the United States as a global power in the turn of the 20th century, see BENJAMIN ALLEN COATES, *LEGALIST EMPIRE: INTERNATIONAL LAW AND AMERICAN FOREIGN RELATIONS IN THE EARLY TWENTIETH CENTURY* (2016).

some contemporary Chinese academics have also espoused the development of a Chinese theory of international law that is premised on a pluralistic understanding of norms, allowing for significant margin of appreciation.⁸⁶ This “international law with Chinese characteristics”⁸⁷ is pragmatic and realist, where state sovereignty justifies continuous pursuit of interest maximization.⁸⁸ In the words of Zhipeng He:

[I]nternational law cannot be a projection of abstract “natural justice” into reality, but must be the result of consultation, balancing, and gaming by different countries based on their own value orientation and practice position. Based on this dialectical relationship, international law must be developed in the expression of positions by all actors in international relations and in the game of discourse by states.⁸⁹

Notably, Zhipeng He rejects the view of international law as based on natural justice⁹⁰ or common consent.⁹¹ Instead, he sees international law as a constantly evolving product of interactions among states, defined by their differing strengths, positions, and national interests. This Thucydidean view of the international order, where “[g]reat powers try to compete in interests defined by politics [and] small states try to survive in the political cracks, and to find space in the edge of the law[,]”⁹² is a strong undercurrent in contemporary Chinese approach to international law. This framework, says Zihang Liu, “promotes realism as the most beneficial philosophy to guide China’s involvement in the international lawmaking process[.]” and sees “the furtherance of national interests [as] the ultimate purpose for which China should strive.”⁹³ Thus, for contemporary Chinese practice, international law is not a rules-based constraint on state sovereignty, but is rather a multilateral process informed by relative strengths and weaknesses that can be “manipulated in order to serve the state’s needs.”⁹⁴ “This method of interpreting international law renders it flexible enough to be utilized as a tool forwarding Chinese state interests on the international stage. It is

⁸⁶ See ZHIPENG HE & LU SUN, A CHINESE THEORY OF INTERNATIONAL LAW 5–8 (2020).

⁸⁷ *Id.* at 5.

⁸⁸ *Id.* at 9.

⁸⁹ *Id.* at 20.

⁹⁰ *Id.* at 9, 20.

⁹¹ *Id.* at 11.

⁹² *Id.* at 9.

⁹³ Liu, *supra* note 59, *citing generally*, He, *supra* note 86.

⁹⁴ Liu, *supra* note 59.

furthermore able to accommodate China's evolving state interests, such as the state's sovereign claim over the South China Sea."⁹⁵

II. THE SOUTH CHINA SEA MARITIME DISPUTES

The territorial and maritime contest among seven Asian states over islands, reefs, and waters of the SCS "is one of the globe's most complex and volatile geopolitical flashpoints."⁹⁶ Strategic control of important shipping lanes, biodiverse marine resources and fishing stocks, and potential exploitation of significant hydrocarbon reserves in the seabed underlie these disputes.⁹⁷ The sea lanes that pass through the SCS account for an estimated \$3.4 trillion worth of trade, or 21% of the global maritime trade.⁹⁸ This includes nearly 40% of China's total trade.⁹⁹ Approximately 90% of petroleum imports by China, Japan, and South Korea,¹⁰⁰ and 40% of global liquefied natural gas trade,¹⁰¹ pass through its waters. As important, the SCS serves as a vital artery between the Pacific and Indian Oceans, not only for goods, but also for military transit.¹⁰²

China has a deep-vested economic and security interests in the semi-enclosed SCS, which geographic reality dictates it share with six other states. If maritime security is its aim, however, it is not achieving it. The PRC's

⁹⁵ *Id.*

⁹⁶ Benjamin Herscovitch, *A Balanced Threat Assessment of China's South China Sea Policy*, CATO INSTITUTE, Aug. 28, 2017, at <https://www.cato.org/policy-analysis/balanced-threat-assessment-chinas-south-china-sea-policy>.

⁹⁷ See YOSHIFUMI TANAKA, *THE SOUTH CHINA SEA ARBITRATION: TOWARD AN INTERNATIONAL LEGAL ORDER IN THE OCEANS 2-3* (2019); Jeff Himmelman, *A Game of Shark and Minnow*, NEW YORK TIMES MAGAZINE, Oct. 27, 2013, at <http://www.nytimes.com/newsgraphics/2013/10/27/south-china-sea/index.html>. In his article, Himmelman writes that "the seabed beneath the Spratlys may hold up to 5.4 billion barrels of oil and 55.1 trillion cubic feet of natural gas. On top of which, about half of the world's merchant fleet tonnage and nearly one third of its crude oil pass through these waters each year. They also contain some of the richest fisheries in the world."

⁹⁸ China Power Team, *How much trade transits the South China Sea?*, CHINA POWER, Aug. 2, 2017, at <https://chinapower.csis.org/much-trade-transits-south-china-sea> (last updated Jan. 25, 2021).

⁹⁹ *Id.*

¹⁰⁰ Marvin Ott, *The South China Sea in Strategic Terms*, ASIA DISPATCHES, May 14, 2019, at <https://www.wilsoncenter.org/blog-post/the-south-china-sea-strategic-terms>.

¹⁰¹ Justine Barden et al., *Almost 40% of global liquefied natural gas trade moves through the South China Sea*, US ENERGY INFORMATION ADMINISTRATION WEBSITE, Nov. 2, 2017, at <https://www.eia.gov/todayinenergy/detail.php?id=33592>.

¹⁰² Ott, *supra* note 100.

aggressive pursuit of its territorial and maritime claims in the SCS has weakened the international law of the sea¹⁰³ and created serious insecurities in the ASEAN region. China's escalating maritime aggression even during the pandemic has exacerbated tensions to a tipping point. Enough has been written on Beijing's militarization of the SCS that it is clear that it is willing to suffer reputational damage to achieve military and strategic gains in the region.¹⁰⁴ Moreover, China calculates that "it can influence outcomes through coercion and, in the economic realm, inducements."¹⁰⁵

In 2016, the legal landscape surrounding the SCS disputes was dramatically altered by the Arbitral Award in *Philippines v. China*, which ended the legal ambiguity previously existing with China's infamous nine-dash line.¹⁰⁶ Although the Award was not intended to settle territorial claims or maritime delimitations in the region, it clarified understandings of maritime features and entitlements under the UNCLOS (e.g., low tide elevations, rocks, and islands capable of generating maritime zones) and applied it to Chinese-held features in the Spratly Islands (Spratlys). To no surprise, the Award was ignored by China. However, it has significant, far-reaching consequences imposing constraints on China's claims which it cannot entirely ignore.

A. Interstate Maritime Disputes in the South China Sea

The SCS dispute concerns competing territorial and maritime claims between and among seven states: China, the Philippines, Vietnam, Malaysia, Brunei, Taiwan,¹⁰⁷ and Indonesia.¹⁰⁸ Of the geographic features in the SCS, the greatest source of tension is the Spratlys, which is claimed in its entirety by China, Taiwan, Vietnam, and the Philippines, and in part by Malaysia and Brunei. While many littoral states claim only portions of the SCS resulting

¹⁰³ Lynn Kuok, *How China's Actions in the South China Sea Undermine the Rule of Law*, BROOKINGS INSTITUTION, Nov. 2019, at 1, available at https://www.brookings.edu/wp-content/uploads/2019/11/FP_20191118_china_scs_law_kuok.pdf.

¹⁰⁴ *Id.* See also Cohen, *supra* note 15, at 143.

¹⁰⁵ *Id.*

¹⁰⁶ See Lowell Bautista & Aries A. Arugay, *Philippines v. China The South China Sea Arbitral Award: Implications for Policy and Practice*, 9(1) ASIAN POL. & POL'Y, 122, 123 (2017).

¹⁰⁷ Taiwan's maritime claims essentially mirror the PRC's, except for EEZs pertaining to islands it occupies, including Itu Aba. For a deeper discussion on the maritime claims of Taiwan, see YIH-JYE HWANG & EDMUND FRETTINGHAM, *MARITIME AND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA* (2021 ed.).

¹⁰⁸ Indonesia's EEZ claims overlap with the EEZ claims of Malaysia and Vietnam, and the nin-dash lines of China and Taiwan, but it is not a claimant in the Spratlys.

from overlapping maritime entitlements under the UNCLOS,¹⁰⁹ China's maritime claims as signified by its nine-dash line—a series of nine broken lines drawn on a map lacking precise geographic coordinates—is considered expansive and largely without basis in international law.

