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CAN INTERNATIONAL LAW MAKE A DIFFERENCE?

UNCLOS AND THE SOUTH CHINA SEA

by

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Biography

Colonel Shannon L. Sherwin, entered the Air Force in 1997 as a direct appointee. She graduated from Creighton University in 1994 and obtained her Juris Doctorate from the University of Denver, College of Law in 1997. She was commissioned as a Judge Advocate upon passing the Colorado Bar exam. Col Sherwin is sworn and can practice before the Colorado Supreme Court, the Air Force Court of Appeals, the Armed Forces Court of Appeals and the United States Supreme Court. She has been an Assistant Staff Judge Advocate, Deputy Staff Judge Advocate and Legal Advisor to an Air and Space Operations Center before becoming a Wing Staff Judge Advocate. Col Sherwin received her Masters in Legal Letters in Military Law with a Specialty in Operations and International Law from the Army Judge Advocate General's Legal Center in School in 2008. Col Sherwin has deployed as a Staff Judge Advocate and legal advisor on three different occasions in support of OPERATION IRAQI FREEDOM, ENDURING FREEDOM, and ODYSSEY DAWN. Prior to attending Air War College, Col Sherwin was the Deputy Staff Judge Advocate for Air Force Special Operations Command and the Staff Judge Advocate at the United States Air Force Safety Center responsible for all safety investigation legal advice and the Air Force freedom of information act requests related to safety information and investigations. She is currently a student at the Air War College at Maxwell Air Force Base, Alabama.

Abstract

There are challenges facing the international community, one of which is the fear of conflict born out of the inability to reach consensus and understanding. The volatile security situation in the South China Sea is a prime example and has made the region ripe for intervention. The South China Sea region has emerged as an unrivalled area of economic activity and natural resources and as a global hub of commerce. Adjoining nations are aggressively pursuing sovereignty claims over the islets and reefs to exploit and develop its economic and natural resources. Despite the high stakes, American strategy for the region is largely rhetorical.

Focusing on the Spratly Islands and the July 2016 International Court of Justice's Permanent Court of Arbitration (PCA) decision, this essay examines whether international law can play a role in diffusing the potential for conflict in the South China Sea. The failure on the part of the United States to ratify the United Nations Convention on the Law of Sea is analyzed in light of the current situation and the role of international law can play in the region. Ultimately, the essay advocates a fresh approach to focusing on facilitating resolution of the sovereignty issues and the rule of law to more effectively and efficiently diffuse the hostility in the region and come to agreements on promoting equitable resource distribution. While the US has acknowledged the "peaceful" rise of China and it has diplomatic and economic power levers to compel change, international law is the only way to ensure stability in the region. Given the current international order and the desire of the United States to maintain its power status, international law will become increasingly important as states strive to maintain peace and stability in the region.

Introduction

“Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”¹ Except when they do not. There are several challenges facing the international community today, one of which is the fear of conflict born out of the inability to reach consensus and understanding. The current maritime disputes in the South China Sea (SCS) are a prime example. China’s need for self-preservation includes its hold on the SCS which is vital to its national security and is driving its actions in the region.² Adding potential fuel to the fire, the International Court of Justice’s Permanent Court of Arbitration (PCA) handed down a decision that has grave implications for China and potentially the current international world order. The pivot in American foreign policy to the Asia-Pacific region places the South China Sea skirmishes and maritime claims in the forefront of US policy and strategic decisions. Economically, Asia is becoming the world powerhouse as its economies are projected to expand and surpass the West.³ Where Asia is strong economically; they are unstable regionally with one of the main causes being the SCS. The United States has acknowledged the rise of China as a power and welcomes its rise as a “stable, peaceful and prosperous China.”⁴ In its focus on the region, the US has taken the position that it will remain in a place of dominance and “insist that China uphold international rules and norms on issues ranging from maritime security to trade and human rights.”⁵ The question becomes how to do this in an ever changing security environment.

In looking to the SCS, China and other regional countries have conflicting maritime claims. Despite its size, the Sea has been described as “a mass of connective economic tissue where global sea routes coalesce” around the hub or world economy.⁶ As the states in the

region interact with a rising diplomatic, economic, and military power, the SCS has become more strategically important for the US to ensure unfettered global access to the sea.⁷

Natural resource development, freedom of navigation, and sovereignty disputes underlie the strategic regional competition between the coastal nations and the balance of their Chinese neighbor and the American global hegemon. Current US posturing over the necessity for China to obey international law is largely rhetorical and unlikely to solve any of the core issues in the SCS or the region. Unfortunately, the US call for order lacks legitimacy, as it has failed to ratify the 1982 United Nations Convention on the Law of the Sea (UNCLOS) which is the basis for the dispute between the Philippines and China.

This essay argues that the United States needs to take a much more proactive role in pursuit of a peaceful and balanced regional stability and dissolution of maritime claims. To do that the United States must ratify UNCLOS in order to legitimize its calls for nation states to obey the international order and strengthen US national security and global interests. The ratification of UNCLOS will enable a strategy that will facilitate the peaceful resolution of maritime claims by promoting international law in the region. “The purpose of international law is to regulate international relations.”⁸ Although international law is limited, international law and diplomacy have a greater role in the area than military use of force. The current US National Security Strategy states “we will continue to embrace the post – World War II legal architecture – from the U.N. Charter to the multilateral treaties that govern the conduct of war, respect for human rights, nonproliferation, and any other topics of global concern... We will lead by example....”⁹ The United States therefore needs to put its words into action.

This essay looks at the troubled waters of the SCS by focusing on the Spratly islands and the maritime claim between China and the Philippines. It begins with a concise examination of

maritime claim and the background of UNCLOS; then it explores the pros and cons of ratifying UNCLOS. Finally, the essay provides a way forward and implications of a greater international law structure for the area.

