

# GIVING TEETH TO THE TIGER: HOW THE SOUTH CHINA SEA CRISIS DEMONSTRATES THE NEED FOR REVISION TO THE LAW OF THE SEA

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*It would live in history, because of its length and its unremitting ferocity: it would live in men's minds for what it did to themselves and to their friends, and to the ships they often loved. Above all, it would live in naval tradition, and become legend, because of its crucial service to an island at war, its price in sailors' lives, and its golden prize—the uncut lifeline to the sustaining outer world.*<sup>1</sup>

*I urge the Senate to act favorably on U.S. accession to the United Nations Convention on the Law of the Sea during this session of Congress. Joining will serve the national security interests of the United States, including the maritime mobility of our armed forces worldwide [and] . . . will give the United States a seat at the table when the rights that are vital to our interests are debated and interpreted.*<sup>2</sup>

## I. Introduction

On October 27, 2015, the *U.S.S. Lassen*, an *Arleigh Burke*-class destroyer, sailed within twelve nautical miles of a maritime feature in the South China Sea known as Subi Reef.<sup>3</sup> Intrigue

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<sup>1</sup> NICHOLAS MONSARRAT, *THE CRUEL SEA* 506 (1951) (describing the World War II Battle of the Atlantic, during which German U-Boats nearly choked off all maritime sea lanes leading to Great Britain and the European continent).

<sup>2</sup> President George W. Bush's Statement on the Advancement of United States Maritime Interests, 43 WEEKLY COMP. PRES. DOC. 635 (May 15, 2007).

<sup>3</sup> Adam Klein & Mira Rapp-Hooper, *After the Freedom of Navigation Exercise: What Did the U.S. Signal?*, LAWFARE (Oct. 27, 2015, 4:05 PM), <https://www.lawfareblog.com/after-freedom-navigation-exercise-what-did-us-signal>.

surrounds this relatively insignificant speck in the Pacific Ocean, at least for political scientists and maritime law scholars, and for quite some time mystery surrounded the October voyage of the *Lassen*. The sailing was highly anticipated and widely covered by news outlets, yet in the aftermath, many were left wondering what it signaled for the future of the region.<sup>4</sup>

First, the “island,”—a seemingly innocuous term; questions surround whether Subi Reef and other features like it are in fact islands, or something less. In a region of competing economic interests, this label can carry significant impact.<sup>5</sup> Furthermore, ownership of Subi Reef is contested, as China currently adversely possesses the feature, contrary to claims of the Philippines.<sup>6</sup> The dispute exists somewhere between rhetorical finger-pointing and full-fledged conflict as the Philippines sought relief from the Permanent Court of Arbitration at The Hague, and China persistently refused to participate in the proceedings.<sup>7</sup> Hence, on the day of the *Lassen*’s sailing, who held valid claim to Subi Reef, the legal definition of this spot of land, and corresponding maritime entitlements were all issues in dispute.

Subi Reef, one of many maritime features in a chain known as the Spratly Islands, has seen extensive land reclamation efforts by China since July 2014.<sup>8</sup> Scholars agree that Subi Reef is a low-tide elevation, at least preceding China’s land reclamation efforts,<sup>9</sup> meaning the land feature is fully submerged at high tide but partially above water at low tide.<sup>10</sup> As China has developed the land, the reef has begun to look much more like a conventional island; similar works are underway by China on other features in the Spratly chain, some with disputed claims of sovereignty and

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<sup>4</sup> Raul “Pete” Pedrozo & James Kraska, *Can’t Anybody Play This Game? U.S. FON Operations and the Law of the Sea*, LAWFARE (Nov. 17, 2015, 10:57 AM), <https://www.lawfareblog.com/cant-anybody-play-game-us-fon-operations-and-law-sea>.

<sup>5</sup> See *infra* Section III.B. for further discussion.

<sup>6</sup> Kristen E. Boon, *International Arbitration in Highly Political Situations: The South China Sea Dispute and International Law*, 13 WASH. U. GLOBAL STUD. L. REV. 487, 504 (2014).

<sup>7</sup> Philippines v. People’s Republic of China, Case No. 2013-19, Award on Jurisdiction and Admissibility (Perm. Ct. Arb. Oct. 29, 2015), <http://www.pcacases.com/web/sendAttach/1506>.

<sup>8</sup> *Subi Reef Tracker*, ASIA MARITIME TRANSPARENCY INITIATIVE, <http://amti.csis.org/subi-reef-tracker/> (last visited July 7, 2016). Referred to as the “Great Wall of Sand,” China’s efforts to create land masses capable of supporting construction in the South China Sea are sweeping; land reclamation in this instance entails dredging sand onto coral reefs, then paving over the top to create a stable surface. Simon Denyer, *U.S. Navy Alarmed at Beijing’s “Great Wall of Sand” in South China Sea*, WASH. POST (Apr. 1, 2015), [https://www.washingtonpost.com/world/us-navy-alarmed-at-beijings-great-wall-of-sand-in-south-china-sea/2015/04/01/dda11d76-70d7-4b69-bd87-292bd18f5918\\_story.html](https://www.washingtonpost.com/world/us-navy-alarmed-at-beijings-great-wall-of-sand-in-south-china-sea/2015/04/01/dda11d76-70d7-4b69-bd87-292bd18f5918_story.html).

<sup>9</sup> *A Freedom of Navigation Primer for the Spratly Islands*, ASIA MARITIME TRANSPARENCY INITIATIVE, <http://amti.csis.org/subi-reef-tracker/> (last visited July 7, 2015); Bonnie S. Glaser & Peter A. Dutton, *The U.S. Navy’s Freedom of Navigation Operation around Subi Reef: Deciphering U.S. Signaling*, NAT’L INTEREST (Nov. 6, 2015), <http://nationalinterest.org/feature/the-us-navy%E2%80%99s-freedom-navigation-operation-around-subi-reef-14272>.

<sup>10</sup> U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, Art. 15 [hereinafter UNCLOS].

some without.<sup>11</sup> The past year and a half witnessed rising tensions in the region as multiple nations staked claim to features within the South China Sea (the Spratly chain among them)<sup>12</sup> and outwardly opposed China's land reclamation efforts.

The regime of international maritime law—the United Nations Convention on the Law of the Sea (UNCLOS)<sup>13</sup>—provides the backdrop for this drama. The main text of the UNCLOS is the result of years of multilateral negotiations and compromise, was published in 1982, and is currently joined by 167 nation states.<sup>14</sup> The international convention is simultaneously extraordinary for its breadth, scope, and completeness while remaining intentionally vague and deferential to national autonomy. The convention settles lingering disputes about the breadth of territorial waters and provides a framework for determining security, economic, and regulatory rights on the seas.<sup>15</sup> Among the more remarkable aspects are the institutions created within the UNCLOS framework to resolve disputes; but at the same time, the convention's deference to national sovereignty nearly eviscerates its own dispute resolution clauses.<sup>16</sup>

Enter the *Lassen*: the ship and her crew sailed near Subi Reef as part of a Freedom of Navigation Operation (FONOP)—a program run by the Department of Defense (DoD) in coordination with the Department of State—designed to “demonstrate a non-acquiescence to excessive maritime claims asserted by coastal states.”<sup>17</sup> The U.S. Navy routinely conducts FONOPs throughout the globe, challenging a variety of excessive maritime claims or misapplication of international law principles.<sup>18</sup> But in the immediate aftermath of the *Lassen*'s voyage, as maritime security blogs and news outlets wondered what the U.S. Navy had actually challenged at Subi Reef, neither the DoD nor the Obama administration commented on the

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<sup>11</sup> *Island Tracker*, ASIA MARITIME TRANSPARENCY INITIATIVE, <http://amti.csis.org/island-tracker/> (last visited July 7, 2016).

<sup>12</sup> See Keyuan Zou, *The South China Sea*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 626, 629 (Donald R. Rothwell et al. eds., 2015).

<sup>13</sup> UNCLOS, *supra* note 10.

<sup>14</sup> *United Nations Convention on the Law of the Sea Status*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en) (last visited July 7, 2016). While the United States has not signed or ratified UNCLOS, the Department of Defense (DoD) has repeatedly asserted the desire to become party to the convention, and the United States treats the majority of the contents as customary international law. See *infra* Section II.A. for further discussion.

<sup>15</sup> See *infra* Parts II, III. for further discussion.

<sup>16</sup> See *infra* Part IV. for further discussion.

<sup>17</sup> U.S. Department of Defense Freedom of Navigation Program Fact Sheet (Mar. 2015), <http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20%28March%202015%29.pdf>.

<sup>18</sup> See U.S. Department of Defense Freedom of Navigation Report for Fiscal Year 2014 (Mar. 23, 2015), <http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/20150323%202015%20DoD%20Annual%20FON%20Report.pdf>. During the year, naval vessels exercised freedom of navigation in South America, the Persian Gulf, the Mediterranean Sea, the South China Sea, and the Indian Ocean, among others. *Id.*

specifics of the operation.<sup>19</sup> What, then, did the *Lassen* challenge at Subi Reef? Was it China's claim to sovereignty over the feature? Was it China's land reclamation efforts throughout the South China Sea? Or was it an excessive maritime claim, independent of whether China owns Subi Reef or whether the feature is in fact an island or a low-tide elevation?<sup>20</sup>

This article will explore the legal distinctions of each of these questions. First, it will discuss the background of the law of the sea and the relevant aspects of the UNCLOS. Among those aspects are the process for determining areas of sovereignty and areas of sovereign rights, and the process of maritime boundary delimitation (the establishment of boundaries for overlapping maritime entitlements). Additionally, this article will explore the mechanisms provided for dispute resolution, including nations' rights to opt out of compulsory tribunals. By applying these constructs to the situation within the South China Sea, including the discussion of rocks, islands, and low-tide elevations, this article will show that the issue of sovereignty influences the entire dispute.

Despite the fact that the Permanent Court of Arbitration issued a final award on the Philippines' claim in July 2016, the question of whether China's land reclamation actions within the South China Sea violate the UNCLOS remains unclear, and will remain so until the underlying issue of sovereignty is resolved.<sup>21</sup> As ground-breaking as the UNCLOS may have been in 1982 with its terms for dispute resolution,<sup>22</sup> the time has arrived to amend the treaty to implement compulsory dispute resolution—without reservation—for maritime territorial disputes. Recognizing the improbability of this endeavor, the United States should take the lead by ratifying the UNCLOS and proposing this change, thereby ensuring stability and predictability on the seas.