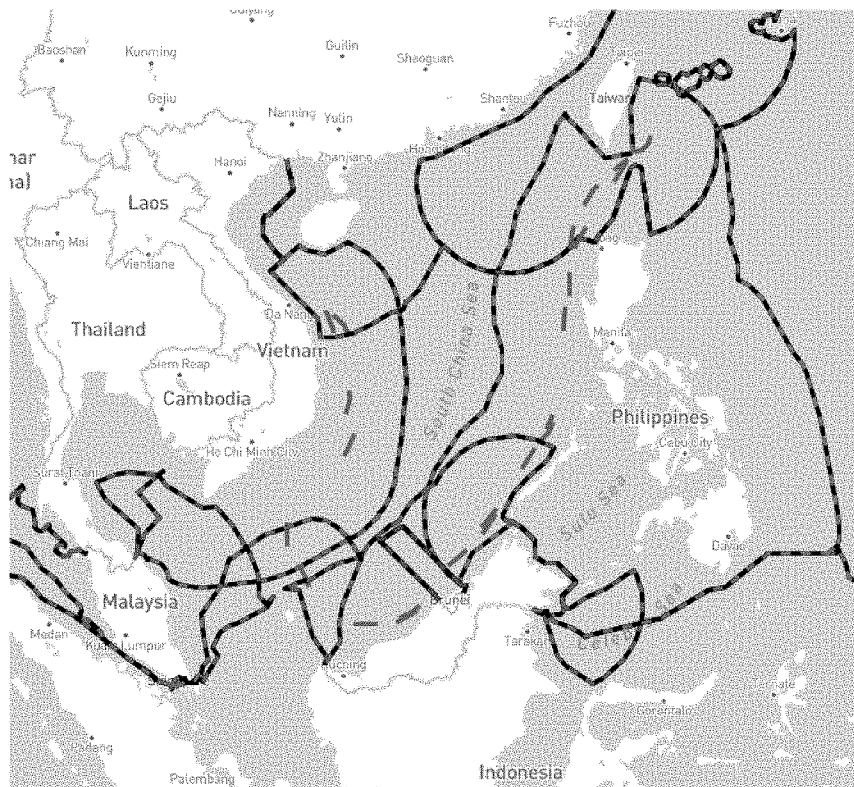


Fig. 1: Competing maritime claims in the SCS
(Source: Asia Maritime Transparency Initiative)¹¹⁰

¹⁰⁹ Malaysia and Brunei claim parts of the Spratlys as part of their EEZs. The Philippines claims the Spratlys as part of its EEZ, based on *terra nullius* discovery in the 1950s. China (and Taiwan) claims the entire Spratlys based on “historical rights” underlying its nine-dash line. For an account of the maritime features occupied and/or claimed by each state, particularly in the Spratlys, see Alexander Vuving, *South China Sea: Who Occupies What in the Spratlys?*, DIPLOMAT, May 6, 2016, at <https://thediplomat.com/2016/05/south-china-sea-who-claims-what-in-the-spratlys>.

¹¹⁰ *Maritime Claims of the Indo-Pacific*, ASIA MARITIME TRANSPARENCY INITIATIVE, at <https://amti.csis.org/maritime-claims-map/>. The link provides an interactive map tracking and showing the claims of each state within the region.

Except for Taiwan, all contending states are parties to the UNCLOS.¹¹¹ Under the UNCLOS, each coastal state has sovereignty over a territorial sea that extends to 12 nautical miles (NM) from its baselines, which is usually measured from its coasts.¹¹² Beyond this area and up to 200 NM from the baselines is the Exclusive Economic Zone (“EEZ”), where a coastal state has enumerated rights such as the exclusive right to explore, exploit, and conserve natural resources, whether living or non-living.¹¹³ Beyond this, up to 350 NM from the baselines, is the continental shelf, where the coastal state only has the sovereign right to exploit non-living resources and sedentary living resources,¹¹⁴ but where all states coastal and land-locked enjoy rights and freedoms under the UNCLOS. Beyond the 350-NM extended continental shelf is the Area, which is a “common heritage of mankind.”¹¹⁵ Importantly, under the UNCLOS, maritime features can be categorized into low-tide elevations (“LTE”)¹¹⁶ or high-tide formations (“HTF”), the latter further sub-classified into rocks or islands.¹¹⁷ LTEs form part of the seabed and thus generate no maritime zone. Rocks generate only a 12-NM territorial sea, while islands generate a territorial sea as well as a 200-NM EEZ.

The SCS dispute has its roots in China’s controversial nine-dash line, an ambiguous U-shaped demarcation that encapsulates much of the SCS.¹¹⁸ Through its nine-dash line, China claims “indisputable sovereignty over the islands in the [SCS] and the adjacent waters,” as well as “sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof[.]”¹¹⁹ Notably, “‘adjacent’ and ‘relevant’ waters are not UNCLOS terms.”¹²⁰ The use of such terms, as well as the inherent vagueness of the

¹¹¹ China, the Philippines, Vietnam, and Malaysia are original signatories to the 1982 Convention.

¹¹² United Nations Convention on the Law of the Sea [hereinafter “UNCLOS”], art. 3, Dec. 10, 1982, 516 U.N.T.S. 205.

¹¹³ Art. 57.

¹¹⁴ Art. 76–77.

¹¹⁵ Art. 136.

¹¹⁶ Art. 13.

¹¹⁷ Art. 121.

¹¹⁸ Kuok, *supra* note 103, at 2.

¹¹⁹ Permanent Mission of China to the U.N., Letter to the United Nations addressed to the Secretary-General, U.N. Doc. CML/17/2009 (May 7, 2009), available at https://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_ynm_e.pdf. This communication is in response to Vietnam and Malaysia’s joint submission to the UN on their Extended Continental Shelf claims.

¹²⁰ ANTONIO T. CARPIO, THE SOUTH CHINA SEA DISPUTE: PHILIPPINE SOVEREIGN RIGHTS AND JURISDICTION IN THE WEST PHILIPPINE SEA 27 (2017).

nine-dash map, has contributed to the strategic ambiguity of China's SCS claims and its legal basis.

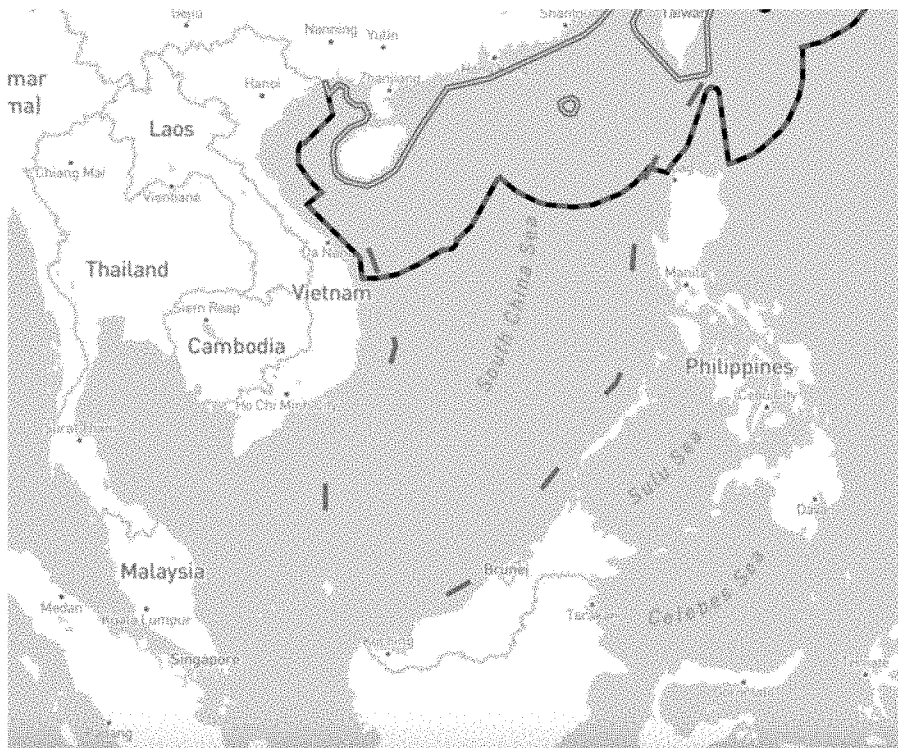


Fig. 2: The PRC's claimed territorial sea, EEZ, and the ill-defined nine-dash line (Source: Asia Maritime Transparency Initiative)¹²¹

B. Historical Underpinnings of China's Nine-Dash Claim

China has always insisted that its “nine-dash line” is based on “historical facts and international law.”¹²² This position is usually backed by an emotive appeal to broad historical claims of Imperial China being the most dominant state in the region, often not accounting for the cultural rather than political character of the tribute system, and the historic reality

¹²¹ Asia Maritime Transparency Initiative, *supra* note 110.

¹²² Antonio T. Carpio, *Historical Facts, Historical Lies, and Historical Rights in the West Philippine Sea*, 88 PHIL. L.J. 389, 389 (2014), citing Wang Yi, *Press Conference*, Voltairnet.org, Mar. 8, 2014, available at <https://www.voltairnet.org/article182652.html>.

of the country being a land rather than naval power.¹²³ Regardless of ill-defined historic claims, China's nine-dash line is a 20th-century invention and did not appear in any historical map because it was only mapped on China's official map in 1948.¹²⁴ In his extensive study of historical maps of China, the South China Sea, and the Philippines, Philippine jurist Antonio T. Carpio concluded that "[t]here is not a single ancient Chinese map, whether made by Chinese or foreigners, showing that the Spratlys and Scarborough Shoal were ever part of Chinese territory."¹²⁵ An examination of ancient Chinese maps, whether made by Chinese authorities and individuals or by foreigners, will show that the southernmost territory of China has always been Hainan Island.¹²⁶

Indeed, as the Tribunal in the SCS Arbitration established, "[w]hat has become known as the 'nine-dash line' first appeared on an official Chinese map in 1948."¹²⁷ This "Location Map of the Southern Sea Islands," adopted by the Ministry of Interior of the then ROC, originally had 11 dashes "forming a broken U-shaped line covering almost the entire [SCS]."¹²⁸ Although China was silent on any claim to the surrounding waters at that time, it nevertheless claimed the islands enclosed by the 11 dashes, namely Dongsha Islands (Pratas), Xisha Islands (Paracels), Zhongsha Island (Macclesfield Bank), and Nansha Islands (Spratlys).¹²⁹ Significantly, Huangyan Island (Scarborough Shoal) was not mentioned in the map.¹³⁰

¹²³ See Jia Yu, *International Perspective on the Dotted Line in the South China Sea*, 1 CHINA LEGAL SCI. 25 (2013).

¹²⁴ On May 12, 2016, the Director-General of the Department of Treaty and Law at the Chinese Ministry of Foreign Affairs made a statement that the dotted line was first mapped on China's official map only in 1948. See *Briefing by XU Hong, Director-General of the Department of Treaty and Law on the South China Sea Arbitration Initiated by the Philippines*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA WEBSITE, May, 12 2016, available at https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/201605/t20160519_8523323.htm.

¹²⁵ Carpio, *supra* note 122, at 420–21.

¹²⁶ *Id.* at 421.

¹²⁷ *Award on Merits*, *supra* note 2, at 71–72 ¶ 181. See also Carpio, *supra* note 120, at 26.

¹²⁸ Carpio, *supra* note 120, at 26.