BACKGROUND

Maritime Claim

The significance of the SCS sea lines of communication and the natural resources in the sea have intensified the sovereignty disputes that have afflicted the region since 1945. Small uninhabited rocks, reefs, and other natural structures have become increasingly more important as a legal basis for territorial assertions over the right to develop resources and navigation.¹⁰



Figure 1 Maritime claims in the South China Sea¹¹

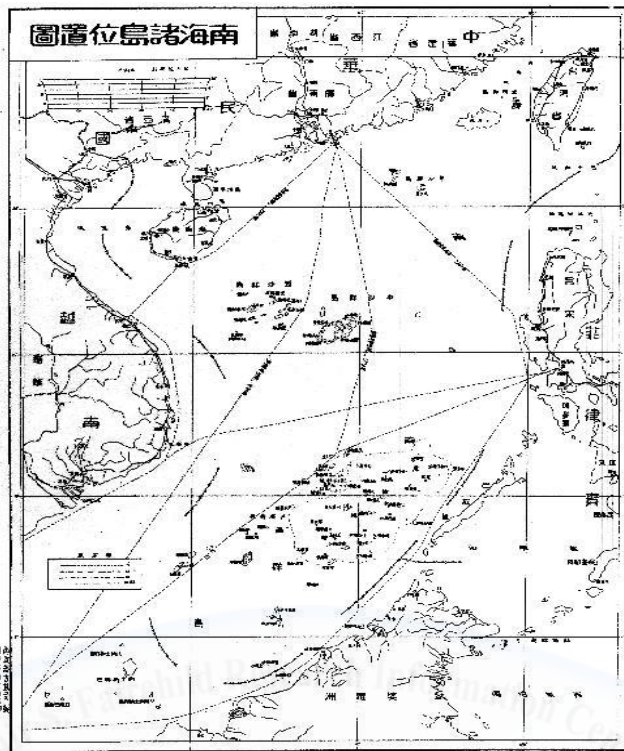


Figure 2 – 1947 China’s Eleven Dashed Line ¹²

The starting point of the maritime claims begins with the creation of the Peoples Republic of China in 1949 and the establishment of a claim to almost the entire SCS in the form of an eleven-dashed line map shown in figure 2 above. The map was published by China which officially declared the four island chains as its territory.¹³ The largest of the four island chains in dispute are the Spratlys.¹⁴ The conflicting claims of sovereignty between China and the Philippines has resulted in military and diplomatic contests over sovereignty of rocks, reefs, and maritime rights in the adjacent waters.¹⁵

States have bolstered their territorial assertions by occupying islets, building islands, placing markers, and passing domestic laws that incorporate the features into their respective jurisdictions, and allowing or disallowing resource development and fishing.¹⁶ The legal

foundational document for maritime boundary delimitation is UNCLOS. All SCS adjacent nations are signatories to UNCLOS and therefore have agreed to be bound by the definitions and rules outlined by the convention.¹⁷ Underlying the SCS maritime claims are UNCLOS's provisions that allow coastal states to establish maritime zones, specifically: 12 nautical miles (nm) of territorial seas with full sovereignty and rights to marine resources, drilling, and scientific research in the 200nm exclusive economic zones (EEZ) and 350nm continental shelves.¹⁸ In addition, to the delimitation provisions, UNCLOS provides for a formal arbitration process upon which claimants can seek legal conclusion to maritime disputes.¹⁹

While China has historically and consistently held the belief that any dispute should be handled through negotiation and consultations rather than through compulsory third party settlement, it gave its advanced consent to settlement procedures when it ratified UNCLOS.



Figure 3 – China's Nine-Dashed Line SCS Claim²⁰

In 2013, the Philippines sought a determination by the PCA that China's maritime claims, as seen in figure 3 above, violated Philippine entitlements under the law to the maritime space, and that China illegally interfered with its sovereign rights.²¹ The court held that they had jurisdiction over the case, and made an award and final ruling in favor of the Philippines in July 2016.²² The binding decision has caused additional concerns in the area as China has failed to recognize it and has publicly renounced the holding.²³

Laws of the Sea

There exist two primary legal frameworks for codifying maritime laws: UNCLOS and customary international law (CIL) of the sea. UNCLOS defines maritime security regimes, and defines jurisdictions, rights, and responsibilities for such things as navigation and access/control of resources, and provides for the peaceful resolution of disputes. For purposes of this paper, references to UNCLOS include both the 1982 Treaty and the 1994 Agreement contained in Part XI of the Convention.

“International rules, norms, principles, privileges, duties, and entitlements form an identifiable and coherent set within the international system.”²⁴ As International organizations, treaties, and law have codified and formalized rules and principles into international law, it is the hope of all that each law is recognizable. Unfortunately, it may be difficult to truly know what is an international rule or law which is binding on all states unless codified in writing and ratified by all states. An impetus for UNCLOS was the growing number of maritime claims which arose out of CIL. The Third United Nations Conference on the Law of the Sea met in

1973 with the “hope for a more stable order, promoting greater use and better management of ocean resources and generating harmony and goodwill among States that would no longer have to eye each other suspiciously over conflicting claims.”²⁵ Reliance on the states to know what was and was not CIL was not fortuitous.

CIL consists of sets of rules which nations hold as binding upon their own actions as well as the actions of others in the international arena.”²⁶ In essence, CIL evolves from “extensive and virtually uniform” state practice that is “carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”²⁷ Unfortunately, there is an inherent uncertainty in what constitutes CIL and identifying those rules can be an extremely difficult when “one attempts to make sense of all the multiple claims, counterclaims, actions and omissions of the 193 states that make up the international community.”²⁸

CIL’s rules and obligations “by their very nature must have equal force for all members of the international community.”²⁹ Inherent in this is the fact that CILs unlike treaties, apply *prima facie* to all states (even those that fail to observe the rule). Unfortunately, because nations make CIL through their actions and public pronouncements, they can also forge new law by breaking existing law and thereby opening the door for other nations to follow.³⁰ Decisions handed down by international courts and tribunals do not create any rules or obligations to a nation or party except those who are a party to the case.³¹ Additionally, there is no formal precedent in international law.³² However, while not obligated to follow decisions, both legal and political state actors do tacitly accept to be bounded by precedent and hold the opinions of international courts and tribunals as binding on their own behavior.³³

In addition to potentially not knowing what the law is, international law is weak on

enforcement mechanisms unless provided for through state action. In the case of the SCS the littoral states will not be able to resolve the many claims unless the parties comply with international law and allow themselves to be bound by decisions, agreements and rules. Any enforcement of wrongs or violations of UNCLOS will necessitate incentives that are outside the confines of legal frameworks and will most likely come through political, reputational, or economic means.³⁴ This is where we are today as China has not accepted the decision of the PCA with regards to the Philippines case.