## II. Background of the United Nations Convention on the Law of the Sea

To approach the conflicts within the South China Sea from a critical legal or political perspective, one must appreciate the circumstances under which the UNCLOS was drafted, and the different viewpoints that were melded to formulate the convention as it stands today. Indeed, the history of the UNCLOS sheds light on China's precise position with respect to maritime claims in the South China Sea and its role in dispute resolution. An appreciation of the treaty's history illustrates the magnitude of the looming hurdle to overcome in attempting to invoke this article's proposed change.

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<sup>19</sup> Upon request from Senator John McCain, Secretary of Defense Ash Carter submitted an analysis of the Freedom of Navigation Operation on December 22, 2015, which was made public in early January of 2016. *Document: SECDEF Carter Letter to McCain on South China Sea Freedom of Navigation Operation*, USNI NEWS (Jan. 5, 2016, 11:02 AM), <http://news.usni.org/2016/01/05/document-secdef-carter-letter-to-mccain-on-south-china-sea-freedom-of-navigation-operation>.

<sup>20</sup> While Secretary Carter's letter eventually answers some of these questions, this paper will highlight the underlying issues with areas of disputed sovereignty and how it affects Freedom of Navigation Operations.

<sup>21</sup> See *infra* Part IV. for further discussion of the arbitration case and final award.

<sup>22</sup> See *infra* Part II.C for further discussion.

## A. The Convention's History

The United Nations Convention on the Law of the Sea is a culmination of many years of multilateral negotiations.<sup>23</sup> The Convention, as it is known today, represents significant compromises among blocks of nations, often diametrically opposed by politics, economic resources, and maritime interests. Yet the UNCLOS was hardly the first application of international law to the sea; in fact, it can be said that “[t]he law of the sea is a branch of international law as old as international law itself.”<sup>24</sup> Hence, the strategic interests of the parties negotiating the convention existed parallel to decades of custom and tradition bestowed with the concept of international law.

While the roots extend even deeper into history, a fair discussion of maritime law usually begins with Hugo Grotius. In response to efforts by some nations to claim broad swaths of the sea as national property, and in defense of the Dutch East India Company, Hugo Grotius wrote a pamphlet in 1609 entitled *Mare Liberum*.<sup>25</sup> In this pamphlet, Grotius expressed a concept of freedom of the seas that would become a generally accepted binding principle to the present day; he argued that “[l]ike the air, and unlike land, the sea cannot in practice be occupied, thus demonstrating that nature intended it to be free for all to use.”<sup>26</sup> To understand the appeal of seventeenth century Grotius, one must understand that free navigation of the seas in 1609 was equally as important for the economic interests of coastal states as it was for security or any principle of natural law.<sup>27</sup>

Over time, coastal states recognized this general principle of freedom of navigation on the high seas while also carving out sovereignty over narrow bands of water along their coasts. Although originally based on the range of a navy's artillery (the so-called “cannon-shot rule,” which was subject to change with the technological advances of weaponry), most nations proclaimed discrete bands of sovereign seas by the beginning of the twentieth century, ranging from three to twelve nautical miles from their coasts.<sup>28</sup> Swept up in the desire for codification of international norms after World War I, the first attempt, albeit unsuccessful, to standardize the breadth of the territorial sea occurred at the 1930 Hague Conference on the Codification of International Law.<sup>29</sup> Throughout the twentieth century, the international community gradually recognized that many aspects of the law of the seas required more specificity in order to protect coastal state economic desires, and to more clearly determine the shape of territorial waters.<sup>30</sup>

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<sup>23</sup> Tullio Treves, *Historical Development of the Law of the Sea*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 1 (Donald R. Rothwell et al. eds., 2015).

<sup>24</sup> *Id.*

<sup>25</sup> Edward Gordon, *Grotius and the Freedom of the Sea in the Seventeenth Century*, 16 WILLAMETTE J. INT'L L. & DISP. RESOL. 252, 256–57 (2008).

<sup>26</sup> *Id.* at 260.

<sup>27</sup> Yoshifumi Tanaka, *Navigational Rights and Freedoms*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 536 (Donald R. Rothwell et al. eds., 2015).

<sup>28</sup> Treves, *supra* note 23, at 5.

<sup>29</sup> *Id.* at 7–9.

<sup>30</sup> *Id.* at 10–13.

Following its inception post-World War II, the United Nations (U.N.) began constructing a comprehensive law of the sea. The first conference to undertake this endeavor, attended by eighty-six states, was held in 1958; the second conference met two years later.<sup>31</sup> Neither conference achieved its goal of establishing a single legal framework to rule the seas.<sup>32</sup> In 1967, the U.N. was reinvigorated to adopt a comprehensive law of the sea. During a General Assembly, Arvid Pardo, the Maltese Ambassador to the U.N., presented a speech proposing that mineral resources on the seabed “be declared ‘a common heritage of mankind,’ to be developed by the United States for the benefit of all the nations, large and small.”<sup>33</sup> In response to Ambassador Pardo’s speech, the U.N. called for a third conference to consider the law of the sea, and to marry the concept of seabed mineral exploitation for the common good with existing principles of territorial rights and freedom of navigation.<sup>34</sup>

Over the course of nine years, nation states participated in eleven different sessions considering various proposals championed by individual states and groups of states united by common goals.<sup>35</sup> In 1982, the third conference on the law of the sea achieved what the previous two conferences could not: a comprehensive treaty that would “settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea . . . .”<sup>36</sup> That the 1982 conference was able to produce a single text is somewhat remarkable; the conference was framed by the Cold War and a clear east-west rift, and was further complicated by a north-south rift created by the divergent interests of developing nations and industrial nations.<sup>37</sup> Country representatives proposed vastly differing ideas of how to establish a regime of territorial claims and a universal resource development construct.<sup>38</sup>

Considering the differing viewpoints represented at the conference, it is no surprise that the resulting text of the treaty was not universally accepted. Article 308 of the UNCLOS text states that the treaty would enter into force twelve months after the sixtieth ratification or accession.<sup>39</sup> However, as written in 1982, the treaty was unacceptable to a cadre of industrialized states, united in opposition with the United States.<sup>40</sup> While ratifications trickled in, it took eleven years to reach the sixtieth ratification; of the sixty nations that deposited ratification with the U.N., fifty-eight

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<sup>31</sup> *Id.* at 13–16.

<sup>32</sup> *Id.*

<sup>33</sup> Louis B. Sohn, *Managing the Law of the Sea: Ambassador Pardo’s Forgotten Second Idea*, 36 COLUM. J. TRANSNAT’L L. 285, 287 (1997).

<sup>34</sup> *Id.* at 288.

<sup>35</sup> Robin R. Churchill, *The 1982 United Nations Convention on the Law of the Sea*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 24, 25 (Donald R. Rothwell et al. eds., 2015).

<sup>36</sup> UNCLOS, *supra* note 10, Preamble.

<sup>37</sup> Alberto R. Coll, *Functionalism and the Balance of Interests in the Law of the Sea: Cuba’s Role*, 79 AM. J. INT’L L. 891–94 (1985) (portraying the balance between competing interests from the perspective of Cuba, a nation with political ties to the Soviet bloc, but resource exploitation interests with much of Latin America and the United States).

<sup>38</sup> *Id.* at 894.

<sup>39</sup> UNCLOS, *supra* note 10, art. 308.

<sup>40</sup> Churchill, *supra* note 35, at 26.

were considered developing nations.<sup>41</sup> The United States strongly opposed Part XI of the UNCLOS, the section dealing with Ambassador Pardo's vision for the exploration and exploitation of the deep seabed.<sup>42</sup> In an attempt to assuage the opponents of Part XI, while giving deference to the fifty-plus nations that had already ratified the UNCLOS, the U.N. General Assembly passed the 1994 Implementation Agreement specific to implementation of Part XI.<sup>43</sup>

The 1994 Implementation Agreement achieved its intended effect and soothed the concerns of most industrialized nations, leading to relatively quick accession by nearly every remaining coastal state.<sup>44</sup> However, despite an active role in drafting the original 1982 text of the treaty and the 1994 Implementation Agreement, the United States failed to ratify the UNCLOS, and remains the only coastal nation in the world that is not a party.<sup>45</sup> Despite the fact that the U.S. Senate Foreign Relations Committee has twice recommended approval of the UNCLOS, in 2004 and 2007, and despite widespread support for accession,<sup>46</sup> the UNCLOS has yet to reach the Senate for a vote.<sup>47</sup>

## B. The Convention's Text

Notwithstanding the lack of ratification by the United States, the UNCLOS was considered a tremendous success, both in the scope of the treaty and the worldwide breadth of support.<sup>48</sup> There were several important components that made it "the constitution of the sea."<sup>49</sup> The third conference finally succeeded in providing a new rubric for determining coastal state maritime claims where the 1930 Hague Conventions and the first two law of the sea conferences had failed.

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<sup>41</sup> *Id.*

<sup>42</sup> Statement on United States Oceans Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983).

<sup>43</sup> D.H. Anderson, *Resolution and Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea: A General Assessment*, 55 HEIDELBERG J. INT'L L. 275, 277 (1995).

<sup>44</sup> Churchill, *supra* note 35, at 27. See also *List of Participants by Date*, [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI6&chapter=21&Temp=mtdsg3&lang=en#1](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&lang=en#1) (last visited July 7, 2016).

<sup>45</sup> Marjorie Ellen Gallagher, *The Time is Now: The United States Needs to Accede to the United Nations Convention on the Law of the Sea to Exert Influence Over the Competing Claims in the South China Sea*, 28 TEMP. INT'L & COMP. L. J. 1, 9 (2014).

<sup>46</sup> Support for UNCLOS includes the Clinton, George W. Bush, and Obama presidential administrations, numerous former Secretaries of State, and every living former Chief of Naval Operations. See also *Diplomacy in Action Supporters*, U.S. DEP'T OF STATE, <http://www.state.gov/e/oes/lawofthesea/statements/index.htm> (last visited July 7, 2016) for a list of supporters.

<sup>47</sup> John H. Knox, *The United States, Environmental Agreements, and the Political Question Doctrine*, 40 N.C. J. INT'L L. & COM. REG. 933, 947–48 (2015).

<sup>48</sup> NATALIE KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA 1–2 (2005).

<sup>49</sup> In a plenary session, the United Nations (U.N.) General Assembly stated that "the universal and unified character of the Convention . . . sets out the legal framework within which all activities in the oceans and seas must be carried out and is of strategic importance . . . ." G.A. Res. 67/78, Preamble (Apr. 18, 2013).