¹²⁹ *Id.*

¹³⁰ *Id.*

图丙 2

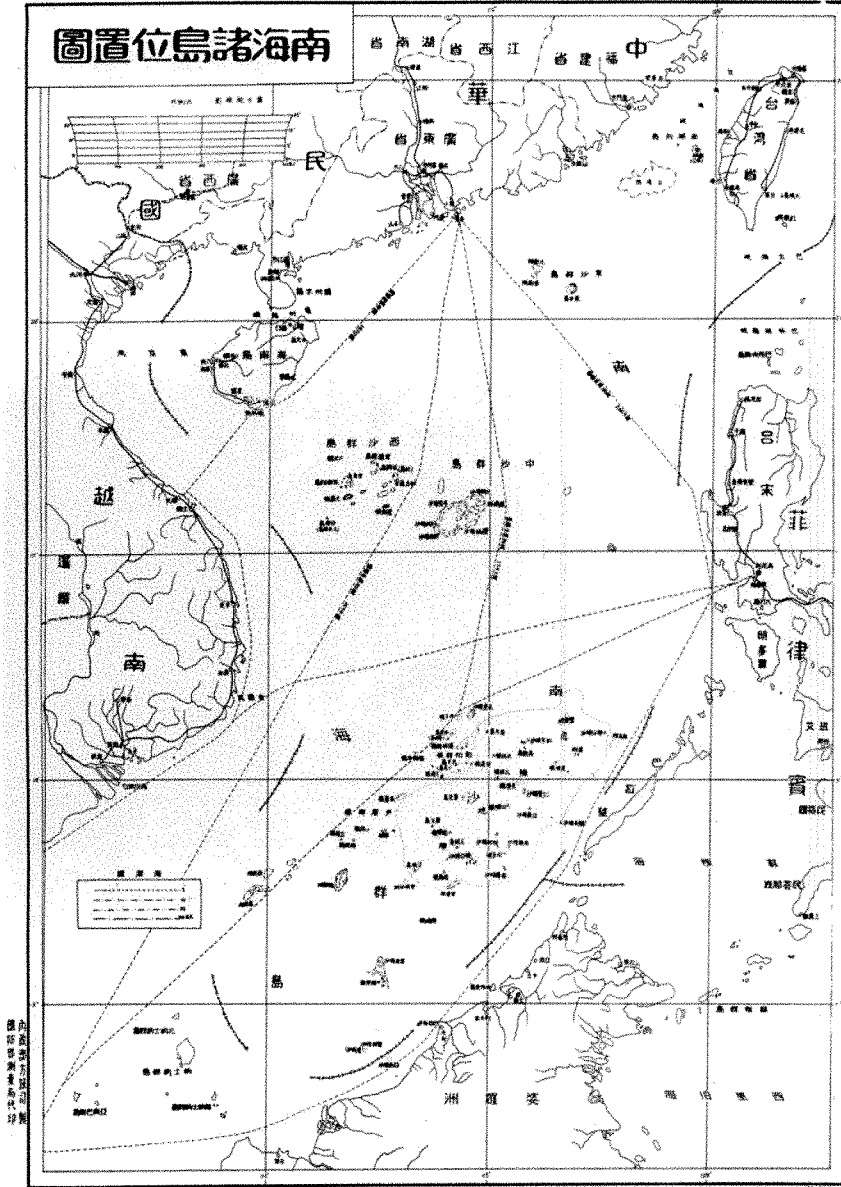


Figure 3: 1948 Map showing the “Location of the Various Islands in the South Sea,” Department of the Ministry of Interior, Republic of China (Reproduced from *Philippines v. China Award*, p. 75)

China neither gave the coordinates for the 11 dashes, nor explained its meaning or basis.¹³¹ In 1950, China (now under communist rule) announced the removal of two dashes in the Gulf of Tonkin. Thus, the line became known as the “nine-dash line.”¹³² It remained in relative obscurity until its first official appearance in a map submitted by Beijing to the UN in 2009.¹³³ In protest to Vietnam and Malaysia’s joint submission for their extended continental shelf claims, China submitted its nine-dash map to the UN, claiming “‘indisputable sovereignty over all the islands in the [SCS] and the adjacent waters’ and ‘sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil’ enclosed by the dashes.”¹³⁴ China’s notes prompted immediate objections from Vietnam and Malaysia, Indonesia, and the Philippines.¹³⁵ Although this was the PRC’s first official announcement of its nine-dash claim to the world, it still did not give the coordinates of the dashes, or explain its meaning or basis, much less the meaning of “adjacent” and “relevant” waters which are not recognized maritime zones under the UNCLOS.¹³⁶

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 27. See also *Kuok*, *supra* note 103, at 2.

¹³⁴ *Id.*

¹³⁵ *Award on Merits*, *supra* note 2, at 72 ¶ 184.

¹³⁶ *Carpio*, *supra* note 120, at 27.

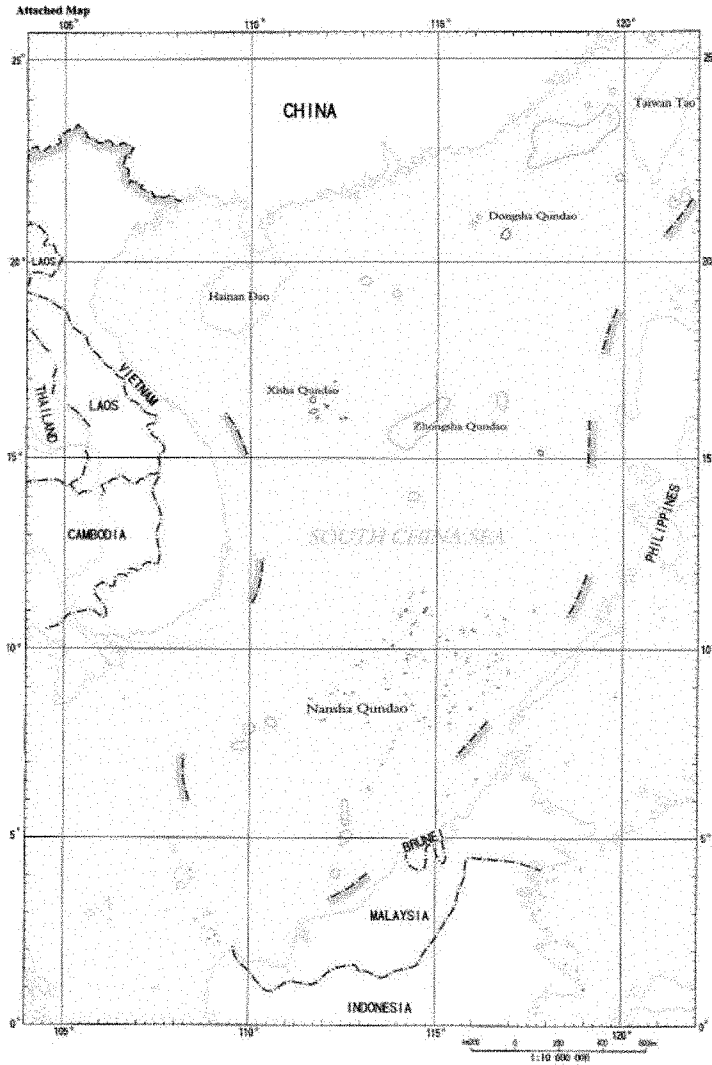


Figure 4: Map attached to China's 7 May 2009 Notes Verbales from the Permanent Mission of the PRC to the Secretary-General of the UN,

*No. CML/18/2009 (7 May 2009) (Annex 192)
(Reproduced from *Philippines v. China Award*, p. 77)*

C. China's Aggressive Maritime Policy Beginning 2013

The dispute over China's claimed entitlements in its "nine-dash line" was mostly academic until 2013, when China embarked on an aggressive policy to assert its SCS claims. Xi Jinping's ascension to the leadership of the CCP is considered a turning point for China's maritime policy,¹³⁷ with Xi credited for changing China's "passivity" into an assertive strategy to defend its maritime claims.¹³⁸

China's present SCS policy simultaneously employs: (a) reclamation and island-building in Chinese-held maritime features; (b) transformation of the reclaimed features into dual-use facilities for civilian and military purposes; and (c) use of maritime militias and "cabbage strategy"¹³⁹ to seize islands and project *de facto* control and domination in the SCS.

Xi-era China's most consequential move has been the massive expansion and militarization of Chinese-held maritime features in the Spratlys.¹⁴⁰ Since 2013, years of unprecedented dredging and artificial island-building in the Spratlys have turned submerged reefs into 3,200 acres of new land, at enormous financial and ecological cost.¹⁴¹ This island-building was

¹³⁷ Andrew Chubb, *Xi Jinping and China's maritime policy*, BROOKINGS INSTITUTION, Jan. 22, 2019, available at <https://www.brookings.edu/articles/xi-jinping-and-chinas-maritime-policy>. According to Chubb, China's maritime policy under Xi Jinping has contained three notable elements: *first*, the goal of building China into a "maritime great power (海洋强国)"; *second*, the "unity of rights defense and stability maintenance (维权维稳相统一)" which addresses the tension between advancing China's claims and avoiding military escalation; and *third*, its uncompromising "no-acceptance, no-participation, no-recognition, no-implementation" response to the arbitration case brought by the Philippines under the UNCLOS. As to the latter, Xi declared that while China was peace-loving, it "absolutely will not give up its legitimate rights, much less sacrifice its national core interests." (*Id.*)

¹³⁸ See Jonathan Manthorpe, *Beijing's maritime militia, the scourge of South China Sea*, ASIA TIMES, Apr. 28, 2019, available at <https://asiatimes.com/2019/04/beijings-maritime-militia-the-scourge-of-south-china-sea>.