UNCLOS is widely considered to be the most significant contribution to maritime law, is seen as the “constitution for the oceans,” and is designed to regulate the utilization of 70% of the earth’s surface.³⁵ While not definitive, it has settled and codified some emerging CIL like transit through the high seas and territorial waters, as well as, archipelagic sea lanes and right of passage.³⁶ UNCLOS consists of 17 parts, 9 annexes, 320 articles with 166 states and entities as signatories.³⁷ The US is not a party to UNCLOS for reasons that will be explained in a later part of this essay. Although it is not a party to the convention, the US has chosen to view much of the convention as CIL and they adhere to the convention and the 1994 Agreement as such.³⁸

The 2016 International Court of Justice’s Permanent Court of Arbitration Decision

“Codification and progressive development of the law of the sea will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principle of justice and equal rights.”³⁹ What happens when one country does not see the law as binding or consistent with their national interests? In July 2016 the Permanent Court of Arbitration (PCA) issued an award under Annex VII to UNCLOS to the Philippines against China. In making its ruling, the PCA examined the dependence of the

territorial sea upon the land domain and the presence or absence of any links between the maritime space and the land.⁴⁰

One critical feature of UNCLOS was the establishment of the EEZ as a new maritime regime between territorial waters and the high seas. The EEZ effectively gives coastal states “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources...of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone.”⁴¹ In essence, the EEZ provides a protected area for expansion and exploitation which is of strategic importance to many nations. Unfortunately, for China, the legal basis for such sovereignty claims did not hold water with the PCA and UNCLOS.

The PCA held that China’s “historic” claim over the Spratly Islands had no legal standing.⁴² Additionally, it was found that in accordance with UNCLOS, the land forms at issue were rocks and not islands, that Chinese actions were unlawful and that China caused harm to the maritime environment and heightened geopolitical tensions by aggravating the dispute.⁴³ The PCA’s decision clarified the definitions found within UNCLOS and significantly limited the claims China can make to the surrounding waters and airspace as these “rocks” lie within the Philippine’s lawful 200nm EEZ.⁴⁴ The decision censured China for interfering with Philippine fishing and oil exploration and constructing artificial islands causing irreparable harm to the marine environment.⁴⁵

China has publicly stated that it will not abide by the PCA’s ruling and without an enforcement mechanism within UNCLOS or international law, China is free to do as it wants at least for the time being. As international maritime laws are important to maintain global and regional peace and stability, gaining acceptance of defined rights, obligations and duties only

provides a legal framework. Challenges of the legal interpretations, changing norms and violations will require enforcement by global powers and other nations. The US has a significant role on the international stage and it may begin with linking itself to the international law framework that has already been established – namely UNCLOS.

WILL US RATIFICATION OF UNCLOS PERSUADE CHINA TO ABIDE BY THE UNCLOS RULING?

In the wake of the arbitration filing by the Philippines, the US reaffirmed its support for the exercise of peaceful resolution without the fear of intimidation, retaliation, or coercion by stating “we hope that this case serves to provide greater legal certainty and compliance with the international law of the sea.”⁴⁶ After the decision was handed down, the US publicly chastised China and called upon it to obey the ruling of the court.⁴⁷ What credibility does the US have in making this statement or in backing the international court when it is not itself a signatory to the convention upon which this ruling is based? The US’s current maritime security policy states that the US must ensure continued “freedom of the seas,” “deter conflict and coercion,” and “promote adherence to international law and standards,” yet the US pays lip service to these statements as outsiders to the convention.⁴⁸ Although the US signed the Convention in 1994, Congress has yet to ratify it. At the heart of the US debate on ratification is the question of expanding the rule of law or sacrificing sovereignty. Critics and proponents alike agree that it is within the US national interests to ensure maritime security, stability, and power yet their opinions are divided on how to preserve and protect those interests. Some hold that US sovereignty interests are preserved by limiting reliance on international law and multilateral

alliances, whereas others see UNCLOS as a win-win proposition for US national interests by strengthening the international order and endorsing US sovereignty over marine resources.⁴⁹

Critics of UNCLOS believe that any benefit garnered from becoming a signatory is outweighed by the costs associated with adherence to flawed international organizations or treaties that threaten US sovereignty.⁵⁰ They claim ratification will unnecessarily expose the US to lawsuits regarding all maritime activity including pollution and argue enslaving the US to the interpretations of law by another body would be detrimental to US interests by signing the US up to endless dispute resolution by an unfriendly body.⁵¹ These same critics hold that should ratification happen, the US would be ceding the moral high ground it currently enjoys by upholding CIL and established custom and it would signal intentionally or unintentionally the approval of errant interpretations of the law.⁵² The main argument against ratification is that it is not essential or necessary for the US to ratify to protect its navigational rights and freedoms given that those rights exist in CIL.

The arguments fail to address the very real present day threats to US interests and sovereignty that will not be solved through the application of military power so long as the US fails to join the 166 states that have ratified UNCLOS. As we have seen in the previous section, CIL has a unique structure, inherent uncertainty and is made through state action; therefore it is logical that CIL and new laws can be created where states, like China, break existing laws. The critics of UNCLOS forget that “international law is a tool that governments employ with care” and that if international law and UNCLOS is redefined on the international stage over the SCS maritime disputes, the maritime domain will change, and maybe not in the favor of the US.⁵³ Today the US influence in the maritime domain regarding such issues as the outer limits of the continental shelf, the rights over Arctic resources, and boundary disputes is tempered by the

inability of the US to insert itself with authority into the deliberations and discussions. Without the power of UNCLOS behind the US, there is no legal mechanism or framework that will enable the US to counter conflicting claims and push for peaceful resolutions.