The newly constructed process began with the establishment of a “baseline” for each coastal state, which is dependent on the contours of the coastline and the presence of islands—the coastal state was now entitled to a standardized territorial sea ending twelve nautical miles seaward of the baseline.<sup>50</sup> Broader than the territorial seas, the UNCLOS also granted title to an Exclusive Economic Zone (EEZ) based on the same baseline.<sup>51</sup> The EEZ allowed coastal states to exercise certain sovereign rights to exploit natural resources and to regulate certain activities.<sup>52</sup>

Responsive to the demands of the industrialized nations present at the third conference, the UNCLOS also formalized the customary principles of freedom of navigation, including the establishment of concepts such as innocent passage,<sup>53</sup> transit passage through international straits,<sup>54</sup> archipelagic sea lanes passage,<sup>55</sup> and a reservation for freedom on the high seas.<sup>56</sup> While not explicit with respect to every possible scenario, the UNCLOS provided much clearer rights and responsibilities both for coastal states and transiting vessels than had been settled before the third conference.<sup>57</sup> Nonetheless, the text’s framers certainly intended for some vagueness; on occasion they defer potential conflicts to unstructured resolution by the interested states<sup>58</sup> and also purposefully utilize ambiguous terms.<sup>59</sup>

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<sup>50</sup> UNCLOS, *supra* note 10, arts. 2–16.

<sup>51</sup> *Id.* art. 57.

<sup>52</sup> *Id.* arts. 55–75. In the Exclusive Economic Zone (EEZ), a coastal state enjoys certain “sovereign rights” over the seabed and the entire water column. *Id.* art. 56. The EEZ may extend up to 200 nautical miles from the state’s baseline. *Id.* art. 57.

<sup>53</sup> *Id.* arts. 17–32.

<sup>54</sup> *Id.* arts. 37–44.

<sup>55</sup> *Id.* arts. 53–54.

<sup>56</sup> *Id.* art. 87.

<sup>57</sup> Compare, e.g., Treves, *supra* note 23, at 5 (describing the “cannon-shot rule” of sovereign seas), with UNCLOS, *supra* note 10, arts. 2–16 (establishing a twelve-nautical mile-territorial sea).

<sup>58</sup> For instance, the issue of maritime boundary delimitation, the process of clearly establishing boundaries between national maritime zones where they would otherwise overlap, is primarily left to the states to resolve through diplomatic channels. Article 15 of UNCLOS provides:

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, *failing agreement between them to the contrary*, to extend its territorial seas beyond the median line . . . [unless] necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

*Id.* art. 15 (emphasis added). Language such as this leads to conclusions such as “[i]t is axiomatic that States are free to agree upon the course of the maritime boundaries between themselves in any way they wish.” Malcolm Evans, *Maritime Boundary Delimitation*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 254, 255 (Donald R. Rothwell et al. eds., 2015).

<sup>59</sup> For instance, “A hallmark of the law of the sea has been the preference to treat security concerns implicitly rather than explicitly.” Natalie Klein, *Maritime Security*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 582, 597 (Donald R. Rothwell et al. eds., 2015).



In light of these areas of intentional ambiguity, the UNCLOS does provide several internal mechanisms for rulemaking and dispute resolution, as well as consideration for dispute resolution before standing international tribunals. Recognizing “[t]he sustainability of the Convention as the ‘legal order of the oceans’ depends upon its ability to adapt to changes in the legal, political, and technical environment in which it exists,”<sup>60</sup> the UNCLOS contemplates later interpretation, growth, and persistence. For instance, the UNCLOS establishes: an annual meeting of the state parties to receive reports and consider rules for implementation of UNCLOS;<sup>61</sup> the International Tribunal for the Law of the Sea to provide provisional measures to preserve parties’ rights pending arbitration or to settle certain disputes under the convention;<sup>62</sup> a Commission on the Limits of the Continental Shelf “to oversee the delineation of the continental shelf beyond 200 nautical miles;”<sup>63</sup> and the International Seabed Authority to “oversee development and implementation of the deep seabed mining regime found in Part XI of the Convention.”<sup>64</sup>

### C. Dispute Resolution in the UNCLOS

The complicated issue of dispute resolution under the UNCLOS simultaneously provides a wealth of interpretation of the law of the sea and consternation over the binding nature of dispute resolution clauses. This paradigm again represents the delicate balance of competing interests at the third conference. On the one hand, the provisions of the UNCLOS are recognized as “a flexible, comprehensive, and binding dispute resolution settlement system for the oceans,”<sup>65</sup> and “the most important development in the settlement of international disputes since the adoption of the U.N. Charter and the Statute of the International Court of Justice.”<sup>66</sup> The heart of this statement is the fact that the UNCLOS purports to mandate jurisdiction for the resolution of disputes to compulsory arbitration or adjudication.<sup>67</sup> On the other hand, some argue that the UNCLOS is a paper tiger, subjugating arbitration to diplomacy and ancillary international agreements, and allowing sufficient limitations and exceptions to compulsory procedures so as to make them anything but.<sup>68</sup>

In a thorough analysis of the compulsory procedures of the UNCLOS, law of the sea specialist Professor Natalie Klein highlighted this balance. Recognizing the competing interests of parties at the 1982 conference, Klein acknowledged that “the dispute settlement system in UNCLOS relies

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<sup>60</sup> James Harrison, *The Law of the Sea Convention Institutions*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 373–74 (Donald R. Rothwell et al. eds., 2015) (quoting U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, Preamble).

<sup>61</sup> UNCLOS, *supra* note 10, art. 319; Harrison, *supra* note 60, at 376–78.

<sup>62</sup> UNCLOS, *supra* note 10, annex VI; Bernard H. Oxman, *Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 394, 398–99 (Donald R. Rothwell et al. eds., 2015).

<sup>63</sup> Harrison, *supra* note 60, at 382–85; UNCLOS, *supra* note 10, Annex II.

<sup>64</sup> Harrison, *supra* note 60, at 385–87; UNCLOS, *supra* note 10, arts. 156–157.

<sup>65</sup> KLEIN, *supra* note 48, at 25.

<sup>66</sup> Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT’L & COMP. L.Q. 37 (1997).

<sup>67</sup> KLEIN, *supra* note 48, at 2.

<sup>68</sup> *Id.* at 26–27.

on a spectrum of resolution techniques—ranging from formal adjudication or arbitration, to compulsory conciliation, to diplomatic initiatives and negotiation. What procedure is available depends on the substantive question in dispute.”<sup>69</sup> Therefore, where mandatory arbitration or adjudication does not apply, the third conference considered that such a compulsory mechanism would be either politically untenable, or practically unnecessary.<sup>70</sup>

Part XV of the UNCLOS deals with the settlement of disputes. The underlying premise of the UNCLOS dispute resolution is that the parties control the mechanism of resolution.<sup>71</sup> Compulsory procedures can only be invoked after the parties have exchanged views on the dispute,<sup>72</sup> and only in the absence of any general, regional, or bilateral treaty providing for dispute resolution.<sup>73</sup> Hence, an obligation exists—along with encouragement—to attempt diplomatic settlement before resorting to international tribunals, which comports with general international legal obligations, and is in accord with the U.N. Charter.<sup>74</sup>

The compulsory provisions of Part XV were largely intended to protect high seas freedoms, such as the freedom of navigation and overflight within the EEZ or continental shelf of coastal states.<sup>75</sup> In contrast, the UNCLOS left certain categories of disputes to more traditional consent-based modes of resolution. Under Article 298, states are allowed to opt out of compulsory dispute resolution for matters concerning maritime boundary delimitation, military or law enforcement activities, or matters under the purview of the U.N. Security Council.<sup>76</sup> As Professor Klein noted concerning these categories of dispute, “mandatory jurisdiction is either not necessary . . . or not politically viable . . . .”<sup>77</sup>

This balanced treaty, reflective of nine years of negotiation and concession, created a common framework to map the sovereign rights of coastal nations. It has led to a new body of jurisprudence, further defining rights and responsibilities on the seas. Yet, it can be read with sufficient interpretation and nuance so as to allow leeway for some coastal states to expand maritime claims and creatively participate in bilateral and multilateral negotiations. In this latter reality, China has implemented the UNCLOS and dealt with its neighbors in the South China Sea.

### III. China and the Convention

China actively participated in the conferences and was one of the first signatories to the UNCLOS, signing on December 10, 1982; China’s formal ratification of the UNCLOS occurred

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<sup>69</sup> *Id.* at 28.

<sup>70</sup> *Id.*

<sup>71</sup> “Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.” UNCLOS, *supra* note 10, art. 280.

<sup>72</sup> *Id.* art. 283.

<sup>73</sup> *Id.* art. 282.

<sup>74</sup> KLEIN, *supra* note 48, at 31–32.

<sup>75</sup> *Id.* at 142–43.

<sup>76</sup> UNCLOS, *supra* note 10, art. 298.

<sup>77</sup> KLEIN, *supra* note 48, at 227–28.

on June 7, 1996.<sup>78</sup> As anticipated by the convention, and allowed under Article 298 of the UNCLOS, China exercised the right to make certain declarations and reservations upon ratification. Importantly, China declared that “[t]he Government of the People’s Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.”<sup>79</sup>

This reservation allows China to resist the Compulsory Procedures Entailing Binding Decisions (Section 2 of Part XV), which otherwise would require resolution of differing interpretations of UNCLOS at the International Tribunal for the Law of the Sea (ITLOS), International Court of Justice (ICJ), or other arbitral tribunals.<sup>80</sup> As discussed above, the specific matters excluded from compulsory dispute resolution are those concerning maritime boundary delimitation, military and law enforcement activities, and actions sanctioned by the U.N. Security Council.<sup>81</sup>

The UNCLOS only provides for compulsory dispute resolution when all other options have been exhausted, including mandating deference to any bilateral or regional agreements that state parties may enter into.<sup>82</sup> One such regional treaty is the Charter of the Association of Southeast Asian Nations (ASEAN). Currently, China is not a party to ASEAN,<sup>83</sup> however, China and ASEAN jointly signed the Declaration on the Conduct of Parties in the South China Sea (DOC) in 2002.<sup>84</sup> While the DOC contains aspirational commitments of cooperation and peaceful resolution of conflicts, it does not contain any compulsory dispute resolution procedures.<sup>85</sup>

China is also a signatory to the 1976 Treaty of Amity and Cooperation in Southeast Asia (TAC).<sup>86</sup> This treaty, signed by each member state of ASEAN, as well as over twenty non-ASEAN nations, is similarly aspirational with respect to the resolution of disputes through peaceful means,

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<sup>78</sup> *Status of the United Nations Convention on the Law of the Sea*, [http://www.un.org/Depts/los/reference\\_files/status2010.pdf](http://www.un.org/Depts/los/reference_files/status2010.pdf) (last visited July 17, 2016).