¹³⁹ China has employed its maritime militia to, among others, grab contested features controlled by other countries using what PLA General Zhang Zhaozhong calls the "cabbage strategy," i.e., "surrounding a contested area with so many boats — fishermen, fishing administration ships, marine surveillance ships, navy warships" that the disputed island is essentially wrapped like layers of cabbage. See Himmelman, *supra* note 97. See also Huseyin Erdogan, *China invokes 'cabbage tactics' in South China Sea*, ANADOLU AGENCY, Mar. 25, 2015, available at <https://www.aa.com.tr/en/economy/china-invokes-cabbage-tactics-in-south-china-sea/63892>.

¹⁴⁰ Chubb, *supra* note 137.

¹⁴¹ For satellite imagery and in-depth analysis of China's island building in its occupied features in the SCS, see China Island Tracker, ASIA MARITIME TRANSPARENCY INITIATIVE, at <https://amti.csis.org/island-tracker/china>.

followed by the construction of an array of “dual-use” infrastructure, including military-grade runways, aircraft hangars, and substantial air and naval base facilities. Satellite images reveal that, as of 2016, China has built “significant point-defense capabilities, in the form of large anti-aircraft guns and probable close-in weapons systems (CIWS), at each of its outposts in the Spratly Islands”¹⁴²—with large military bases in Fiery Cross,¹⁴³ Mischief,¹⁴⁴ and Subi Reefs¹⁴⁵ and smaller facilities on Johnson, Cuarteron, Gaven, and Hughes Reefs.¹⁴⁶

¹⁴² For descriptions of the probable military capabilities of China’s reclaimed islands, see *China’s New Spratly Island Defenses*, ASIA MARITIME TRANSPARENCY INITIATIVE, Dec. 13, 2016, available at <https://amti.csis.org/chinas-new-spratly-island-defenses>.

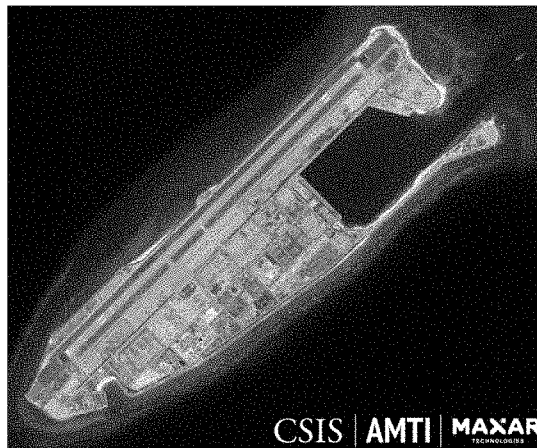
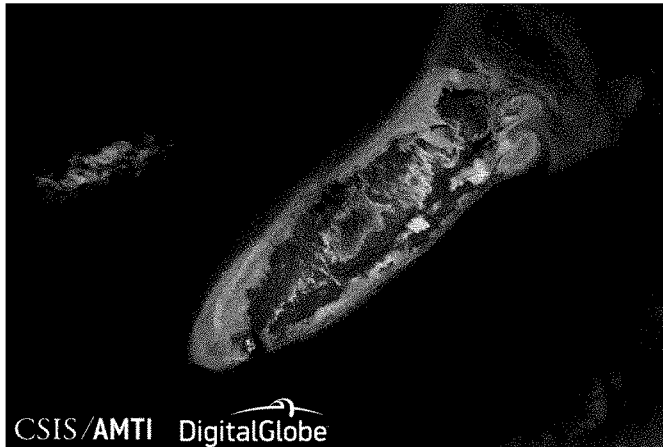
¹⁴³ UPDATED: *China’s Big Three Near Completion*, ASIA MARITIME TRANSPARENCY INITIATIVE, June 29, 2017, available at <https://amti.csis.org/chinas-big-three-near-completion>. According to the Center for Strategic and International Studies’ Asia Maritime Transparency Initiative, Fiery Cross is “the most advanced of China’s bases” in the SCS, with 12 hardened shelters with retractable roofs for mobile missile launchers. It has enough hangars to accommodate 24 combat aircraft and four larger planes. Fiery Cross also has a runway long enough to land a Chinese Xian H-6N bomber; a bomber like this could perform combat operations within 5,600 kilometers (3,500 mi) of the reclaimed reef. A large radome was “recently installed on a building at the southern end of Fiery Cross, indicating a sizeable communications or radar system.” China’s three air bases in the Spratlys and another on Woody Island in the Paracels allows Chinese military aircraft to operate over nearly the entire SCS. The same is true of China’s radar coverage, made possible by advanced surveillance/early-warning radar facilities at Fiery Cross, Subi, and Cuarteron Reefs, as well as Woody Island and smaller facilities elsewhere.

¹⁴⁴ *Id.* “On Mischief Reef, the hangars for 24 combat aircraft have been completed and in early March construction teams were putting the finishing touches on five larger hangars. A finished radar tower stands in the middle of the reef and a trio of large towers have been constructed on the southwestern corner. [...] Retractable roofs are also being installed on the recently-built missile shelters.” “A very large antennae array is being installed on a small outpost at the southern side of Mischief Reef, presumably boosting China’s ability to monitor activity around the feature. That ability should be of particular concern to Manila, given Mischief’s proximity to Palawan, Reed Bank, and Second Thomas Shoal.”

¹⁴⁵ *Id.* “On Subi Reef, construction is complete on hangars for 24 combat aircraft and four larger hangars. Recent imagery shows the radomes on Subi’s three-tower array in various stages of completion, along with a completed radar tower next to the runway. Subi Reef also sports what appears to be a high-frequency ‘elephant cage’ radar array on its southern end. This is unique among the Big 3. As with radar facilities at the other reefs, this high-frequency radar is close to a point defense structure, providing protection against air or missile strikes.”

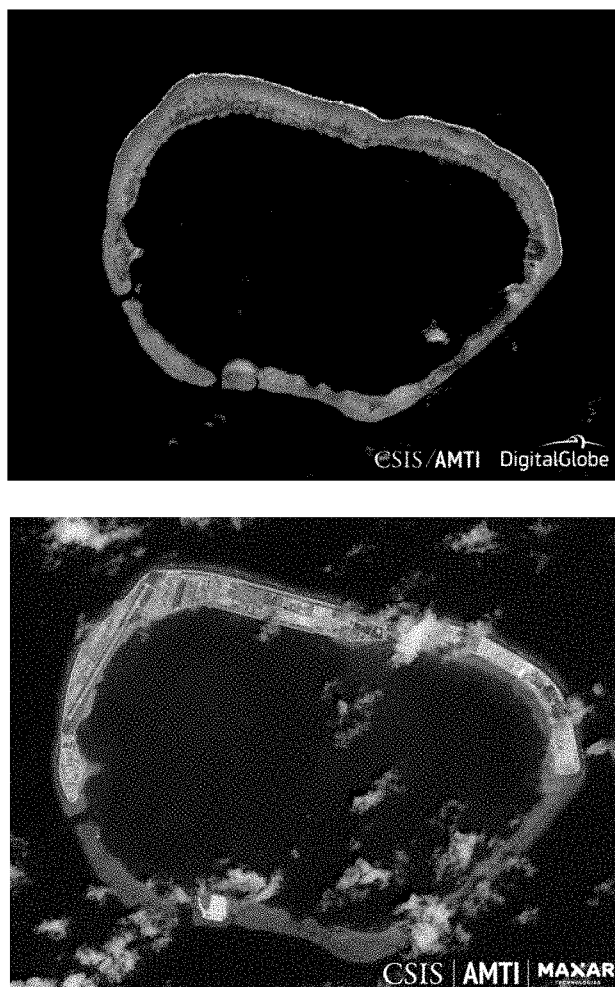
¹⁴⁶ Satellite images in 2016 show that the expanded Johnson Reef has been armed with anti-aircraft guns and a close-in weapons system (“CIWS”) missile-defense system, along with a radar. Cuarteron, Hughes, and Gaven Reefs also featured similar anti-aircraft guns and what are likely to be CIWS to protect against cruise missile strikes. See Asia Maritime Transparency Initiative, *supra* note 142.

China's militarization of the SCS has been met with international condemnation. Since 2015, the United States, France, and the United Kingdom have conducted freedom of navigation operations ("FONOPs") in the region, operations that China has strongly condemned.



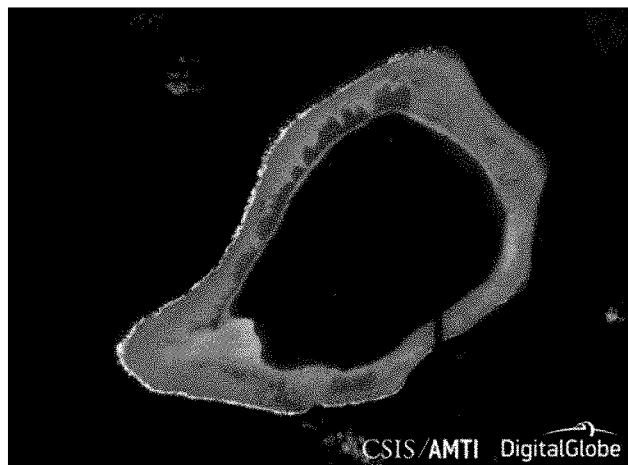
*Fig. 5.1: Satellite images of Fiery Cross Reef (Jan. 22, 2006; Mar. 27, 2020)
(Source: Asia Maritime Transparency Initiative)¹⁴⁷*

¹⁴⁷ See *Satellite images of Fiery Cross Reef*, ASIA MARITIME TRANSPARENCY INITIATIVE, Jan. 22, 2006 & Mar. 27, 2020, at <https://amti.csis.org/fiery-cross-reef/>.