Arguments against ratification are short sighted as ratification will most certainly enhance US security interests. For example, UNCLOS is a tool that will enable the US Navy and the Air Force to maximize their ability to protect US national interests by enabling forward presence and maritime superiority while protecting against dilution of navigational freedoms and the growth of excessive maritime claims. It also would enhance the legitimacy of multilateral actions by reducing the number of naval assets that the US must devote to the freedom of navigation missions throughout the world. Most importantly, it allows the US to secure international recognition of US-based claims and rights which enhances our economic growth and stability. Ratification does not cede sovereignty, it strengthens it. As a power projection UNCLOS allows US ships and aircraft access to areas without permission allowing them to transit in their normal formation (submerged submarines, aircraft carriers can do flight operations etc.).⁵⁴ UNCLOS has an established governing body apart and distinct from the United Nations. If the US were to ratify, it would have a seat on the governing body. Without a seat at the table, we have little say in amendments and US ability to influence the decisions of the commissions or other signatories is diminished if nonexistent.

Given the current holding and the tensions in the SCS, ratification of UNCLOS gives the US legitimacy. It allows the US to declare support for the current arbitration process and ruling, and it allows the international community to focus on legal not military messages to encourage parties to negotiate and use diplomatic means to resolve the numerous disputes. Additionally, it encourages China to remain a part of UNCLOS and the international legal order.⁵⁵ Without

ratification, the US “loses its moral suasion in pushing China toward compliance with UNCLOS norms – and more broadly in helping enforce the rights of countries using UNCLOS – when the US is not a ratifying party.”⁵⁶

China uses UNCLOS and other international conventions for specific purposes, to create distortions of the law in hopes of extending its administrative writ and power projection in the SCS. Domestic law, international legislation, judicial holdings, legal pronouncements and agreements provide a foundation for exerting pressure on states to conform but that pressure becomes unbearable only by a widely ratified international agreement. Ratification of UNCLOS can be seen as analogous to the US moving carriers into the region when China threatened Taiwan. The US cannot put pressure on China to obey international law and the PCA ruling if the US does not have the foundational backing provided by the Law of the Sea Conventions upon which to stand. Without UNCLOS behind it, the US may not have enough diplomatic and political clout to overcome China’s economic and financial advantage.⁵⁷

INTERNATIONAL LAW IMPLICATIONS FOR THE REGION

While critics and proponents disagree on the ratification of UNCLOS the arguments against ratification hold little water when one understands the implications international law has within the SCS and the Asia-Pacific region. “Since WWII there has been a dramatic proliferation of treaties, organizations, and other legal frameworks covering new spheres of global life, purporting to regulate everything from chemical weapons to pandemic response to civil aviation.”⁵⁸ As such, this has given another level of order in the international world order but an international order gains legitimacy only if “all powerful states accept the identity and

rules of the great power and embrace the basic conventions and rules governing state conduct.”⁵⁹ Given the defiant nature of China in regards to the SCS crisis, it has the ability to quickly become a major challenge to world order without international law. As we have already seen, open access to global commons is at the very heart of the matter and the freedom of seas has been a core US national interest and this very principle is housed in international law. This principle may be (if not already) under attack by China’s jurisdictional claims and their lack of adherence to UNCLOS provisions and the PCA decision. Additionally, if the Law of the Sea is redefined on the international stage, the US is at risk of losing its ability to navigate approximately one-third of the earth’s surface.

The US and most of the international community view China’s actions as violating world norms and rules. Additionally, some fear China may intend to change the maritime status quo in ways that are detrimental to the international world order.⁶⁰ Aside from the public pronouncements condemning the decision and the arbitration process, China’s behavior seems to be inconsistent with recent trends in its foreign policy and nation building.⁶¹ China’s soft power has been instrumental in its “peaceful rise” vice the use of their military or armed force except when it comes to disputes in the SCS, why? Is it because the Chinese are firmly committed to their own economic growth and the SCS is a vital part of that commitment? Unfortunately, for China’s neighbors and the international community, China is using its military power and diplomatic pressure to exert dominance in the region. Were China successful in gaining sovereignty over the majority of the SCS, it would give China additional strategic depth by enabling continued trade, economic growth, and power projection that it doesn’t currently have. These are not insignificant to a country that is hedging its bets and its control to become a regional power house.

Unfortunately for China, the PCA's decision has wider implications than China and the international community anticipated which could effectively back China into a figurative corner as it deflated the delimitation dispute by defining the features as rocks.⁶² China does not have a mainland or large island close to the region capable of generating a maritime zone it needs to pursue its goal of consolidation of power and sovereignty in the SCS and in the region.⁶³ While China may feel backed into a corner, it is important for the international community to communicate that military force is not the only option for China.

China's statements that it will ignore the ruling does not necessarily mean that it is in non-compliance or that it will never comply. China continues to occupy Mischief Reef and is interfering with the Philippines' rights in its EEZ and continental shelf.⁶⁴ China also continues to interfere with the Philippines' rights but has allowed Filipino fishermen back into their traditional fishing ground at Scarborough Shoal.⁶⁵ Although many view China's disapproval of the award as a blanket violation, China is compliant in that it agrees disputes associated with maritime claims in the SCS should be resolved on the basis of international law.⁶⁶ Unfortunately, China differs on the mechanisms and interpretation of the law.⁶⁷ If China is to attain its goal it must "demonstrate its authority," "strengthen its legal claims" (regardless of the ruling), "accustom other countries to Chinese possession and control," and "preclude efforts by rival claimants to assert control over contested areas but potentially changing the norm."⁶⁸ This becomes problematic for the international community.

Throughout the last few years, the role of UNCLOS in managing the SCS conflicts was evident by the actions of the claimant states and the international community. Claimant states, including China, pledged to abide by their obligation to resolve disputes by peaceful means and in accordance with international law.⁶⁹ All actors continue to call for resolution through

agreement even though the PCA's decisions are viewed as gospel by some and hollow by others.