<sup>79</sup> *Declarations and Reservations of China to the United Nations Convention on the Law of the Sea*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI6&chapter=21&Temp=mtdsg3&lang=en#EndDe c](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&lang=en#EndDe c) (last visited July 7, 2016).

<sup>80</sup> UNCLOS, *supra* note 10, Part XV Section 2.

<sup>81</sup> *Id.* art. 298.

<sup>82</sup> *Id.* art. 299.

<sup>83</sup> *ASEAN Member States*, ASS’N OF SOUTHEAST ASIAN NATIONS, <http://www.asean.org/asean/asean-member-states/> (last visited July 17, 2016).

<sup>84</sup> *Declaration on the Conduct of Parties in the South China Sea*, ASS’N OF SOUTHEAST ASIAN NATIONS (Nov. 4, 2002), [http://www.asean.org/?static\\_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea](http://www.asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea) (last visited July 17, 2016) [hereinafter DOC].

<sup>85</sup> *Id.* ¶ 4.

<sup>86</sup> *Treaty of Amity and Cooperation in Southeast Asia*, ASS’N OF SOUTHEAST ASIAN NATIONS (Feb. 24, 1976), <http://agreement.asean.org/media/download/20131230235433.pdf> (for the United States July 22, 2009).

and with mutual understanding and respect among nations.<sup>87</sup> While the TAC does provide a mechanism for dispute resolution, the recommended provisions are only applicable if both parties to a dispute consent to the particular mechanism for a given dispute.<sup>88</sup>

In light of China's reservation upon ratification of the UNCLOS, together with the lack of any bilateral or regional treaties requiring binding dispute resolution, many disputes over the interpretation of the UNCLOS provisions remain beyond the reach of the very dispute resolution provisions that have been hailed as revolutionary.<sup>89</sup> At least, this is China's position.<sup>90</sup> However, this position is currently under intense scrutiny relative to China's actions within the South China Sea.

## A. The South China Sea

The South China Sea lies south of the Strait of Taiwan and north of the Strait of Malacca, bordered on the west by Vietnam and Cambodia and on the east by the Philippines. The size, location, and resources of the sea make it of immense strategic importance to Southeast Asian countries and significant maritime powers such as the United States and Australia.<sup>91</sup> It is also a hotbed of competing claims of sovereignty and regional power struggles.<sup>92</sup>

### 1. *The Nine-Dash Line*

China asserts a vast maritime claim to the South China Sea that can be formally traced back to 2009. That year, China issued two *notes verbales*<sup>93</sup> to the U.N. member nations outlining a territorial claim to almost the entire South China Sea.<sup>94</sup> The *notes* included the statement that "China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof."<sup>95</sup> In support of this claim, China attached a map containing nine dashes

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<sup>87</sup> See *Instruments of Ratification*, ASS'N OF SOUTHEAST ASIAN NATIONS, <http://agreement.asean.org/agreement/detail/60.html> (last visited July 17, 2016)

<sup>88</sup> Treaty of Amity and Cooperation in Southeast Asia, *supra* note 86 art. 16.

<sup>89</sup> At least with respect to the three excluded types of conflicts; however, as the current dispute in the South China Sea shows, disputes over maritime boundary delimitation and disputes over military activities can be squarely in the international limelight. See *infra* Part IV.

<sup>90</sup> See *infra* Part IV for further discussion.

<sup>91</sup> Commander Dustin E. Wallace, *An Analysis of Chinese Maritime Claims in the South China Sea*, 63 NAVAL L. REV. 128, 130 (2014).

<sup>92</sup> *Id.*

<sup>93</sup> A *note verbale* is "a diplomatic note that is more formal than an *aide-mémoire* and less formal than a note, is drafted in the third person, and is never signed." MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/note%20verbale> (last visited July 7, 2016).

<sup>94</sup> U.S. DEP'T OF STATE, LIMITS IN THE SEAS NO. 143: CHINA MARITIME CLAIMS IN THE SOUTH CHINA SEA (Dec. 5, 2014), <http://www.state.gov/documents/organization/234936.pdf> [hereinafter LIMITS IN THE SEAS].

<sup>95</sup> Permanent Rep. of the People's Republic of China to the U.N., Note Verbale CML/17/2009 dated May 7, 2009, [http://www.un.org/Depts/los/clcs\\_new/submissions](http://www.un.org/Depts/los/clcs_new/submissions)

forming a line,<sup>96</sup> purportedly serving as a maritime boundary. The dash lines appear to originate from Chinese maps published as early as 1947.<sup>97</sup>

Despite frequent appeals from other member states, China has not provided clarity on its statements exerting sovereignty over the islands or the sovereign rights of the waters within the nine-dash line, nor has China provided any further justification for the basis of the nine dashes.<sup>98</sup> Further frustrating international relations, China has not claimed an EEZ, or continental shelf, based off of the nine-dash line, or published a baseline reflective of its claims of territorial sovereignty.<sup>99</sup> Therefore, when it comes to interpreting China's claims, educated guesses and conjecture have become standard practice; but what is abundantly evident is that absent some extraordinary justification that China has yet to provide, the nine-dash line deviates significantly from the provisions of the UNCLOS.<sup>100</sup>

The breadth and shape of a coastal state's territorial sea, contiguous zone, exclusive economic zone, and continental shelf is based upon a fixed distance from the state's baseline.<sup>101</sup> Under normal circumstances, the baseline is simply determined by an artificial line that mimics the coast of the nation at the low-water line (as reflected on standard nautical charts).<sup>102</sup> The general rule, then, is that the maritime zones claimed by a coastal state derive from land features. The establishment of a baseline, although simple in principle, can lead to significant disputes, and is often at the core of maritime boundary delimitation conflicts.<sup>103</sup>

Within the UNCLOS there are only two allowances that depart from the normal baseline approach; the first is to allow the use of a straight baseline when mimicking land features is

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files/mysvnm33\_09/chn\_2009re\_mys\_vnm\_e.pdf; Permanent Rep. of the People's Republic of China to the U.N., Note Verbale CML/18/2009, dated May 7, 2009, [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2009re\\_vnm.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf).

<sup>96</sup> The original 1947 map published by the Chinese government actually had eleven dashes and was adopted by the newly formed People's Republic of China in 1949. See Wallace, *supra* note 91, at 130. In 1953, in a show of solidarity with the Communist government of North Vietnam, China removed two dashes, and the resulting nine-dash line has been used ever since. *Id.*

<sup>97</sup> LIMITS IN THE SEAS, *supra* note 94, at 3.

<sup>98</sup> *Id.* at 23.

<sup>99</sup> *Id.*

<sup>100</sup> For example, the nine-dash line greatly exceeds the standard twelve-nautical-mile territorial zone that is afforded by Articles 3 and 4 of the UNCLOS.

<sup>101</sup> UNCLOS, *supra* note 10, arts. 5, 33, 57, 76.

<sup>102</sup> *Id.* art. 5.

<sup>103</sup> Evans, *supra* note 58, at 254, 262.

impractical,<sup>104</sup> and the second is to allow for coastal state claims to historic waters.<sup>105</sup> One possible explanation for China's deviation from the normal baseline procedures is to view the nine-dash line as a claim of historic title.<sup>106</sup> This may be a natural inclination, especially considering China's reliance on a mid-twentieth century map and repeated Chinese references to historical title.<sup>107</sup> Establishing historic title to a body of water could significantly advantage a coastal state in that it would accrete a maritime zone beyond what associated land features would typically allow.

In light of this potential windfall, the standard for establishing historic title should be relatively rigorous. In the view of the United States, a coastal state must establish: "(1) open, notorious, and effective exercise of authority over the body of water in question; (2) continuous exercise of that authority; and (3) acquiescence by foreign States in the exercise of that authority."<sup>108</sup> Like many national policies, this language essentially demands a judicial body to interpret and provide final judgment.

However, with the law of the sea, that is unlikely to occur. Just as with maritime boundary delimitation of normal baselines, the UNCLOS allows for states to except—or opt-out of—mandatory dispute resolution for conflicts concerning historic title.<sup>109</sup> In its 2006 declaration, China expressly reserved this right by exception.<sup>110</sup> It is currently unclear whether China has actually asserted a claim of historic title to the South China Sea.<sup>111</sup> But, even if such a claim is

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<sup>104</sup> Straight baselines may be employed when coast lines are "deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity." UNCLOS, *supra* note 10, art. 7. Similarly, a straight baseline may be used for waters properly classified as a bay. *Id.* art. 10. Lastly, archipelagic States may employ straight baselines to encircle the entire archipelago. *Id.* art. 47.

<sup>105</sup> The UNCLOS contains two references to historic claims, in Articles 10 and 15. The Convention does not provide a definition of, or methodology for, establishing historic title. *Id.* arts. 10, 15.

<sup>106</sup> Conversely, the nine-dash line may purport to be a claim of sovereignty over all islands encompassed or a claim to sovereign rights of all waters encompassed. *See* LIMITS IN THE SEAS, *supra* note 94, at 11–15.

<sup>107</sup> *See, e.g.,* Wallace, *supra* note 91, at 150; Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (Dec. 7, 2014), [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml) [hereinafter China Position Paper on Arbitration].

<sup>108</sup> LIMITS IN THE SEAS, *supra* note 94, at 10. Although the U.S. position is that an actual showing of acquiescence by foreign states is necessary, as opposed to a mere lack of opposition, the generally accepted standard is that mere toleration is sufficient. *See* A.R. Thomas & James C. Duncan, *Historic Bays*, NAV. WAR C. INT'L L. STUD. 73-7, § 1.3.3.1.

<sup>109</sup> UNCLOS, *supra* note 10, art. 298(1)(a)(i).

<sup>110</sup> *Declarations and Reservations of China to the United Nations Convention on the Law of the Sea*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en#EndDec](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en#EndDec) (last visited Feb. 22, 2016).

<sup>111</sup> LIMITS IN THE SEAS, *supra* note 94, at 18–19; Wallace, *supra* note 91, at 150.

asserted, and if the international community disputes such a claim, an UNCLOS institution would likely not be the final arbiter, due to member state reservations in Article 298.<sup>112</sup>

## 2. *The Spratly Islands*

The Spratly Island chain is just one group of maritime features within the South China Sea. The South China Sea is home to many competing claims of ownership over such features, as well as demonstrations of law enforcement or regulatory authority on the seas. Within the Spratlys alone, among the countless reefs, shoals, and atolls, are twelve naturally formed islets large enough to be considered “islands.”<sup>113</sup> These twelve land formations are claimed in some fashion by a combination of Vietnam, Malaysia, Brunei, the Philippines, Taiwan, and China.<sup>114</sup>

Over the past several decades, several nations have undertaken land reclamation efforts on various Spratly Island features. Vietnam constructed a harbor on Southwest Cay; Malaysia constructed a naval base on Swallow Reef; Taiwan constructed an airstrip on Itu Aba; and the Philippines have planned construction of an airport and pier on Thitu Island.<sup>115</sup> However, none of these projects matched the scope of land reclamation undertaken by China in the past two years.