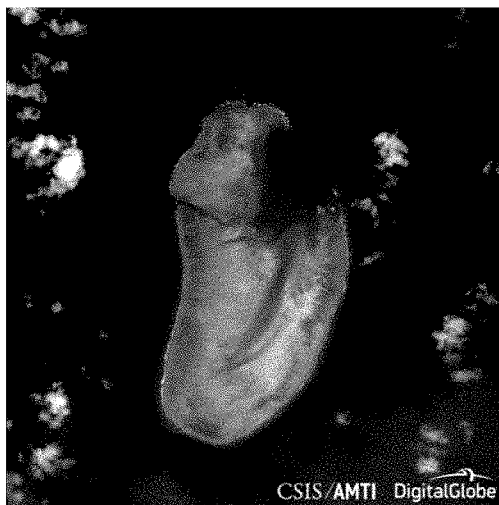
*Fig. 5.2: Satellite images of Mischief Reef (Jan. 24, 2012; Apr. 23, 2020)
(Source: Asia Maritime Transparency Initiative)¹⁴⁸*

¹⁴⁸ See *Satellite images of Mischief Reef*, ASIA MARITIME TRANSPARENCY INITIATIVE, Jan. 24, 2012 & Apr. 23, 2020, at <https://amti.csis.org/mischief-reef/>.



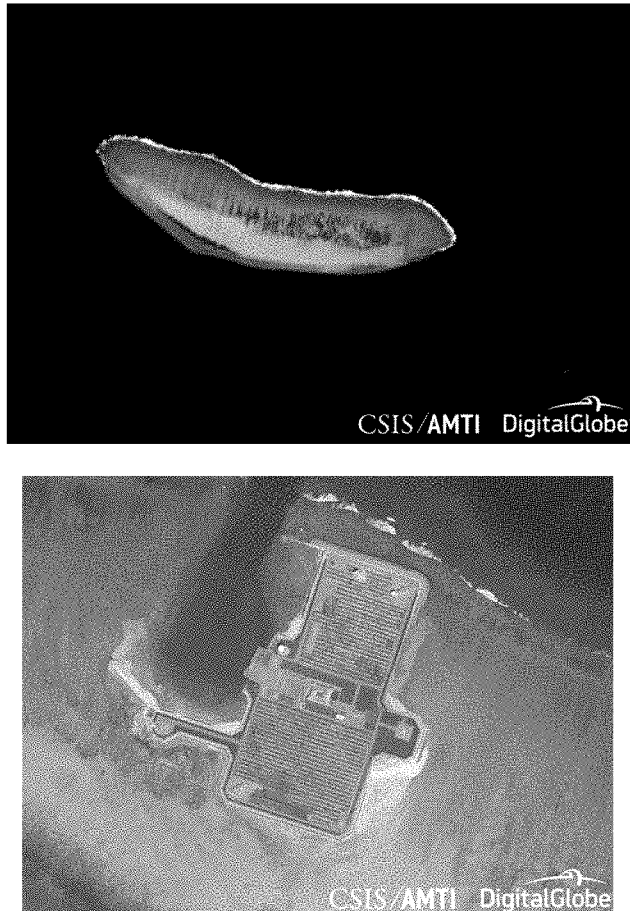
*Fig. 5.3: Satellite images of Subi Reef (Jul. 27, 2012; Mar. 27, 2020)
(Source: Asia Maritime Transparency Initiative)¹⁴⁹*

¹⁴⁹ *Satellite images of Subi Reef*, ASIA MARITIME TRANSPARENCY INITIATIVE, July 27, 2012 & Mar. 27, 2020, at <https://amti.csis.org/subi-reef/>.



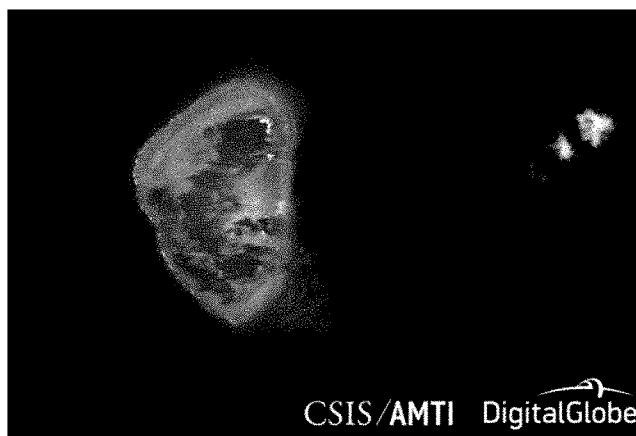
*Fig. 5.4: Satellite images of Johnson Reef (Nov. 29, 2004; Jul. 5, 2017)
(Source: Asia Maritime Transparency Initiative)¹⁵⁰*

¹⁵⁰ *Satellite images of Subi Reef*, ASIA MARITIME TRANSPARENCY INITIATIVE, Nov. 29, 2004 & July 5, 2017, at <https://amti.csis.org/johnson-reef/>.



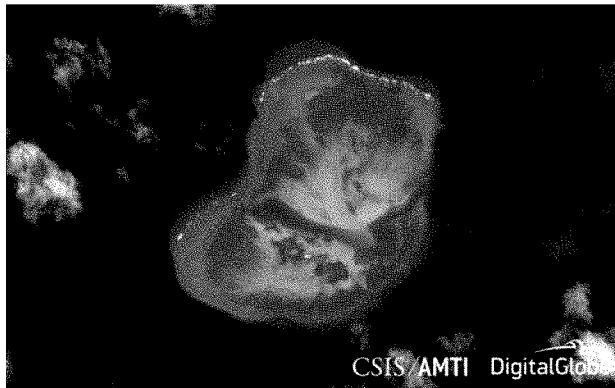
*Fig. 5.5: Satellite images of Cuarteron Reef (Feb. 21, 2014; Oct. 12, 2017)
(Source: Asia Maritime Transparency Initiative)¹⁵¹*

¹⁵¹ *Satellite images of Cuarteron Reef*, ASIA MARITIME TRANSPARENCY INITIATIVE, Feb. 21, 2014 & Oct. 12, 2017, at <https://amti.csis.org/cuarteron-reef/>.



*Fig. 5.6: Satellite images of Gaven Reefs (Sep. 1, 2007; Jan. 25, 2017)
(Source: Asia Maritime Transparency Initiative)¹⁵²*

¹⁵² *Satellite images of Gaven Reefs*, ASIA MARITIME TRANSPARENCY INITIATIVE, Sept. 1, 2007 & Jan. 25, 2017, at <https://amti.csis.org/gaven-reefs/>.



*Fig. 5.7: Satellite images of Hughes Reef (Mar. 12, 2008; Jan. 1, 2018)
(Source: Asia Maritime Transparency Initiative)¹⁵³*

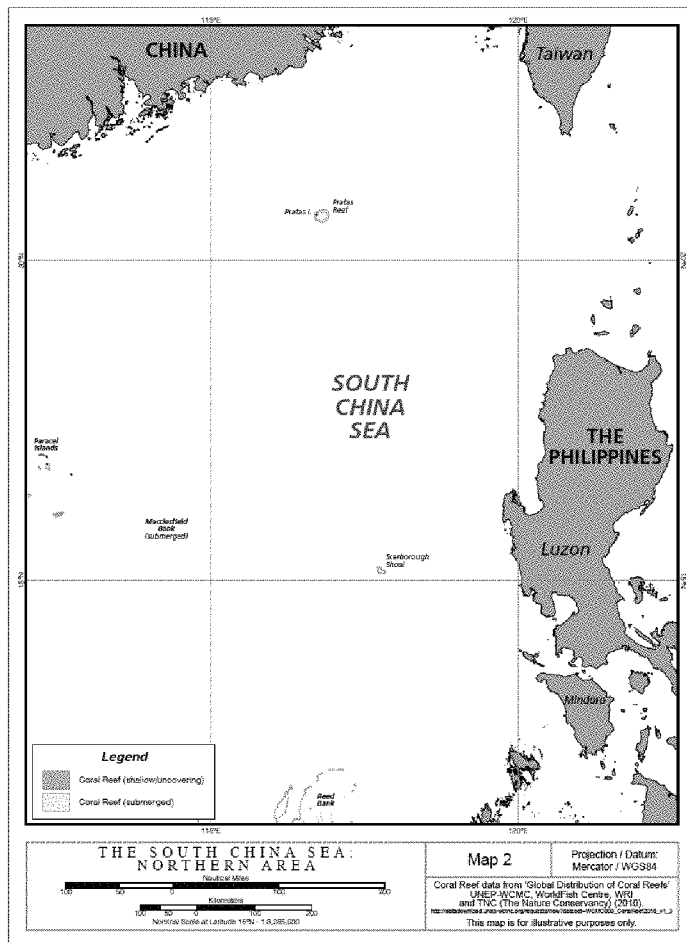
In April 2012, China and the Philippines had a standoff at Scarborough Shoal, a triangle-shaped chain of reefs and rocks located 124 NM west of Luzon, well within the Philippine EEZ.¹⁵⁴ As the closest landmass, the Philippines has exercised jurisdiction over the shoal from 16th century recorded history until 2012,¹⁵⁵ when a Philippine warship attempted to expel Chinese fishing boats allegedly harvesting endangered marine

¹⁵³ *Satellite images of Hughes Reefs*, ASIA MARITIME TRANSPARENCY INITIATIVE, Mar. 12, 2008 & Jan. 1, 2018, at <https://amti.csis.org/hughes-reef/>.

¹⁵⁴ See Himmelman, *supra* note 97.

¹⁵⁵ See DFA, *Philippine position on Bajo de Masinloc (Scarborough Shoal) and the waters within its vicinity*, OFFICIAL GAZETTE, Apr. 18, 2012, available at <https://www.officialgazette.gov.ph/2012/04/18/philippine-position-on-bajo-de-masinloc-and-the-waters-within-its-vicinity>.

species within the Philippine EEZ.¹⁵⁶ The Philippine Navy was prevented from doing so by Chinese surveillance boats. After a two-month standoff, the Philippine Navy withdrew from the shoal following a US-brokered agreement for both countries to peacefully withdraw. China never left and, employing its “cabbage strategy,” has since wrestled control over the shoal and blocked access to it using a swarm of boats that continuously wards off Filipino fishers attempting to make a living in traditional fishing grounds.¹⁵⁷



*Figure 6: Location of Scarborough Shoal
(Reproduced from Philippines v. China Award, p. 123)*

¹⁵⁶ See Himmelman, *supra* note 97.