It is necessary for decision makers to look at how the law functions within the paradigm of foreign policy decisions which shapes the behavior of the littoral States. For the US, "the law of the sea is the bedrock of global and civilizational development... and represents formal justice for US strategy and policy."⁷⁰ For China, it is not as easy to determine if law shapes its behavior. In 2009 China re-introduced their nine-dash line as seen in figure 3 and made "its legal position transparent" by using the cover of law to claim legitimate maritime claims.⁷¹ Throughout the different SCS disputes, China has remained ambiguous in its claim to maintain its "strategic flexibility," all the while risking its reputation as a peaceful rising actor in the region.⁷² When the Philippines brought forth the arbitration action, it essentially "legalized the dispute, making law the dominant frame through which all states' actions have been evaluated" and demands for compliance to the international rule of law came from the international community.⁷³

China exists within a "legalized regional community" as the decisions in law keep China's actions within a more confined policy space.⁷⁴ According to some legal experts, China recognized that the modern legal interpretation did not provide a strong defense and China's best chance to keep their claim was to stay out of court, hence the decision not to cooperate with the arbitration.⁷⁵ The PCA decision invalidated China's claim that CIL allowed for historical rights and therefore determined that UNCLOS was the primary source of law upon which to judge the States' actions. By holding the PCA invalid, China continues to claim historical justice under CIL and is risking its reputation in order to reinforce domestic legitimacy. As a non-signatory the US is operating under CIL much like China is trying to do. By ratifying

UNCLOS, the US reinforces the PCA position and lessens China's belief that its claim can exist outside UNCLOS. As we saw above in China's decision to remain outside of the arbitration, China's actions can be shaped by the law as "international law *does matter* for China."⁷⁶

Will China be persuaded or even compelled by the pressure of the US? This remains to be seen. China has some choices to make. It either continues to be more aggressive and risks its neighbors supporting the US efforts to bring stability back into the region or China can work with the US in the international order and have its neighbors become more comfortable with it having a more powerful role in the region.⁷⁷ International law and UNCLOS in particular, gives China an out. Whether it chooses to take it is up to its leaders, however, the goal of the US and other international actors should be to show China that it is in China's best interest to deescalate the conflicts between it and its neighbors and rely on modern international law to help stabilize the region.

Way Forward

Unfortunately, asserting that the SCS disputes should be resolved on the basis of UNCLOS entails the need for some binding options. Decisions that are handed down by the International Court of Justice or another third-party arbitration board (as in UNCLOS) are inherently uncertain and potentially against the interests of at least one party to the case. As in the case of the Asia-Pacific region, attempts have been made to provide for a mechanism that would allow for the peaceful settlement of claims outside UNCLOS's framework. Namely the ASEAN forums, the 1992 Declaration on the South China Sea and the 2002 Declaration on the Conduct of Parties. Unfortunately, while they provide for the basic principles of dispute avoidance, they fail to address head-on the questions relating to geographic scope and more

importantly enforcement.⁷⁸ While both documents envision a binding code of conduct on the parties in the SCS, no such document exists today.

UNCLOS includes obligations, language, and techniques for conflict prevention, management, and resolution. Yet there are ambiguities and many of those controversial provisions can be resolved through decisions and bilateral treaties not to mention amendments to UNCLOS itself. China has stated that it will engage with the Philippines in talks to resolve the contested issues with a bilateral agreement. While only binding on China and the Philippines, it is a step in the right direction and can lead to another data point of state practice for CIL development.

How does the US persuade China, which has a strong nationalist goal to become a level player in the international system and abide by already established international rules and norms? The United States needs to use a strategy that “accepts and even encourages China’s rise to greater power and prominence in international politics but shapes China’s choices so that it is more likely to forgo bullying behavior that destabilizes...and more likely to accept burdens as a responsible stakeholder in global governance.”⁷⁹ The US is not powerful enough to order China to act a certain way, but with its allies, partners and other international systems the US does have the ability and power to shape China’s choices.⁸⁰ Given the fact that the US has a strong presence in the Asia-Pacific region it is in the US interest to continue to push peaceful dispute resolution while still allowing China to rise in stature and privilege. Success in global governance and liberal international order in the region can lead to success in regional security and vice versa. Effectively shaping “China’s foreign policy to improve – to be assertive without being aggressive – may be the greatest challenge” the US will face.⁸¹ There needs to be stronger regional emphasis on conflict management such as the Declaration of the Conduct of

Parties as envisioned by the ASEAN 1992 and 2002 Declarations.⁸² These types of documents would reaffirm the commitment of the parties to the purposes and principles provided in UNCLOS and other international agreements.

Escalation into military use of force must be avoided. Stressing the need to use legal and diplomatic measures by all parties can alleviate the need to escalate. The US must therefore, combine its strength with diplomatic moderation.⁸³ UNCLOS ratification and adherence to the arbitration decision by the US in its own dealings are good starting points. This along with the international community backing would send a message to China that it is not backed into a corner by the arbitration decision. There is room to maneuver and save face by coming to peaceful resolutions and still protecting their national security and economic interests. If the provisions of UNCLOS are more rigorously respected and applied by its parties (and the US ratifies the convention) its peace-promoting potential becomes stronger and more apparent.⁸⁴ As States draft and sign agreements whether those are multilateral or bilateral, the provisions of UNCLOS must be used as a basis and map. While UNCLOS created the controversial 200nm EEZ at the heart of the SCS controversy, without that provision, conflict in the region would likely manifest itself in violent confrontations and unilateral national legislation, making the situation more volatile both legally and politically.⁸⁵ International law has the ability to lessen the volatile nature where coercive military power brings heightened tensions and subpar decisions. This means by ratifying UNCLOS, States agree to bind themselves to the definitions and decisions provided on subjects dealing with maritime claims and disputed articles; to continue talks and negotiations in good faith; to come to agreements on bilateral and multilateral treaties; and to continue the development and study of customary international law and seek formal codification of various laws.