Starting in 2014, China began aggressively reclaiming several Spratly Island features. Over the course of an eighteen-month period, it is estimated that China reclaimed nearly 2000 acres—more than all other countries’ reclaimed land in the South China Sea combined.<sup>116</sup> On Subi Reef, the subject of the *Lassen’s* FONOP in October, 2015, China has reclaimed approximately 3.9 million square meters, constructing pier facilities, a helipad, and multiple communications towers.<sup>117</sup> In its normal state, prior to China’s reclamation efforts, Subi Reef would be submerged at high tide.<sup>118</sup>

The majority of China’s land reclamation efforts (as well as those of other South China Sea nations) appear to be designed for military use. On Subi Reef, as on other features, construction efforts include garrisons, airstrips, radar sites, fuel depots, and deep-draft pier facilities.<sup>119</sup> Experts

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<sup>112</sup> As will be discussed in later sections, the issue of China’s historic title claim was addressed by the Permanent Court of Arbitration, although the efficacy of the tribunal’s ruling has already been called into question. *See infra* Part IV and V for further discussion.

<sup>113</sup> Kenneth Pletcher, *Spratly Islands*, ENCYC. BRITANNICA, <http://www.britannica.com/place/Spratly-Islands> (last visited July 11, 2016).

<sup>114</sup> Wallace, *supra* note 91, at 131.

<sup>115</sup> Mira Rapp-Hooper, *Before and After: The South China Sea Transformed*, ASIA MARITIME TRANSPARENCY INITIATIVE (Feb. 18, 2015), <http://amti.csis.org/before-and-after-the-south-china-sea-transformed/>.

<sup>116</sup> BEN DOLVEN ET AL., CONG. RES. SERV., R44072, CHINESE LAND RECLAMATION IN THE SOUTH CHINA SEA: IMPLICATIONS AND POLICY OPTIONS (2015) [hereinafter DOLVEN CRS REPORT].

<sup>117</sup> *Subi Reef Tracker*, *supra* note 8.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*; DOLVEN CRS REPORT, *supra* note 116, at 9. Starkly demonstrating this proposition, China recently positioned several anti-air missile batteries on Woody Island, a feature located within the disputed Paracel Island chain in the South China Sea. *Water Wars: China Makes Waves With*

assess that the increased capability the Chinese Navy may gain by using reclaimed features could increase the range of daily ship and aircraft operations, and greatly enhance potential anti-access/area denial systems.<sup>120</sup> From a historical perspective, such use should be expected; during World War II, Japan occupied the Spratly Islands and constructed a submarine base there.<sup>121</sup>

Tracking the progress of land reclamation efforts in the South China Sea is a relatively easy task with the benefit of satellite imagery. What is decidedly more difficult is assessing the motivations and implications of those same actions. Thus far, China's claims are both ambiguous and vague; it has not claimed a territorial sea or EEZ based on any South China Sea feature, declared whether any of the features are islands or something less, or indicated whether reclamation efforts are intended to change the maritime entitlements stemming from those features.<sup>122</sup> Meanwhile, international concerns over overlapping maritime entitlements and the UNCLOS reservation on the use of the seas for peaceful purposes linger in the background.

## B. A Note on Rocks versus Islands

In its unadulterated state, Subi Reef would be submerged at high tide.<sup>123</sup> That fact is extremely relevant under UNCLOS in terms of determining maritime entitlements.<sup>124</sup> Classifying a maritime feature as either an island, a rock, or a low-tide elevation (sometimes referred to as a submerged feature) starts with Article 121.<sup>125</sup> What category a feature falls under operates distinctly from any question of sovereignty over the feature. However, as can be seen currently in the Spratlys, assigning maritime entitlements to a feature can lead to overlapping entitlements requiring delimitation.<sup>126</sup>

Why does it matter? An island—no matter how small—is treated like any other contiguous piece of land in that it is allowed the full complement of maritime zones, including territorial sea, exclusive economic zone, and continental shelf.<sup>127</sup> A rock, on the other hand, is entitled only to a territorial sea.<sup>128</sup> A low-tide elevation, which is “a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide,” does not generate any territorial sea of its own.<sup>129</sup> Hence, the only time the sovereignty of a feature impacts the regime

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*Missile Deployment After Uneventful U.S.-ASEAN Summit*, LAWFARE (Feb. 19, 2016, 2:58 PM), <https://www.lawfareblog.com/water-wars-china-makes-waves-missile-deployment-after-uneventful-us-asean-summit>.

<sup>120</sup> DOLVEN CRS REPORT, *supra* note 116, at 8.

<sup>121</sup> Pletcher, *supra* note 113.

<sup>122</sup> LIMITS IN THE SEAS, *supra* note 94, at 11–22.

<sup>123</sup> *Subi Reef Tracker*, *supra* note 8.

<sup>124</sup> UNCLOS, *supra* note 10, art. 121.

<sup>125</sup> *Id.*

<sup>126</sup> See discussion *infra* Part IV.

<sup>127</sup> UNCLOS, *supra* note 10, art. 121.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* art. 13. However, “where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.” *Id.*



of the seas is where a feature “owned” by one coastal state creates a maritime zone that overlaps that of another coastal state.

Temporarily setting aside any question of sovereignty, an examination of China’s land reclamation efforts in the South China Sea begs interpretation of several UNCLOS provisions. According to Article 121, the ability to “sustain human habitation or economic life of their own” distinguishes an island from a rock.<sup>130</sup> Land reclamation efforts trigger the key language here—“of their own”—which becomes starkly important. Is it consistent with international law to convert a submerged feature or rock to an island, and if so, what is the practical outcome of that action?

Like most legal questions, the answer is a resounding “it depends.” In several instances, the UNCLOS contemplates the creation of artificial islands. Article 60 discusses artificial islands, installations, or structures in an exclusive economic zone, and grants a coastal state the right to construct such a feature within their own EEZ.<sup>131</sup> Artificial islands are only entitled to a 500-meter safety zone, both to preserve the safety of the feature and for navigational purposes.<sup>132</sup> Moreover, “artificial islands . . . do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.”<sup>133</sup> Interestingly, both coastal and land-locked states enjoy the right to construct artificial islands on the high seas.<sup>134</sup>

The UNCLOS does not explicitly provide the definition of an “artificial island.” The convention defines islands, rocks, and low-tide elevations as “naturally formed area[s] of land.”<sup>135</sup> By negative inference, it is reasonable to presume that an artificial island is not a naturally formed area of land, and therefore not an island, a rock, or a low-tide elevation under the meaning of the UNCLOS. However, when a feature is naturally formed, such as a low-tide elevation, the UNCLOS does not specifically allow or prohibit converting a low-tide elevation or rock to an island. Looking back to the definition of an island, having the ability to sustain life is the dispositive language. One could reasonably argue that an improved feature that can sustain human habitation on its own is truly an island under the plain meaning of the UNCLOS, and therefore entitled to the panoply of maritime zones.

The authorization to construct artificial islands within the EEZ is limited to the coastal state by the UNCLOS, and, while silent, it is safe to infer that constructing an artificial island in another state’s territorial sea or EEZ is prohibited. Assuming such an action is undertaken without the coastal state’s consent, that act undeniably impinges on the coastal state’s sovereign rights and

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Therefore, while low-tide elevations on their own do not create a territorial sea, they can affect the shape and size of the territorial sea of another landmass

<sup>130</sup> UNCLOS, *supra* note 10, art. 121.

<sup>131</sup> *Id.* art. 60. The same rights and protections with respect to artificial islands are incorporated on the continental shelf. *Id.* art. 80.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* art. 87.

<sup>135</sup> *Id.* arts. 13, 121.

authority of jurisdiction over the EEZ.<sup>136</sup> Conversely, it is clear that under the UNCLOS, a coastal state may construct an artificial island within its own territorial sea without limitation,<sup>137</sup> and similarly within the coastal state's EEZ.<sup>138</sup> Lastly, while allowing construction of artificial islands on the high seas, the UNCLOS also prohibits claims of sovereignty over any part of the high seas,<sup>139</sup> meaning that an artificial island on the high seas would be treated merely as a navigational hazard entitled to a 500-meter safety zone.

The more problematic scenario is the construction of an artificial island in an area of overlapping maritime zones subject to delimitation. There is no clear answer as to the legality of island construction in a "disputed" zone. Though one would hope that, pending delimitation, claimants to the zone would refrain from actions that could potentially harm other claimants, there is no clear prohibition on such actions.<sup>140</sup> Furthermore, every state bears responsibility for protecting the marine environment, both within areas in exercise of sovereign rights such as territorial seas and the EEZ, as well as the high seas.<sup>141</sup> Construction of an artificial island or a major land reclamation project could have broad environmental impacts and, therefore, should not be undertaken on the high seas, or within another state's EEZ.

When applying this discussion to the Spratlys, it may be a stretch to categorize China's land reclamation efforts as construction of artificial islands in the first place. The maritime features in

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<sup>136</sup> A state exercises complete sovereignty over the territorial sea in accordance with Article 2, subject to the right of innocent passage. Additionally, within a coastal state's EEZ, other states are limited to the rights and duties contained within Article 58. *Id.* arts. 2, 58.

<sup>137</sup> "Without limitation" is a maxim better left out of legal conversations. Of course, as discussed, there are limits on a coastal state's rights, even within their own territorial sea based on the *mare liberum* principle of Grotius. *See supra* Part II.A. For instance, construction of an artificial island may not impede the right of innocent passage in accordance with Article 24. *Id.* art. 24; *see also* Michael Gagain, *Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims Through the 'Constitution of the Oceans'*, 23 COLO. J. ENVTL. L. & POL'Y 77, 101–06 (2012) (discussing some responsibilities of a coastal state with respect to other states after construction of an artificial island within the coastal state's own territorial sea).