¹⁵⁷ *Id.*

The Philippines, a primary but weaker party to the SCS disputes, has a long record of using international law hedged with powerful alliances to consolidate and protect its sovereignty and related maritime rights.¹⁵⁸ The seizure of the Scarborough Shoal in 2012 would prompt the country into initiating compulsory arbitration against the PRC under Article 286 and Annex VII of the UNCLOS¹⁵⁹—the first international litigation initiated by a claimant state in the SCS.¹⁶⁰ In response, China adopted an uncompromising “no-acceptance, no-participation, no-recognition, no-implementation” policy. Arguing that the Tribunal lacked jurisdiction, China made it clear early on that it would neither participate nor honor the ruling.¹⁶¹

D. The SCS Arbitration and Award

China’s refusal to participate in the SCS Arbitration is unprecedented, as it was the first state to do so since the UNCLOS came into force.¹⁶² (Compulsory arbitration is one of the innovative features of UNCLOS, which was intended to provide for a “compulsory and binding framework for the peaceful settlement” of all maritime disputes.) Nevertheless, in accordance with the UNCLOS, the Arbitration proceeded

¹⁵⁸ See Chih-Mao Tang, *Power, International law, and the Philippine hedging strategy in the South China Sea*, in MARITIME AND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA (2021).

¹⁵⁹ UNCLOS art. 286, Dec. 10, 1982, 516 U.N.T.S. 205. According to Lowell Bautista, “[t]he right of the Philippines to institute compulsory arbitration was incontestable. The Philippines and China being both States parties to UNCLOS, having ratified it on 8 May 1984 and on 7 June 1996, respectively, are both bound by the compulsory dispute settlement procedures provided for in Part XV of UNCLOS.” See Lowell Bautista, *The South China Sea Arbitral Award: Evolving Post-Arbitration Strategies*, 10(2) ASIAN POL. & POL’Y 178, 181 (2018).

¹⁶⁰ Bautista, *supra* note 159.

¹⁶¹ See Chubb, *supra* note 137; Bautista, *supra* note 159, at 180–81.

¹⁶² Raphael G. Toman, *Jurisdictional Requirements for Arbitration Under UNCLOS: Does the South China Sea Decision Bring Long Sought Clarity to the Scope of Historic Claims?*, 49 INT’L L. & POL. 619, 622 (2017). According to Toman, instead of participating, “the Chinese government presented a *note verbale* to the Philippines on February 9, 2014, and released two position papers on December 7, 2013 and December 14, 2014. In these statements, China provided three major arguments against the jurisdiction of the Tribunal. *First*, the Tribunal did not have subject-matter jurisdiction as the claims concern questions of territorial sovereignty, which are beyond the scope of UNCLOS. *Second*, the parties agreed to settle their relevant disputes through negotiations and, through initiating the present proceedings, the Philippines had breached its international obligations. *Third*, even if the Tribunal had subject matter jurisdiction under UNCLOS, the current claim fell within the scope of the declaration according to UNCLOS Article 298 (1)(a)(i) filed in 2006 where China opted out of compulsory jurisdiction regarding disputes ‘involving historic bays or titles.’ This strategic approach allowed China to both submit its views on the dispute without formally participating and to selectively address the claims it wanted to make without clarifying the issues that it refused to elaborate.” *Id.* at 622–23. (Citations omitted.)

despite China's absence. China released two position papers on December 7, 2013 and December 14, 2014, which the Arbitral Tribunal treated as China's *de facto* submissions on its jurisdictional challenge.¹⁶³ In its October 29, 2015 Award on Jurisdiction, the Tribunal upheld its jurisdiction upon a finding that it was properly constituted in accordance with Annex VII of the UNCLOS, and that the Philippines' submissions do not concern sovereignty over the features within the SCS, or delimitation of maritime boundaries.¹⁶⁴

The issues over which the Tribunal exercised jurisdiction can be classified to three: *first*, whether China's claims based on its "nine-dash line" is consistent with the UNCLOS; *second*, whether certain maritime features claimed by both China and the Philippines are islands, rocks, or LTEs, and whether they are capable of generating entitlement to maritime zones; and *third*, whether China violated the sovereign rights and jurisdiction of the Philippines within the latter's EEZ.¹⁶⁵ These issues related exclusively to the interpretation or application of the UNCLOS, and the Philippines did not ask the Tribunal to rule on the territorial aspects of its disputes with China or to delimit their maritime boundaries.¹⁶⁶

On July 12, 2016, the Arbitral Tribunal issued its final Award in the SCS Arbitration.¹⁶⁷ The Award was a "clear, resounding[,] and overwhelming moral and legal victory for the Philippines."¹⁶⁸ The Tribunal declared that China's nine-dash claim is incompatible with the UNCLOS,¹⁶⁹ and any claim of "historic rights" that China may have over living and non-living resources in the SCS, beyond the limits of its maritime zones as provided for under the Convention, have been extinguished by its accession to the UNCLOS and its entry into force.¹⁷⁰ The Tribunal also declared that none of the high tide features in dispute are "islands," but are merely "rocks" which do not generate entitlements to an EEZ or a continental shelf.¹⁷¹

¹⁶³ *See id.*

¹⁶⁴ Bautista, *supra* note 159, at 181, *citing* South China Sea Arbitration (Phil. v. China), Award on Jurisdiction [hereinafter "*Award on Jurisdiction*"], PCA Case No. 2013-19 (Perm. Ct. Arb. Oct. 29, 2015), ¶¶ 398-411.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*, *citing* Award on Merits, *supra* note 2, ¶¶ 28, 1202(G), 1203.

¹⁶⁷ *Id.* at 180.

¹⁶⁸ *Id.* at 182.

¹⁶⁹ *Id.*, *citing* Award on Merits, *supra* note 2, ¶¶ 261, 278, 1203 (B)(2), 232, 252, 246, 262, 263.

¹⁷⁰ *Id.* at 182, *citing* Award on Merits, *supra* note 2, ¶¶ 257, 261, 262.

¹⁷¹ *Id.*, *citing* Award on Merits, *supra* note 2, ¶¶ 646.

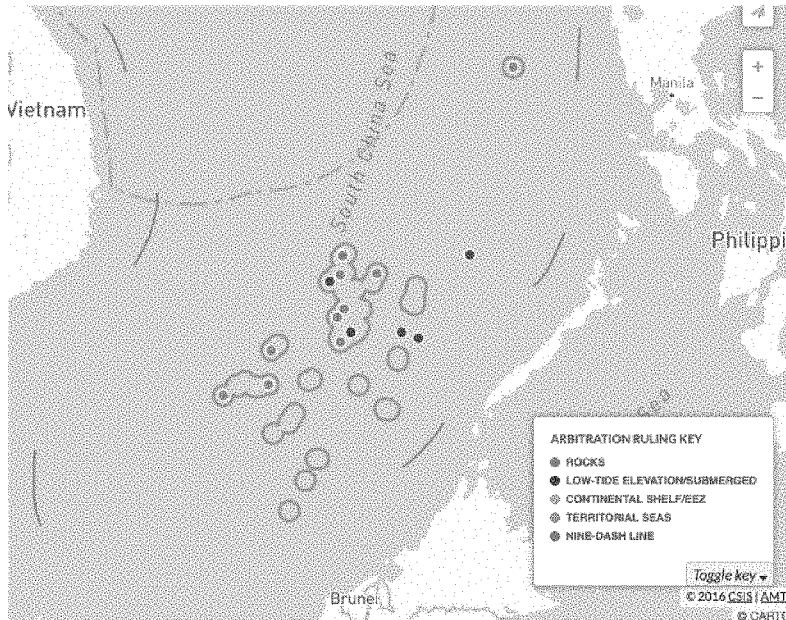


Figure 7: Maritime entitlements of various features in the Spratlys after the SCS Arbitration - most are rocks that generate only a 12-NM territorial sea, with some submerged features having no maritime entitlements at all (Source: Asia Maritime Transparency Initiative)¹⁷²

After a detailed examination of evidence, the Tribunal concluded that the following in their natural conditions are high-tide features: Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef, and Gaven Reef (North); and that the following features are LTEs which generate no maritime zones of their own: Hughes Reef, Gaven Reef (South), Subi Reef, Mischief Reef, and Second Thomas Shoal.¹⁷³ As regards Mischief Reef and Second Thomas Shoal, the Tribunal decided that they form part of the EEZ and continental shelf of the Philippines, both being located within 200 NM of the Philippine island of Palawan, in an area which does not overlap with any entitlements generated by any maritime feature claimed by China.¹⁷⁴ Lastly, the Tribunal concluded that China's reclamation activities have interfered with the rights of the Philippines under the UNCLOS, aggravated the dispute and undermined the integrity of the

¹⁷² Asia Maritime Transparency Initiative, *supra* note 110.

¹⁷³ Bautista, *supra* note 159, at 182-183, *citing* Award on Merits, *supra* note 2, ¶¶ 382, 383, 646.