Of course, the issues involved in the SCS region are interwoven and involve not only legal constraints but also political, economic, environmental, security, transportation, and other concerns of national interest not easily compartmentalized or solved. It is important that claimant states throughout the world, prioritize the issues, and work toward resolving them. The SCS claims are not unique, they just happen to be front page news recently. Problems surrounding maritime claims cannot be solved by lawyers, but they can come to resolution by understanding international law and using it as a tool to work toward a positive end for all involved. Legal categorization and analysis of priorities can help policy makers and diplomats resolve disagreements before they turn into physical and violent military confrontations.⁸⁶

CONCLUSION

“Moving forward, the United States needs to maintain a strong military, diplomatic, and economic presence in Asia...” and insist that the SCS and other territorial disputes be handled in a peaceful manner.⁸⁷ The United States must take a proactive role in pursuit of a peaceful and balanced regional stability and dissolution of maritime claims. To legitimize its call for the nation states to obey international laws and norms in the region, the US must ratify UNCLOS. International law is a fragile yet effective way to enhance security in certain areas but it is only as good as those who abide by it. The Ruling by the Permanent Court of Arbitration provides the Philippines, Vietnam, Malaysia, and Indonesia with a significant foundation for negotiations with China over disputes in the SCS. The US cannot assert itself into the dispute resolution process except to facilitate confidence-building, negotiation, and cooperation in the region between those affected nations. The best way to look at this is for the US and others to find

common interests and avoid red lines. UNCLOS ratification by the US adds a degree of sophistication to the US foreign policy as “US pressure for a multilateral code of conduct in the South China Sea – something that Beijing has resisted – would carry more diplomatic heft if the US were to become party to UNCLOS” as it would hold the US to the same standards as the Chinese and 165 other nations.⁸⁸ The SCS is the epicenter of trade and commerce for the global economy and the region holds lifelines of security for many of the US allies and partners. To sustain “an open, vibrant, and resilient international order will require the United States to temper it’s often “exemptionalist” stance toward multilateral order” and rely on the existing international law infrastructure to balance the economic and security paradigms in the regions.⁸⁹ As tensions run high in the SCS, the US and the rest of the international community needs to turn toward international law, treaty/agreement development, negotiations and other diplomatic efforts to resolve the complex web of maritime claims. As the biggest voice, the US has the diplomatic power and leverage to navigate a course for stability amidst the challenge in the SCS – through the use and reliance on International law.

Notes

¹ Stewart Patrick, “World Order: What, Exactly, are the Rules?” *The Washington Quarterly* 39, no.1 (Spring 2016): 10. Quoting Louis Henkin, *How Nations Behave* (New York: Columbia University Press, 1968).

² Garver, “China’s Push through the South China Sea: The Interaction of Bureaucratic and National Interests,” *The China Quarterly* 132 (December 1992): 999-1028.

³ Thomas J. Christensen, *The China Challenge, Shaping The Choices of a Rising Power* (New York, NY: W.W. Norton & Company, Inc., 2015), 13-62.

⁴ Barack Obama, “US National Security Strategy,” *The White House* (February 2015): 24.

⁵ *Idib.*, 24.

⁶ Patrick M. Cronin and Robert D. Kaplan, “Introduction,” in *Cooperation from Strength: The United States, China, and the South China Sea*, ed. Patrick M. Cronin (Washington DC: Center for a New American Security, 2012), 5.

⁷ *Idib.*, 7.

⁸ Anthony D'Amato, "Groundwork for International Law," *The American Journal of International Law* 108, no.4 (October 2014): 652.

⁹ Obama, "US National Security Strategy," 23.

¹⁰ Natalia Prisekina and Roman Dremluga, "United Nations Convention on the Law of the Sea: Inevitable Way Towards Revision to Overcome South China Sea Disputes," *Asian Social Science* 11, no. 18 (June 2015): 274-278; Michael Sheng-Ti Gau, "The U-Shaped Line and a Categorization of the Ocean Disputes in the South China Sea," *Ocean Development & International Law* 43 (2012): 57-69.; Mira Rapp-Hooper, "Parting the South China Sea, How to Uphold the Rule of Law," *Foreign Affairs* (September/October 2016): 76-82; Yann-Huei Song and Stein Tonnesson, "The Impact of the Law of the Sea Convention on Conflict and Conflict Management in the South China Sea," *Ocean Development & International Law* 44 (2013): 235-269.

¹¹ <http://democracyforum.blogspot.com/2016/03/south-china-sea-early-thoughts.html>

¹² Rupert Wingfield-Hayes, "China's Island Factory," *BBC News*, 9 September 2014 found at <http://www.bbc.co.uk/news/resources/idt-1446c419-fc55-4a07-9527-a6199f5dc0e2>.

¹³ Sheng-Ti Gau, "The U-Shaped Line." The official claim since 1953 has been understood to be the nine-dashed line or U-shaped line. Upon declaration of the nine-dashed line, the international community remained silent and at no time did any express dissent nor did any of the adjacent states present a diplomatic protest. Li Jinming and Li Dexia, "The Dotted Line in the Chinese Map of the South China Sea: A Note," *Ocean Development & International Law* 34 (January 2003): 287-290.

¹⁴ Chung Chien-peng, "The Spratlys and Other South China Sea Island Disputes," *The Journal of Social, Political, and Economic Studies* 24, no.1 (Spring 1999): 17-36. The PRC claims 7 occupied reefs, Taiwan claims 1 islet, Vietnam claims 24 islets and reefs, Malaysia claims 5 reefs, and the Philippines claim 8 islets. Chien-peng, "The Spratlys," 17-36; Garver, "China's Push through the South China Sea," 1002-1025; Song and Tonnesson, "The Impact of the Law of the Sea Convention on Conflict," 238-243; Sheng-Ti Gau, "The U-Shaped Line and a Categorization," 57-65.

¹⁵ Chien-peng, "The Spratlys," 17-36. 1988 was China's first assertion of authority over the Spratleys in which it sank three transport ships. While China claims, it is acting in defense of its property, its antagonistic actions continued. In 2007, China issued an ultimatum to US and foreign oil and gas first to stop exploration or face unspecified consequences. Additionally, in 2011 and 2012 Chinese patrol boats harassed oil exploration vehicles and engaged in a standoff regarding Scarborough shoal. In 2014, China placed a state owned offshore oil rig in the waters of another sovereign state. All of this shows China's continued use of their military and the assertion of presence and power in the region. *Idib.*, 17-36; "Making Waves: The South China Sea," *The Economist* 415 (May 2015): 37-38.