<sup>138</sup> There are several examples where coastal states have constructed artificial islands, either without objection, or resulting in favorable international tribunal rulings. *See, e.g., Johnston Atoll Kalama Atoll*, GLOBAL SECURITY [http://www.globalsecurity.org/wmd/facility/johnston\\_atoll.htm](http://www.globalsecurity.org/wmd/facility/johnston_atoll.htm) (last visited July 31, 2016) (describing the U.S. land reclamation of Johnston Atoll); Sarah Dowdey, *Why is the World's Largest Artificial Island in the Shape of a Palm Tree?*, HOW STUFF WORKS, <http://adventure.howstuffworks.com/dubai-palm.htm> (last visited July 31, 2016) (detailing the construction of the Palm Islands in Dubai); and *Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.)*, 2008 I.C.J. 12 (May 23), ¶¶ 249–50 (discussing Singapore's proposed reclamation of Pedra Branca in the Singapore Straits despite a conflicting sovereignty claim with Malaysia).

<sup>139</sup> UNCLOS, *supra* note 10, art. 89.

<sup>140</sup> At best, parties can seek conciliation or provisional measures, assuming that UNCLOS Part XV is applicable. KLEIN, *supra* note 48, at 59–85.

<sup>141</sup> UNCLOS, *supra* note 10, art. 192.

dispute in the South China Sea preexisted the reclamation efforts; some were likely considered islands under Article 121, and others were certainly rocks or low-tide elevations.<sup>142</sup> Therefore, as discussed, it is better to categorize China's efforts as an attempted conversion of a low-tide elevation into an island rather than construction of an artificial island.

At least one U.S. governmental report concludes that China's reclamation efforts have no effect on any maritime entitlements.<sup>143</sup> According to the report, rocks are entitled to a territorial sea (but not an EEZ or continental shelf) even if they have been made inhabitable, and artificially converting a low-tide elevation into a structure that is above water at high tide (and therefore normally considered a rock or island) will not create a corresponding territorial sea.<sup>144</sup> In either case, China may effectively create an artificial island under common parlance, without necessarily creating an artificial island by legal definition. The report notwithstanding, there is nothing explicit in the UNCLOS or any international tribunal that supports the same premise. Until China clarifies its maritime claims, or a challenge to China's reclamation activities reaches a tribunal, the answer will remain murky.

#### IV. The Philippines and International Arbitration

Unsurprisingly, China's nebulous maritime claim in the form of the nine-dash line, coupled with its aggressive land reclamation efforts, have caused increased tension with their neighbors in the South China Sea.<sup>145</sup> Long-time ally Vietnam publicly rebuffed China's claim of ownership of the Spratly and Paracel Islands, and Vietnamese President Truong Tan Sang proclaimed that China's "large-scale reclamation of small islands to make them very big islands . . . [are acts that] violate international law."<sup>146</sup> Similar comments have come from Malaysia<sup>147</sup> and Indonesia,<sup>148</sup> as

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<sup>142</sup> As discussed in the previous section, Subi Reef was submerged at high tide in its normal state, meaning it was a low-tide elevation under the UNCLOS. *Subi Reef Tracker*, *supra* note 8.

<sup>143</sup> DOLVEN CRS REPORT, *supra* note 116, at 4.

<sup>144</sup> *Id.*

<sup>145</sup> M. Taylor Fravel, *Policy Report: U.S. Policy Towards the Disputes in the South China Sea Since 1995*, S. RAJARATNAM SCH. OF INT'L STUD. 4 (Mar. 2014), <http://taylorfravel.com/documents/research/fravel.2014.RSIS.us.policy.scs.pdf>.

<sup>146</sup> Truong Son, *Vietnamese President Reiterates Sovereignty Over Islands in East Sea*, THANHNIEN NEWS (Sept. 30, 2015, 10:48 AM), <http://www.thanhniennews.com/politics/vietnamese-president-reiterates-sovereignty-over-islands-in-east-sea-51897.html>.

*See also* Simon Denyer, *China's Assertiveness Pushes Vietnam Towards an Old Foe, the United States*, WASH. POST (Dec. 28, 2015), [https://www.washingtonpost.com/world/asia\\_pacific/chinas-assertiveness-pushes-vietnam-toward-an-old-foe-the-united-states/2015/12/28/15392522-97aa-11e5-b499-76cbec161973\\_story.html?tid=pm\\_world\\_pop\\_b](https://www.washingtonpost.com/world/asia_pacific/chinas-assertiveness-pushes-vietnam-toward-an-old-foe-the-united-states/2015/12/28/15392522-97aa-11e5-b499-76cbec161973_story.html?tid=pm_world_pop_b).

<sup>147</sup> *Malaysian Deputy PM: We Must Defend Sovereignty in South China Sea Dispute*, NEWSWEEK (Nov. 14, 2015, 11:28 AM), <http://www.newsweek.com/malaysian-deputy-pm-we-must-defend-sovereignty-south-china-sea-dispute-394421>.

<sup>148</sup> Shannon Tiezzi, *Would Indonesia Actually Challenge China's Nine-Dash Line in International Court?*, DIPLOMAT (Nov. 13, 2015), <http://thediplomat.com/2015/11/would-indonesia-actually-challenge-chinas-nine-dash-line-in-international-court/>.

well as concerned comments from outsiders Australia<sup>149</sup> and the United States.<sup>150</sup> Indeed, competing sovereignty claims in the South China Sea and China's land reclamation took front stage at a November, 2015, ASEAN meeting.<sup>151</sup>

Yet the strongest opposition to date has come from the Philippines. On January 22, 2013, the Philippines initiated arbitration against China at the Permanent Court of Arbitration (PCA) to resolve the disputed maritime jurisdiction between the two countries within the South China Sea, which includes Subi Reef and the other Spratly Islands.<sup>152</sup> By petitioning the PCA for relief, the Philippines became the first state to attempt to lay China's nine-dash line before an international tribunal, effectively forcing China to either clarify its maritime claims, or allow someone else to define them.

The Philippines' claim arose under Annex VII of UNCLOS, the procedure allowing for arbitration of matters under dispute.<sup>153</sup> Throughout the statement of claim, the Philippines relied heavily on the text of the UNCLOS.<sup>154</sup> Primarily, the Philippines sought the arbitral tribunal to assert the authority of the UNCLOS over both parties, and to declare the nine-dash line incongruous with the convention.<sup>155</sup> Secondly, the Philippines sought declarations of whether certain features within the Spratly Islands were indeed islands, rocks, or low-tide elevations in accordance with the UNCLOS.<sup>156</sup> Lastly, the Philippines sought affirmation of the Philippines' full EEZ and continental shelf.<sup>157</sup>

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Although Indonesia is not one of the claimants to any maritime features within the South China Sea, China's nine-dash line does overlap Indonesia's Exclusive Economic Zone, a source of contention for the Indonesian government. *Id.*

<sup>149</sup> *Australian Military Plane Flies over Disputed South China Sea*, DEF. NEWS (Dec. 16, 2015, 9:53 PM), <http://www.defensenews.com/story/defense/2015/12/16/australian-military-plane-flies-disputed-south-china-sea/77458100/>.

<sup>150</sup> Jeffrey A. Bader, *The U.S. and China's Nine-Dash Line: Ending the Ambiguity*, BROOKINGS (Feb. 6, 2014), <http://www.brookings.edu/research/opinions/2014/02/06-us-china-nine-dash-line-bader>.

<sup>151</sup> *Media Availability with Secretary Carter at the ASEAN Defense Ministers-Plus Meeting in Kuala Lumpur, Malaysia*, U.S. DEP'T OF DEF. (Nov. 4, 2015), <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/627598/media-availability-with-secretary-carter-at-the-asean-defense-ministers-plus-me>.

<sup>152</sup> The Republic of the Philippines vs. The People's Republic of China, Notification and Statement of Claim (Jan. 22, 2013), <http://www.philippineembassy-usa.org/news/3071/300/Statement-by-Secretary-of-Foreign-Affairs-Albert-del-Rosario-on-the-UNCLOS-Arbitral-Proceedings-against-China-to-Achieve-a-Peaceful-and-Durable-Solution-to-the-Dispute-in-the-WPS/d,phildet/> [hereinafter Philippines Notification and Statement of Claim].

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Philippines Notification and Statement of Claim, *supra* note 152, ¶ 6.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

In filing the request for arbitration, the Philippines recognized one major hurdle to jurisdiction: China's reservation of compulsory dispute resolution in accordance with Article 298. To defuse the issue, the Philippines repeatedly stated that it did not seek a decision on competing claims of sovereignty or delimitation of maritime boundaries.<sup>158</sup> However, the Philippines could not dodge the issue altogether; the Philippines described the nine-dash line as a claim to "sovereignty and sovereign rights," in fact borrowing the language from China's 2009 *notes verbales*.<sup>159</sup> In seeking a ruling that would effectively nullify the nine-dash line, the Philippines asked the arbitral tribunal to rule against Chinese claims of sovereignty over many of the maritime features within the South China Sea, even if it did not seek an affirmative award of sovereignty for those features currently claimed by the Philippines.

For its part, China refused to participate in the arbitration proceedings.<sup>160</sup> In response to the Philippines' notification seeking arbitration, China eventually released a position paper challenging the jurisdiction of the arbitral tribunal.<sup>161</sup> The Chinese position was simple. First, according to China, the subject matter of the arbitration is a dispute over territorial sovereignty of maritime features; on this matter, the UNCLOS does not require resolution via compulsory dispute resolution in accordance with Part XV of the convention.<sup>162</sup> Accordingly, because maritime zones are derived from land territory, one must first settle territorial disputes before determining the authorized extent of any nation's maritime claims.<sup>163</sup>

China's second contention was that even if the subject matter of the arbitration was not territorial sovereignty, then it must be considered a dispute over maritime boundary delimitation, and China reserved against compulsory participation with its declaration in 2006.<sup>164</sup> In opposing the Philippines' effort to seek favorable arbitral awards for only certain maritime features in the Spratly island chain, China argued that the Philippines is actually circumventing the delimitation process that has long been underway between the two states.<sup>165</sup> Indeed, the position paper states that the decision to arbitrate only those features the Philippines claims are within its EEZ is "obviously . . . an attempt to seek recognition by the Arbitral Tribunal that the relevant maritime areas are part of the Philippines' EEZ and continental shelf . . . . This is actually a request for maritime delimitation by the Arbitral Tribunal in disguise."<sup>166</sup>

In accordance with Annex VII, an arbitral tribunal may proceed to make findings and issue an award for a dispute even when one party fails to appear before the tribunal.<sup>167</sup> In October 2015,

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<sup>158</sup> *Id.* ¶ 7.

<sup>159</sup> *Id.* ¶ 2.

<sup>160</sup> The Republic of the Philippines vs. the People's Republic of China, Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 112 (Perm. Ct. Arb. Oct. 29, 2015).