¹⁷⁴ *Id.* at 183, *citing* Award on Merits, *supra* note 2, ¶ 647.

proceedings, irreparably damaged the fragile marine environment of the SCS, and are clearly in violation of China's obligations under the UNCLOS.¹⁷⁵

Under Article 296 of UNCLOS, the Award is final and binding between the Philippines and China.¹⁷⁶ Although the compulsory arbitration procedure under the UNCLOS did not impose any duty on China to participate, it nevertheless imposed on China the obligation to comply with the decision of a tribunal that is properly seized with jurisdiction.¹⁷⁷ As a state party to the UNCLOS, China is obliged under *pacta sunt servanda* to abide by the Tribunal's final ruling notwithstanding its initial jurisdictional challenge which was resolved against it.¹⁷⁸

In keeping with its consistent position rejecting the jurisdiction of the Tribunal, the Chinese Ministry of Foreign Affairs denounced the award as "null and void and [with] no binding force" and that "China neither accepts nor recognizes it."¹⁷⁹ In a separate statement, Chinese President Xi Jinping asserted China's "territorial sovereignty and marine rights" in the seas would not be affected by the ruling, whilst dissonantly maintaining that "China has always been a guardian of international rule of law and of fairness and justice, and will always adhere to the path of peaceful development."¹⁸⁰

International pressure on China for compliance has been inconsistent at best, and periods of neglect have corresponded with further Chinese incursions in the SCS.¹⁸¹ "The international community appears to have taken the pragmatic position that there is some room for ambiguity at the margins, but not for a wholesale repudiation of the tribunal's decision. Thus far, it seems that Beijing has kept its actions within that gray zone."¹⁸²

¹⁷⁵ *Id.*, citing Award on Merits, *supra* note 2, ¶¶ 852–90, 1038, 1043, 1177–1179, 1181, 983, 992, 993.

¹⁷⁶ UNCLOS art. 296(1), Dec. 10, 1982, 516 U.N.T.S. 205. This provision states: "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." See also Bautista, *supra* note 159, at 181, citing UNCLOS ann. VII, art. 11; UNCLOS pt. XV, § 2; UNCLOS art. 296; Award on Merits, *supra* note 2, ¶ 1172.

¹⁷⁷ Bautista, *supra* note 159, at 181, citing UNCLOS ann. VII, art. 9.

¹⁷⁸ See *id.* at 181–182.

¹⁷⁹ *Id.* at 184.

¹⁸⁰ *Id.*

¹⁸¹ Kuok, *supra* note 103, at 1.

¹⁸² Lynn Kuok, *Assessing the rule of law after the South China Sea arbitration: Will the G-20 be a turning point in China's behavior?*, BROOKINGS INSTITUTION, Sept. 1, 2016, at <https://www.brookings.edu/opinions/assessing-the-rule-of-law-after-the-south-china-sea-arbitration-will-the-g-20-be-a-turning-point-in-chinas-behavior>.

Further, “although it may initially have been envisioned to do so, no claimant State has used the award as legal and political leverage to induce conduct among the parties which are more in line with international law, especially on the part of China.”¹⁸³

III. CHINESE RECEPTION OF THE SCS ARBITRATION

The SCS Arbitration Award was perceived as a humiliating defeat for China.¹⁸⁴ As expected, China angrily denounced the Award.¹⁸⁵ Although many observers hoped that, with the Philippines’ adoption of a more accommodating policy toward Beijing, China might find politically face-saving ways to bring its claims and behavior into line with the substance of the ruling, facts on the ground show that these hopes will likely not come to fruition.¹⁸⁶ On the seas, China continues to assert “indisputable sovereignty” over all islands and waters in the SCS. Even after the Award, China continues to resort to hard power to create facts on the sea that render its control over the SCS *fait accompli*.¹⁸⁷

¹⁸³ Bautista, *supra* note 159, at 180.

¹⁸⁴ *Id.* at 184.

¹⁸⁵ See Bill Hayton, *Denounce but Comply: China’s Response to the South China Sea Arbitration Ruling*, 18(2) GEO. J. INT’L AFFAIRS 104, 104 (2017). According to Hayton, Vice-Foreign Minister Liu Zhenmin at an official briefing at the State Council Information Office twice called the Award “nothing more than a piece of waste paper” and one that “will not be enforced by anyone.” He personally attacked the judges, questioning whether they knew anything about Asia or the history of the South China Sea, and implied that since the Philippines paid the costs of the hearing, the judges had been bribed. The state news agency Xinhua accused the international system of political bias because a key figure in the selection of members of the arbitral panel, Shunji Yanai, was Japanese. (*Id.*)

¹⁸⁶ *Failing or Incomplete? Grading the South China Sea Arbitration*, ASIAN MARITIME TRANSPARENCY INITIATIVE, July 11, 2019, at <https://amti.csis.org/failing-or-incomplete-grading-the-south-china-sea-arbitration>.

¹⁸⁷ See Robert A. Manning & Patrick M. Cronin, *Under Cover of Pandemic, China Steps Up Brinkmanship in South China Sea*, FOREIGN POLICY, May 14, 2020, available at <https://foreignpolicy.com/2020/05/14/south-china-sea-dispute-accelerated-by-coronavirus>. Robert A. Manning and Patrick M. Cronin wrote that “[t]rying to create a *fait accompli* is the only way to interpret Beijing’s behavior in recent weeks. On April 18, China declared the establishment of two new administrative districts, one headquartered on Fiery Cross Reef, an artificial island in the Spratlys, and the other on Woody Island in the Paracels. It has named 80 islets and reefs, including not only artificial ones but also 55 entities that are permanently underwater. These actions are meant to create new facts to buttress claims to control the 1.4 million square miles of the South China Sea.” (*Id.*)

A. Domestic Attitudes Toward the Award

The official Chinese response to the SCS Arbitration was to angrily denounce both the ruling and the Tribunal that issued it.¹⁸⁸ In the aftermath of the Award, Chinese officials, diplomats, and scholars made numerous aspersions against the integrity and impartiality of the judges, alleging that they had been illegally influenced and even bribed to rule against Beijing.¹⁸⁹ The state news agency accused the international system of political bias because a key figure in the selection of members of the arbitral panel, International Tribunal for the Law of the Sea President Shunji Yanai, was Japanese.¹⁹⁰ Importantly, the official Chinese response misrepresented the nature of the ruling to the Chinese public, framing it as a violation of China's sovereignty in the SCS, despite the Tribunal's careful consideration of its jurisdictional limitations not to rule on territorial sovereignty aspects.¹⁹¹ Thus, on the day of its promulgation, Chinese Foreign Minister Wang Yi declared that the Award "violates China's lawful rights" and "challenges the norms of international law, including respect for sovereignty and territorial integrity."¹⁹²

The Chinese government's framing of the SCS Arbitration as an attack on territorial integrity is intentional. Bill Hayton identifies two imperatives that motivate Chinese policymaking: *first*, "a profound concern about national territory"; and *second*, "a desire to be seen as a responsible pillar of the international system."¹⁹³ The inherent tension between China's expansive SCS territorial claims and its tarnished international reputation as a consequence of the Award will push China "to try to bend in its favor, but not break, the international order."¹⁹⁴

China's actions and claims in the SCS are fundamentally predicated on its belief on the righteousness of its territorial claims.¹⁹⁵ "Sensitivity about territory is part of the foundational identity of modern China"¹⁹⁶—a sensitivity emotionally rooted in its "century of humiliation" narrative. "The rhetorical and symbolic construction of China as a bounded and sovereign

¹⁸⁸ Hayton, *supra* note 185, at 104.

¹⁸⁹ Bautista, *supra* note 159, at 184.

¹⁹⁰ Hayton, *supra* note 185, at 104.

¹⁹¹ *Id.* at 104–05.

¹⁹² *Id.* at 104.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 107–08.

¹⁹⁶ *Id.* at 108.

territory helped to underwrite [...] the perceived need to reclaim territory deemed to have been lost to imperialist powers [and] to integrate bordering areas of questionable sovereignty into the centralized polity.”¹⁹⁷ This territorial sensitivity explains China’s emotional claim to the SCS. However, it also means that China is unlikely to step back from its expansive sovereignty claims, despite the Arbitral Award rejecting its historical rights as lacking basis in international law. In the words of Hayton:

[...] China sees the SCS through a particular historical lens, one that lends an air of righteousness to its actions. [...] Fundamentally, Beijing does not choose to occupy territory in the South China Sea because it provides for defense, sea lane access, or as a buttress to regime security but simply because, in its own worldview, it is right.

[...] While there are many agendas at work pushed by different actors, underpinning them all is a Chinese sense of righteousness derived from a 20th century territorial narrative. This narrative is undoubtedly chauvinistic: it denies other claimants’ histories and suffers from major evidential failings. Nonetheless, it motivates Chinese state policy.¹⁹⁸

On the other hand, China’s desire to be seen as a responsible leader of the international community means that it will continue to frame its position on the SCS within the UNCLOS, albeit one that is stretched to favor its interests. This explains why China does not openly repudiate the UNCLOS, but remains carefully ambiguous to leave open the possibility of reinterpreting international law norms in its favor.¹⁹⁹ Notwithstanding the Award, “significant interest groups within the Chinese party-state [are still] pushing claims to rights and entitlements in the [SCS] well beyond those allowed by UNCLOS[.]” using Chinese soft and hard power in the region to influence norms that shape international law understandings of law of the sea.²⁰⁰

¹⁹⁷ *Id.*, citing ROBERT CULP, *ARTICULATING CITIZENSHIP: CIVIC EDUCATION AND STUDENT POLITICS IN SOUTHEASTERN CHINA, 1912-1940* 72 (2007).

¹⁹⁸ *Id.* at 109.

¹⁹⁹ Tim Rühlig, *How China approaches international law: Implications for Europe*, EUROPEAN INSTITUTE FOR ASIAN STUDIES, May 2018, at 11, available at http://www.eias.org/wp-content/uploads/2016/03/EU_Asia_at_a_Glance_Ruhlig_2018_China_International_Law.pdf.

²⁰⁰ Hayton, *supra* note 185, at 105–06.

In understanding China's refusal to recognize the Award, one has to consider its power-based approach to international law that does not view compliance as a value in itself.²⁰¹ Under this framework, the legality of the nine-dash claim is not something that is legitimized by existing international law, but by subsequent state recognition and practice. Thus, the Award notwithstanding, China believes that the "nine-dash line" can still become a new norm of international law as long as it continues to be "accepted" by states in the region.²⁰² This motivates China to create facts on the ground that render its nine-dash claim—despite its repudiation in a binding dispute settlement process—a *fait accompli*.