¹⁶ Mark J. Valencia, *China and the South China Sea Disputes* (Oxford: The International Institute for Strategic Studies, 1995), 8.

¹⁷ Song and Tonnesson, "The Impact of the Law of the Sea Convention on Conflict," 236.

¹⁸ *Idib.*, 236-238; In the Matter of The South China Sea Arbitration Between The Republic of the Philippines and The People's Republic of China. *Permanent Court of Arbitration Case No.2013-19*, 12 July 2016 Award. <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>; "The Tribunal Renders Its

Award/Press Release.” *Permanent Court of Arbitration* (12 July 2016). <http://www.pca-cpa.org>.

¹⁹ United Nations, *United Nations Convention on the Law of the Sea*, (1982) Part XV, Settlement of Disputes, found at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

²⁰ Center for Strategic International Studies, Wall Street Journal.

²¹ “The Tribunal Renders Its Award/Press Release.” *Permanent Court of Arbitration* (12 July 2016), <http://www.pca-cpa.org>.

²² *Permanent Court of Arbitration Case No.2013-19*.

²³ Julain Ku and Chris Mirasola, “Tracking China’s Compliance with the South China Sea Arbitral Award,” *Lawfare* (October 2016).

²⁴ D’Amato, “Groundwork for International Law,” 650. The international system will evolve norms and prescribe how to avoid, mitigate and resolve controversy given the fact that it is an open system which pulls its information from diplomacy. Restatement of the law, Third, defines international law as “rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se as well as with some of their relations with persons, whether natural or judicial.” Restatement (Third) of the Foreign Relations Law § 101 (Am. Law Inst. 1987).

²⁵ United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *The United Nations Convention on the Law of the Sea (A historical perspective)*. http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Historical Perspective.

²⁶ Pierre-Hughes Verdier and Erik Voeten, “Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory,” *The American Journal of International Law* 108, no. 3 (July 2014): 389-434.

²⁷ Fernando Lusa Bordin, “Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law,” *The International and Comparative Law Quarterly* 63 (July 2014): 547 *Quoting North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (1969) ICJ Rep 3, paras 74-75. There are two elements necessary for a rule to be considered CIL and those include state action and *opinion juris* which is forming a sense of a legal obligation or a shared belief that a norm or rule exists. Verdier and Voeten, “Precedent, Compliance, and Change in Customary International Law,” 413.

²⁸ Bordin, “Reflections of Customary International Law,” 547.

²⁹ Verdier and Voeten, “Precedent, Compliance, and Change in Customary International Law,” 397-398.

³⁰ *Idib.*, 390-391, 401-402.

³¹ *Idib.*, 419-422; United Nations, *Statute of the International Court of Justice* Article 59 http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.

³² Verdier and Voeten, “Precedent, Compliance, and Change in Customary International Law,” 419-422; United Nations, *Statute of the International Court of Justice* Article 59 http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf. Additionally, the ICJ statute article 59 states “a decision of the ICJ has no binding force except between the parties and in respect of the particular case.” This provision embodies the principles applicable to international law broadly.

³³ Verdier and Voeten, “Precedent, Compliance, and Change in Customary International Law,” 419-422

³⁴ D'Amato, "Groundwork for International Law," 669-671; Miguel de Serpa Soares, "Room for Growth: The Contribution of International Law to Development," *Chinese Journal of International Law* 14 (2015): 1-13.

³⁵ UNCLOS; Song and Tonnesson, "The Impact of the Law of the Sea Convention on Conflict," 236.

³⁶ UNCLOS

³⁷ UNCLOS; Song and Tonnesson, "The Impact of the Law of the Sea Convention on Conflict," 236; China ratified the convention in 1996. Yu Mincai, "China's Responses to the Compulsory Arbitration on the South China Sea Dispute: Legal Effects and Policy Options," *Ocean Development & International Law* 45 (2014): 2.

³⁸ John Kerry, "The Law of the Sea Convention: The U.S. National Security and Strategic Imperative for Ratification," *Hampton Roads International Security Quarterly* (2012): 9.

³⁹ UNCLOS Preamble.

⁴⁰ *In the Matter of The South China Sea Arbitration Between The Republic of the Philippines and The People's Republic of China*; "The Tribunal Renders Its Award/Press Release."

⁴¹ UNCLOS Part V, Article 56.

⁴² "The Tribunal Renders Its Award/Press Release," 1. International law requires that a coastal state demonstrated effective control/occupation or continuous administration and control in order to claim sovereignty over an island. In this case the PCA invalidated China's historic claim and stated that if they did have historic rights, they ceased to exist where they inconsistent with the EEZ as defined in the convention. *Idib.*

⁴³ *Idib.*, 1-3.

⁴⁴ *Idib.*, 1.

⁴⁵ *In the Matter of The South China Sea Arbitration Between The Republic of the Philippines and The People's Republic of China*; "The Tribunal Renders Its Award/Press Release."

⁴⁶ Marie Harf, Deputy Department Spokesperson (Press statement, Washington, DC, 30 March 2014) found at <https://www.state.gov/r/pa/prs/ps/2014/03/224150.htm>

⁴⁷ "South China Sea: Obama urges Beijing to abide by ruling," *BBC News*, 3 September 2016. Found at <http://www.bbc.com/news/world-asia-china-37267372>.

⁴⁸ Department of the Defense, *Asia-Pacific Maritime Security Strategy* (Washington DC, September 2015) 35. https://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P_Maritime_Security_Strategy-08142015-1300-FINALFORMAT.PDF; Department of the Navy, *A Cooperative Strategy for 21st Century Seapower* (Washington, DC, March 2015) 5, 10, 17, 27, 34, 45. <http://www.navy.mil/local/maritime/150227-CS21R-Final.pdf>.