<sup>161</sup> China Position Paper on Arbitration, *supra* note 107.

<sup>162</sup> *Id.* ¶ 3.

<sup>163</sup> *Id.* ¶ 9.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* ¶¶ 65–69.

<sup>166</sup> *Id.* ¶ 69.

<sup>167</sup> UNCLOS, *supra* note 10, Annex VII art. 9.

the PCA decided to do just that with respect to the Philippines' request for arbitration.<sup>168</sup> In announcing that the tribunal would consider evidence and enter findings with respect to some of the Philippines' claims, the tribunal recognized China's refusal to participate and took notice of the previously published position paper. The finding with respect to jurisdiction characterizes China's objections to the tribunal as procedural objections, rather than a bar to jurisdiction, allowing the tribunal to proceed.<sup>169</sup>

In its jurisdictional analysis, the Tribunal disagreed with both Chinese objections. On the matter of territorial sovereignty,

The Tribunal . . . does not see that any of the Philippines' submissions require an implicit determination of sovereignty. The Tribunal is of the view that it is entirely possible to approach the Philippines' submissions from the premise . . . that China is correct in its assertion of sovereignty . . . .<sup>170</sup>

Furthermore, the Tribunal asserted that deciding on the Philippines' challenge of certain maritime entitlements did not equate to delimitation.<sup>171</sup>

On July 12, 2016, the tribunal released its final award.<sup>172</sup> In a sweeping decision that exceeded prognostications, the tribunal dismissed Chinese claims of historic title to the South China Sea, found no basis to support the nine-dash line within the UNCLOS, and declared China in breach of several UNCLOS obligations.<sup>173</sup> The tribunal took further steps, ruling that Subi Reef (among other maritime features) was in fact a low tide elevation in accordance with Article 13, and not "capable of appropriation."<sup>174</sup> Lastly, the tribunal held that China's land reclamation activities violated UNCLOS obligations with respect to the preservation and protection of the marine environment<sup>175</sup> and impinged on the Philippines' sovereign rights within its EEZ.<sup>176</sup>

The tribunal's award was met with predictable responses. The Philippines hailed the ruling, referring to it as a "milestone decision."<sup>177</sup> China repeated its opposition to the tribunal,

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<sup>168</sup> The Republic of the Philippines vs. the People's Republic of China, Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶¶ 112–23 (Perm. Ct. Arb. Oct. 29, 2015).

<sup>169</sup> *Id.* at ¶ 128.

<sup>170</sup> *Id.* at ¶ 153.

<sup>171</sup> *Id.* at ¶ 156.

<sup>172</sup> The Republic of the Philippines vs. the People's Republic of China, Case No. 2013-19, Award (Perm. Ct. Arb. July 12, 2016) [hereinafter Final Award].

<sup>173</sup> *Id.* at "Dispositif."

<sup>174</sup> *Id.* ¶ B.5.

<sup>175</sup> *Id.* ¶ B.13.

<sup>176</sup> *Id.* ¶ B.14.

<sup>177</sup> Kristine Angeli Sabillo, *PH Welcomes 'Milestone Decision' on West Philippine Sea*, INQUIRER (July 12, 2016, 5:37 PM), <http://globalnation.inquirer.net/140963/ph-welcomes-milestone-decision-on-west-philippine-sea-calls-for-restraint-sobriety>.

announcing that the decision is “null and void and has no binding force.”<sup>178</sup> In the streets of Beijing, some Chinese citizens destroyed *iPhones*, attacked a man wearing *Nike* shoes, and called for a boycott of *Kentucky Fried Chicken* in apparent outrage over the perception that the United States somehow influenced the arbitration in the Philippines’ favor.<sup>179</sup>

At the same time, the U.N. apparently distanced itself from the Permanent Court of Arbitration, stressing the independence of the tribunal and the fact that it is not a U.N. entity.<sup>180</sup> The distancing of the United Nations from the arbitration is concerning; coupled with the fact that China continues to effectively possess many of the disputed features, the appearance is that the award did not change anything in the South China Sea at all. As one commentator noted, “[t]he arbitration was never going to resolve issues of sovereignty over the islands and rocks in the South China Sea, because disputes over territorial sovereignty are beyond the jurisdiction of an UNCLOS Tribunal.”<sup>181</sup> Therefore, while the tribunal’s award may be a moral victory for the Philippines, it likely will have no effect on resolving the crisis.

## V. The Question of Sovereignty

Underlying each of the issues discussed above—the efficacy of the nine-dash line, the legality of aggressive land reclamation projects, the delimitation of maritime boundaries, and the applicability of compulsory dispute resolution—is the question of sovereignty. Therein lies the irony: that which underpins each potential area of dispute within the South China Sea is that which is untouched by the “constitution of the sea.” There are many successes to the UNCLOS, but by remaining silent on the resolution of questions of sovereignty, there is a significant gap in the legal regime governing access to the seas.

As written, the UNCLOS strongly relies on states resolving sovereignty disputes via mutual cooperation, diplomatic processes, and bilateral negotiation. The procedural mechanism for dispute resolution contained within Part XV was created to resolve disputes over the interpretation or application of the various provisions of the convention.<sup>182</sup> This intention reflected the political realities of the third conference, where “States were not of the view that mandatory jurisdiction was essential for every issue regulated under the Convention,” allowing instead for instances

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<sup>178</sup> Ankit Panda, *International Court Issues Unanimous Award in Philippines v. China Case on South China Sea*, DIPLOMAT (July 12, 2016), <http://thediplomat.com/2016/07/international-court-issues-unanimous-award-in-philippines-v-china-case-on-south-china-sea/>.

<sup>179</sup> Linette Lopez, *Chinese Nationalists Are Taking Their Anger Out on Anything American They Can Touch*, BUSINESS INSIDER (July 20, 2016), <http://www.businessinsider.com/chinese-nationalist-attack-american-brands-2016-7>.

<sup>180</sup> Daily Press Briefing by the Office of the Spokesperson for the Secretary-General. UNITED NATIONS (July 12, 2016), <http://www.un.org/press/en/2016/db160712.doc.htm>. See also INT’L COURT OF JUSTICE, <http://www.icj-cij.org/homepage/index.php>, last visited Nov. 9, 2016) (“The ICJ, which is a totally distinct institution, has had no involvement in the above mentioned case and, for that reason, there is no information about it on the ICJ’s website.”).

<sup>181</sup> Robert D. Williams, *Tribunal Issues Landmark Ruling in South China Sea Arbitration*, LAWFARE (July 12, 2016, 11:28 AM), <https://www.lawfareblog.com/tribunal-issues-landmark-ruling-south-china-sea-arbitration>.

<sup>182</sup> KLEIN, *supra* note 48, at 22–23.

where “the emphasis has been placed on national decision-making rather than the use of international processes.”<sup>183</sup>

The method of dispute resolution between states, generally, is left for the states to determine. There is no requirement under the U.N. Charter to accept third-party control of a dispute absent action by the U.N. Security Council.<sup>184</sup> Therefore, submission of disputes to international bodies is always based on consent, and is generally achieved via the terms of treaties. On the question of territorial sovereignty (of an island, for instance), the UNCLOS did not fold this topic into its compulsory dispute resolution, nor does any provision of the UNCLOS discuss territorial sovereignty.<sup>185</sup>

The ability within the UNCLOS to except arbitration for questions of sovereignty is not an oversight; it was a vital part of the initial negotiations and an issue with vastly divergent viewpoints. In fact, U.S. proponents of the UNCLOS cite to this provision as a good reason to ratify the UNCLOS, in that the United States will not be signing over sovereignty to an international body.<sup>186</sup>

The nearest the UNCLOS gets to resolving questions of sovereignty appears in the discussion of maritime boundary delimitation. Yet, even for this matter, the UNCLOS maintains deference to national decision-making; the Convention does not tell states how to delimit their maritime zones, it only requires that it be done.<sup>187</sup> The delimitation processes that do exist are completely creatures of international tribunals.<sup>188</sup> Even so, as mentioned earlier, states are free to except participation in compulsory dispute resolution processes for disputes concerning maritime boundary delimitation.<sup>189</sup>

#### A. Sovereignty and the Regime of Islands

One of the successes of the law of the sea is the specificity that it provides to categorizing the oceans and subsoil in order to provide stability and predictability. The breadth of maritime zones, the method of establishing a baseline, and the regime of islands are examples of this specificity. However, the UNCLOS applies these standards with one major assumption: questions of

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<sup>183</sup> *Id.* at 28. Professor Klein provides an excellent history of the three conferences and how each one viewed dispute resolution. As the contemporary view towards international bodies as rule-makers and arbiters shifted, so did the efforts at including mandatory resolution processes within the law of the sea. *Id.* at 7–28.

<sup>184</sup> Bernard H. Oxman, *Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 394, 396 (Donald R. Rothwell et al. eds., 2015).

<sup>185</sup> *Id.* at 400.

<sup>186</sup> Information Paper, Office of the Judge Advocate General Code 10, *Eight National Security Myths: United Nations Convention on the Law of the Sea*, (on file with author) [hereinafter *Eight National Security Myths*] (stating that “there is simply no process or procedure whereby our determination can be subject to review”).

<sup>187</sup> KLEIN, *supra* note 48, at 228–29.

<sup>188</sup> Evans, *supra* note 58, at 278.

<sup>189</sup> See discussion *supra* Section II.C.



sovereignty have already been resolved. Applying the Convention to a particular maritime feature, one can fairly easily classify the feature as an island or a rock, and subsequently attach authorized maritime zones. But if sovereignty is disputed, then whom does the maritime zone benefit? If sovereignty is disputed, then how can one state's actions on that feature be judged against the provisions of the UNCLOS?

One potential outcome is that no state's claim of sovereignty is valid, and the feature is considered part of the high seas. In that case, the fortification of a feature for military purposes could be in violation of the reservation of the high seas for peaceful purposes.<sup>190</sup> Most commentators agree that the peaceful purposes reservation does not categorically prohibit military maneuvers, or even limited weapons-testing.<sup>191</sup> But conceivably, construction of a military outpost on the high seas is exactly what was intended by the Article, otherwise it would lack any "teeth" at all.