Although legal reforms under Xi Jinping indicate an increasing domestic emphasis on the rule of law, China is far from subscribing to the normative value of a rules-based international order that constrains state interests. China's approach to law remains functional and inherently power-based, "paying careful attention to the concrete benefits of law for policy-making."²⁰³ "This functional approach goes along with a preference for vague legal norms that allow very different interpretation and do not constrain political decision-making all too much."²⁰⁴ China has so far skillfully wielded its calculated ambiguity in the SCS to display a veneer of compliance underneath its rhetoric of indignant anger on the outcome of its dispute with the Philippines. As the world has gone fishing, and with Manila's radical conciliatory shift toward China, China has reasserted itself in the SCS, as if the Arbitral Award had never existed, and the claimant states are back to square one.

B. China's Compliance with the Award

Despite initial movement toward compliance, China, in recent years, appears to have fallen back on its strong power nihilism in the SCS. In an early study of China's compliance with the Award in October 2016, Julian Ku and Christopher Mirasola found that China was in clear violation of only four rulings: two relating to its occupation of Mischief Reef, and two relating to China's refusal to allow Filipino fishers to return to traditional fishing grounds around the Scarborough Shoal and the Philippine EEZ.²⁰⁵ A 2019 report by the Asia Maritime Transparency Initiative showed that, overall,

²⁰¹ Rühlig, *supra* note 199, at 13–14.

²⁰² Liu, *supra* note 59.

²⁰³ Rühlig, *supra* note 199, at 13.

²⁰⁴ *Id.* at 13–14.

²⁰⁵ Julian Ku & Christopher Mirasola, *Tracking Compliance with the South China Sea Arbitral Award*, 9(1) ASIAN POL. & POL'Y 139, 149 (2017).

“China is in compliance with just [two] of 11 parts of the ruling, while on another its position is too unclear to assess.”²⁰⁶

Despite the invalidation of the nine-dash claim and the ruling that Chinese entitlements in the SCS may not extend beyond the regime provided for in the UNCLOS, China persists in claiming “ill-defined historic rights to virtually all waters and seabed in the [SCS].”²⁰⁷ Although its officials have spoken less about the nine-dash line as basis, China insists on enforcing its supposed “indisputable sovereignty” in the EEZs of Vietnam, the Philippines, and recently, Indonesia (which is no claimant in the Spratlys disputes), and objects to all oil and gas operations therein.²⁰⁸

Despite a clear ruling that Mischief Reef and Second Thomas Shoal are LTEs that form part of the Philippine EEZ, China continues its occupation and use of Mischief Reef, with satellite imagery of continuous construction on the reef even after the Arbitral Award.²⁰⁹ China occupies the reef and seemingly continues to assert maritime entitlement to it as shown by its objections to US FONOPs within 12 NM of the facility.²¹⁰ In the Second Thomas Shoal, a People’s Liberation Army Navy (“PLAN”) helicopter dangerously harassed a resupply mission to the *Sierra Madre*, a Philippine outpost. Reminiscent of its “cabbage strategy,” CCG vessels have patrolled around the shoal regularly.²¹¹ China also continues to prevent the Philippines from exploiting the resources of its EEZ and continental shelf, blocking oil and gas explorations at Reed Bank (an underwater feature located entirely within the Philippine EEZ);²¹² continuing imposition of moratorium on fishing in the Philippine EEZ; and allowing its fishing boats to operate illegally within Philippine EEZ and engage in environmentally destructive harvesting of endangered species²¹³—all in complete disregard of the Arbitral Award. Since December 2018, China has also maintained a constant militia blockade of Thitu Island—the largest and the only inhabited

²⁰⁶ *Failing or Incomplete? Grading the South China Sea Arbitration*, ASIA MARITIME TRANSPARENCY INITIATIVE, July 11, 2019, at <https://amti.csis.org/failing-or-incomplete-grading-the-south-china-sea-arbitration/>.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Ku & Mirasola, *supra* note 205, at 139.

²¹⁰ Asia Maritime Transparency Initiative, *supra* note 206.

²¹¹ *Id.* See also *Signaling Sovereignty: Chinese Patrols at Contested Reefs*, ASIA MARITIME TRANSPARENCY INITIATIVE, Sept. 26, 2019, at <https://amti.csis.org/signaling-sovereignty-chinese-patrols-at-contested-reefs/>.

²¹² *Id.*

²¹³ *Id.* See also Ku & Mirasola, *supra* note 205, at 139.

Spratlys feature occupied by the Philippines well within Philippine EEZ.²¹⁴ This staredown continued for over 16 months. In February 2020, a PLAN warship, in violation of international rules of engagement, locked its guns on a Philippine Navy warship patrolling Philippine EEZ.²¹⁵ As of December 2021, the Philippine Department of Foreign Affairs has filed over 240 diplomatic protests against various Chinese incursions in the West Philippine Sea.²¹⁶

Reality shows that China is the winner in the SCS Arbitration.²¹⁷ Despite the Philippines' supposed legal victory and the clarification of the legal status of contested features, the SCS remains a hotbed of anxiety without negotiated solutions in the horizon. As Lowell Bautista notes, the true legacies of this contest are "China's reclamation and militarization of artificially built features, the immense environmental damage caused to the fragile ecosystem of the SCS, and its continued illegal and provocative activities."²¹⁸ China is able to maintain its dissonant claims of being a "responsible world leader" while stretching international law of the sea to a breaking point. Its maritime policies are shaped by amorphous domestic attitudes toward a rules-based international order, and informed by a nationalist "century of humiliation" narrative that strongly disincentivizes the CCP from any conciliatory or principled rules-based approach to the binding Arbitral Award. Domestically, since the CCP's continued ability to govern China is anchored on its performance legitimacy—which includes

²¹⁴ *The Long Patrol: Staredown at Thitu Island Enters its Sixteenth Month*, ASIA MARITIME TRANSPARENCY INITIATIVE, Mar. 5, 2020, at <https://amti.csis.org/the-long-patrol-staredown-at-thitu-island-enters-its-sixteenth-month>.

²¹⁵ Although the incident on February 17, 2020 involving a Philippine Navy warship and PLA Navy warship did not escalate, the Chinese warship locking its guns on the Philippine warship while in Philippine EEZ was, by international military conventions, an act of aggression since it was one step away from actual firing. This "provocative and reckless escalation" of tensions occurred in the West Philippine Sea (i.e., the portion of the SCS claimed by the Philippines as its EEZ under the UNCLOS), in open defiance of the Arbitral ruling calling on China to respect Philippine EEZ. See Sofia Tomacruz, *Carpio hits China's 'pure and simple bullying' in West Philippine Sea*, RAPPLER, Apr. 24, 2020, at https://www.rappler.com/nation/258912-experts-hit-china-reckless-escalation-tensions-west-philippine-sea#cxrecs_s.

²¹⁶ The Philippines refers to the portion of the SCS corresponding to its 200-NM EEZ as the "West Philippine Sea." For a summary of the Philippines' diplomatic protests in 2019, see Alyssa Rola & Kristel Limpot, *More incursions, more protests: A look back at PH-China relations, maritime row in 2021*, CNN PHILIPPINES, Dec. 8, 2021, at <https://www.cnnphilippines.com/news/2021/12/28/Duterte-West-Philippine-Sea-2021-yearender.html>.

²¹⁷ Bautista, *supra* note 159, at 188.

²¹⁸ *Id.*

the ability to defend territorial integrity—there is no reason to suppose that the CCP will compromise on China’s expansive territorial and maritime claims. If its recent actions are to go by, China will instead continue with its ultimate aim of occupying every single feature and controlling maritime resources within its U-shaped line,²¹⁹ international law and a binding Award against it notwithstanding.

CONCLUSION

China is a risen power whose transformed status from regime-taker to regime-maker cannot long be ignored. Its phenomenal economic and military rise as a great power in the 21st century placed it in a pivotal role affecting the stability and security of the Asia-Pacific region. As the strongest claimant in the SCS, China’s attitude toward the binding SCS Arbitration has long-term consequences that would determine whether disputes in the contested region could be peacefully resolved. In the context of a highly insecure world order, such peaceful resolution should be a fundamental priority for the international community, especially for regional players in the Asia-Pacific.

China sees itself as a responsible user of international law, and more important, it wants the world to view it as one that honors its obligations in good faith. But the deep irony of this self-imagery lies in its outlaw actions in its own backyard. Five years after *Philippines v. China*, China’s great power domination in the SCS remains a reality. After an initial lull in 2016, Chinese maritime aggression has returned full force, with repeated provocations in the guise of non-military “maritime enforcement activities.” Its Thucydidean view of international relations, coupled with a domestic nationalist rhetoric, justifies open defiance of an arbitral award that could have shaped more nuanced approaches to resolving competing security interests in the region. Domestic party politics and narratives of historical injustice have caged ill-defined territorial and maritime claims into a non-negotiable issue of sovereignty, further narrowing the range of negotiated peaceful solutions. Those looking to international law as an effective means to constrain Chinese aggression in the SCS may have to recalibrate their toolkits, as current normative expectations of rules-based constraints appear unable to significantly restrain the exercise of China’s growing power, especially in areas that could prove potential flashpoints in international peace and security.

²¹⁹ Hayton, *supra* note 185, at 109.

China's strategic thinkers have to realize that it cannot be a professed leader of international law or a responsible great power without meaningful acknowledgment of the changed legal landscape brought by the SCS Arbitration. For as long as China resolutely ignores international law on the SCS, maritime security in Southeast Asia will remain elusive. And in light of renewed geopolitical rivalries and its strategic partnership with Russia, China's maritime aggressions will come under increasing scrutiny, if not suspicion.

Finally, the SCS disputes cannot be viewed as a regional conflict whose consequences can be contained within the Southeast Asian region. At stake are not only critical economic and strategic interests, but certain foundational political principles on respect for international norms, preservation of real sovereign independence, and refusal to legitimize unilateral territorial expansions. Already, the weakening hold of international law norms on the pacific settlement of disputes is apparent in the great power domination exercised by China in the SCS, and, to a more dramatic extent, the ongoing Russian invasion and assault on the territorial integrity of Ukraine.