⁴⁹ Patrick J. Bonner, "Neo-Isolationists Scuttle UNCLOS," *The SAIS Review of International Affairs* 33, no. 2 (Summer/Fall 2013): 3-4; Dan Blumenthal and Michael Mazza, "Why to Forget UNCLOS: The U.S. Push to Ratify the Convention on the Law of the Sea is Wrong, Especially with China's South China Sea Claims," *The Diplomat* (17 February 2012); Steven Groves, "Costs of UNCLOS Accession," *Hampton Roads International Security Quarterly* (July 2012); Kerry. "The Law of the Sea Convention: The U.S. National Security and Strategic Imperative for Ratification." 9; Rumsfeld, Donald. "UNCLOS Advocates Mistaken." *Hampton Roads International Security Quarterly*, 1 July 2012. 56.

⁵⁰ Bonner, “Neo-Isolationists Scuttle UNCLOS,” 3-4; Blumenthal and Mazza, “Why to Forget UNCLOS”; Groves, “Costs of UNCLOS Accession.”

⁵¹ Idib.

⁵² Idib.

⁵³ Verdier and Voeten, “Precedent, Compliance and Change in Customary International Law,” 433-434.

⁵⁴ UNCLOS Part III, Article 39.

⁵⁵ If China leaves UNCLOS it would upset the maritime order and set the stage for further escalation of the SCS disputes. They will continue to ignore the ruling and potentially ignore the rights and provisions that UNCLOS enshrines and that govern the free use of the global commerce.

⁵⁶ Bonner, “Neo-Isolationists Scuttle UNCLOS,” 5.

⁵⁷ Hugh White, *The China Choice, Why American Should Share Power* (Collingwood VIC, Australia: Black Inc., 2012) 98-112.

⁵⁸ Patrick, “World Order,” 9.

⁵⁹ Idib. Quoting Henry Kissinger, *World Restored: Castlereagh, Metternich, and the Congress of Vienna* (New York: Grossett and Dunlap, 1964): 1-6.

⁶⁰ Patrick, “World Order,” 17.

⁶¹ Ku and Mirasola, “Tracking China’s Compliance;” Song and Tonnesson, “The Impact of the Law of the Sea Convention on Conflict.” Efforts to mend fences with Japan in another maritime dispute, drawing closer to India with continued meetings over land border issues are a few examples of where China is using the international legal order to resolve disputes. Why disagree here? Is their survival dependent on the resources in the SCS?

⁶² Sheng-Ti Gau, “The U-Shaped Line and a Categorization of the Ocean Disputes in the South China Sea,” 57-69.

⁶³ Garver, “China’s Push through the South China Sea,” 1000. Additionally, China is pursuing three main objectives, “regional integration, resource control, and enhanced security” as part of its peaceful rise. Peter Dutton, “Three Disputes and Three Objectives: China and the South China Sea,” *Naval War College Review* 64, no. 4 (Autumn 2011): 46.

⁶⁴ Ku and Mirasola, “Tracking China’s Compliance.”

⁶⁵ “China Allows Philippines Fishermen Access to Disputed Shoal in South China Sea,” *CNN World* (October 2016) <http://www.cnn.com/2016/10/31/asia/philippines-china-scarborough-shoal-fishermen/index.html>.

⁶⁶ Ku and Mirasola, “Tracking China’s Compliance.”

⁶⁷ Although they have not done these items if they continue with their expansionistic measures as evidenced in continued operations, they are likely to a) declare a straight baseline around the maritime features in the Spratly islands; b) define historic rights in the SCS as including resource or sovereign rights or other jurisdiction beyond artisanal fishing in the territorial seas; and c) building an artificial island on Scarborough shoal, all of which would be in violation of the PCA’s holding and exacerbate the current claims between China and the Philippines. Idib.

⁶⁸ Garver, “China’s Push through the South China Sea.”

⁶⁹ Song and Tonnesson, “The Impact of the Law of the Sea Convention on Conflict,” 246.

⁷⁰ Justin D, Nankivell, “The Role and Use of International Law in the South China Sea Disputes,” *Maritime Awareness Project* (14 April 2016) found at

<http://maritimeawarenessproject.org/2016/04/14/the-role-and-use-of-international-law-in-the-south-china-sea-disputes/>.

⁷¹ Idib.

⁷² Idib.

⁷³ Idib.

⁷⁴ Idib.

⁷⁵ Idib.

⁷⁶ Idib.

⁷⁷ White, *The China Choice*, 81. In his book, Hugh White discusses the fact that the US have three choices to make with regard the China. According to him, the US can concede power to China, resists China's power grab in the region or share power with China. Idib. 98. The author's overall thesis is that the best option for the US is to share power and with that comes the necessity to write and create a new world order in the region. While not optimal to many, the author puts forth a very strong argument for the US to not need hegemony in Asia.

⁷⁸ Song and Tonnesson, "The Impact of the Law of the Sea Convention on Conflict," 256-261.

⁷⁹ Christensen, *The China Challenge* 311.

⁸⁰ Idib., 288.

⁸¹ Idib., 290.

⁸² Song and Tonnesson, "The Impact of the Law of the Sea Convention on Conflict," 258-261.

⁸³ Christensen, *The China Challenge*, 290-293.

⁸⁴ Song and Tonnesson, "The Impact of the Law of the Sea Convention on Conflict," 258-261.

⁸⁵ Idib.

⁸⁶ Sheng-Ti Gau, "The U-Shaped Line and a Categorization of the Ocean Disputes in the South China Sea," 65-66. On 25 November 2016, US news sources published an article relating to a report published by China's think tank, the National Institute for South China Sea Studies, that warns the US that its freedom of navigation patrols in the East China Sea "pose a threat to China's sovereignty and security interests" and that continued patrols could lead China to "militarize the waters." This demonstrates the need to rethink the US position with its freedom of navigation patrols and define its priorities in light of international law. Bloomberg, "US Naval Patrols Threaten Sovereignty, China Think Tank Warns," *Stars and Stripes* 25 November 2016 <https://www.stripes.com/news/pacific/us-naval-patrols-threaten-sovereignty-china-think-tank-warns-1.441169>.

⁸⁷ Christensen, *The China Challenge*, 297.

⁸⁸ Patrick, "World Order," 18.

⁸⁹ Idib., 23.

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