Looking at Subi Reef, another potential scenario is that China rightfully has sovereignty over this feature; in that case, the reclamation efforts are likely not in contravention of the UNCLOS, regardless of whether any maritime entitlements attach to the feature before or after reclamation. Conversely, if Subi Reef rightfully belongs to the Philippines, then China's land reclamation clearly is an affront to the Philippines' sovereignty.<sup>192</sup> Furthermore, if Subi Reef either entitles the Philippines to a territorial sea or EEZ, or it falls within another maritime zone of the Philippines, then China's actions would also violate the environmental protection principals of the UNCLOS. The arbitral tribunal seemed to sidestep this discussion altogether by labeling Subi Reef a low-tide elevation and stating that such features are not "capable of appropriation."<sup>193</sup>

Lastly, even if a feature does not entitle the coastal state to a maritime zone based on that feature alone, the presence of a low-tide elevation can impact the state's baseline if the feature is situated within the territorial sea of another feature or coastline.<sup>194</sup> While the arbitral tribunal hinted at this with respect to Subi Reef (which lies within twelve nautical miles of the high-tide feature of Sandy Cay), it did not take the further step of determining how any particular baseline is actually affected since it did not rule on the sovereignty of Subi Reef or Sandy Cay.<sup>195</sup>

The question of sovereignty, therefore, is intricately woven into the resolution of maritime disputes. Determining whether actions such as land reclamation are legal in the context of a territorial dispute or applying the peaceful purposes reservation of the high seas is only the

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<sup>190</sup> UNCLOS, *supra* note 10, art. 88.

<sup>191</sup> Douglas Guilfoyle, *The High Seas*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 203, 210–12 (Donald R. Rothwell et al. eds., 2015) (discussing the peaceful purposes' textual history and the consensus of modern application).

<sup>192</sup> The UNCLOS echoes the general duty of the U.N. Charter by requiring states to "refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law . . . ." UNCLOS, *supra* note 10, art. 301.

<sup>193</sup> Final Award, *supra* note 172, "Dispositif" ¶ B.5.

<sup>194</sup> UNCLOS, *supra* note 10, art. 6. *See also infra* note 177 and accompanying text.

<sup>195</sup> Final Award, *supra* note 172, "Dispositif" ¶¶ B.3–B.5.

beginning. Even if a feature can be properly categorized to determine the extent of allowable maritime features, the ownership of the feature will likely lead to issues of maritime boundary delimitation.

## B. Sovereignty and Maritime Boundary Delimitation

For centuries, humankind has accepted some form of territorial governance; the concept of land devoid of title by some nation was fully consumed, some might argue, by the Treaty of Westphalia.<sup>196</sup> Conversely, the overarching paradigm of the seas is that of Grotius; state control over the seas is the exception rather than the rule, and is subject to significant limitations.<sup>197</sup> Following the third conference, with the standardization of territorial seas and the creation of sovereign rights over EEZs and the continental shelf, the subject of maritime boundary delimitation has been the greatest percentage of cases before the ICJ.<sup>198</sup>

The first step in the process of delimitation is to establish maritime entitlements.<sup>199</sup> In order to accomplish this, “it is first necessary to establish whether the parties to a dispute do indeed have entitlements which overlap: just because a State claims that it has an entitlement does not mean that it does.”<sup>200</sup> Specific to the distinction between islands and rocks and their effects on maritime zones, the “practical application remains uncertain and can only be determined on a case by case basis, providing yet another element of indeterminacy at the threshold stage of the delimitation process.”<sup>201</sup>

It is perhaps axiomatic to state that questions of territorial sovereignty must be resolved prior to delimitation. Because maritime entitlements flow from corresponding land rights, there would be no maritime zone to delimit if the territorial sovereignty is undetermined. Hence, in its initial determination that jurisdiction was proper in the Philippines’ request for arbitration, the arbitral tribunal was forced to assume, *arguendo*, that each of China’s territorial claims were valid in order to determine whether China had any maritime entitlements in the Spratlys.<sup>202</sup> The question of sovereignty is woven into nearly every aspect of this maritime dispute; the arbitral tribunal, considering whether it has jurisdiction over the objection of one state, and recognizing that it is

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<sup>196</sup> See, e.g., Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT’L L. 830 (2006).

<sup>197</sup> For instance, all nations enjoy the right of innocent passage within the territorial seas of a coastal state, of which there is no corollary for land passage or overflight of a nation’s land territory. UNCLOS, *supra* note 10, art. 17.

<sup>198</sup> Evans, *supra* note 58, at 255.

<sup>199</sup> *Id.* at 261.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 263. In analyzing the ICJ opinion in *Nicaragua v. Colombia*, Professor Evans notes that the court has been “remarkably coy” about clarifying the distinction between rocks and islands, and therefore complicated delimitation situations remain complicated and often unresolved by international tribunals. *Id.*

<sup>202</sup> *The Republic of the Philippines vs. the People’s Republic of China*, Case No. 2013-19, Award on Jurisdiction and Admissibility ¶¶ 153–57 (Perm. Ct. Arb. Oct. 29, 2015).

not empowered to consider matters of delimitation, is still required to make a presumption on sovereignty to even proceed to the merits.

## VI. The United States' Position

Dating back to at least 1995, the United States has officially stated a neutral position with respect to claims of sovereignty over maritime features within the South China Sea.<sup>203</sup> Notwithstanding this position of neutrality, the United States has sought to become more involved in settling the disputes in the South China Sea. This has primarily been done via gradually ratcheting State and Defense Department policy statements disagreeing with China's actions in the area and by active participation with other partner nations and the regional body ASEAN.<sup>204</sup> And of course, operations like the Freedom of Navigation military operation by the *Lassen* in October, 2015.

In his letter to Senator McCain regarding the *Lassen's* FONOP, Defense Secretary Carter reiterates this position of neutrality: "The United States does not take a position on which nation has the superior sovereignty claims over each land feature in the Spratly Islands."<sup>205</sup> In describing the *Lassen's* maneuvers as consistent with those of innocent passage, Secretary Carter stated that the operation was intended to challenge attempts to restrict freedom of navigation within territorial seas.<sup>206</sup> Although Subi Reef was one of five Spratly island features implicated in the operation, it received particular notoriety because of China's reclamation activity there.

The U.S. Navy furthered this message in a second widely-publicized FONOP in January 2016. On this occasion, the *U.S.S. Curtis Wilbur*, another *Arleigh Burke*-class destroyer, sailed within

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<sup>203</sup> LIMITS IN THE SEAS, *supra* note 94, at 11 n.25 (citing a statement by the Acting U.S. Dep't of State Spokesperson on May 10, 1995); *see also* Hillary Rodham Clinton, U.S. Sec'y of State, Remarks at Press Availability (July 23, 2010), <http://www.state.gov/secretary/20092013clinton/rm/2010/07/145095.htm>; Ash Carter, U.S. Sec'y of Defense, Letter to Sen. John McCain (Dec. 22, 2015), <http://news.usni.org/2016/01/05/document-secdef-carter-letter-to-mccain-on-south-china-sea-freedom-of-navigation-operation>.

<sup>204</sup> Fravel, *supra* note 145.

<sup>205</sup> Ash Carter, U.S. Sec'y of Defense, Letter to Sen. John McCain (Dec. 22, 2015), <http://news.usni.org/2016/01/05/document-secdef-carter-letter-to-mccain-on-south-china-sea-freedom-of-navigation-operation>.

<sup>206</sup> *Id.* Secretary Carter further illuminates the U.S. position with respect to China's land reclamation activities, stating "land reclamation cannot create a legal entitlement to a territorial sea." *Id.* The *Lassen's* voyage was executed consistent with that of innocent passage because Subi Reef, as a low-tide elevation within the territorial sea of another island, Sandy Cay, may form part of Sandy Cay's baseline, which would in effect envelop Subi Reef in a territorial sea. *Id.*

twelve nautical miles of Triton Island, within the South China Sea Paracel chain.<sup>207</sup> Like Subi Reef, Triton Island is controlled by China, but ownership is disputed.<sup>208</sup> The FONOP was intended to challenge the straight baseline that China has claimed around the Paracels, as well as China's dubious requirement for prior notification from foreign warships to conduct innocent passage in China's territorial waters.<sup>209</sup> Unlike the *Lassen's* voyage in October 2015, however, the Pentagon issued a statement the day after the operation explaining the specific legal assertions that were challenged.<sup>210</sup> A third South China Sea FONOP followed in May 2016, with similar U.S. messaging afterward.<sup>211</sup>

Outwardly, the United States' position seems to be that Chinese expansion, the extension of Chinese military capabilities, and the socio-economic and political fallout for China's maritime neighbors is of no concern; so long as the sea lanes remain open under the navigational provisions of the UNCLOS, then the United States is satisfied. This sentiment was captured by the Assistant Secretary of State for the Bureau of East Asian and Pacific Affairs when he stated,

For us, it's not about the rocks and shoals in the South China Sea or the resources in and under it, it's about rules and it's about the kind of neighborhood we all want to live in. So we will continue to defend the rules, and encourage others to do so as well.<sup>212</sup>

Nonetheless, China's military capabilities are certainly cause for concern for the United States, even if government officials have come short of alleging any international law violations. In testimony before the Senate Committee on Foreign Relations, the Assistant Secretary of Defense for Asia and Pacific Security Affairs stated,

The United States welcomes China's peaceful rise . . . . Though increased military capabilities are a natural outcome of growing power, the way China is choosing to advance its territorial and maritime claims is fueling concern in the region about

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<sup>207</sup> Sam LaGrone, *U.S. Destroyer Challenges More Chinese South China Sea Claims in New Freedom of Navigation Operation*, USNI NEWS (Jan. 30, 2016, 10:37 AM), <http://news.usni.org/2016/01/30/u-s-destroyer-challenges-more-chinese-south-china-sea-claims-in-new-freedom-of-navigation-operation>.

<sup>208</sup> The entirety of the Paracel chain is claimed by China, Taiwan, and Vietnam. *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Jane Perlez, *U.S. Sails Warship Near Island in South China Sea, Challenging Chinese Claims*, N.Y. TIMES (May 10, 2016), [http://www.nytimes.com/2016/05/11/world/asia/south-china-sea-us-warship.html?\\_r=0](http://www.nytimes.com/2016/05/11/world/asia/south-china-sea-us-warship.html?_r=0).

<sup>212</sup> Daniel R. Russel, Assistant Sec'y of State, Bureau of East Asian and Pacific Aff., Remarks at the Fifth Annual South China Sea Conference (July 21, 2015), <http://www.state.gov/p/eap/rls/rm/2015/07/245142.htm>.

how it would use its military capabilities in the future. Having these capabilities *per se* is not the issue—the issue is how it will choose to use them.<sup>213</sup>

Hence, China's activities in the South China Sea are worrisome to U.S. officials, despite the outward appearance of a lack of concern, based on the rapidity with which it has increased its presence, and the rhetoric regarding access to the seas coming from Beijing.

It is possible that the U.S. approach has emboldened China to continue reclamation actions and purposely stall any attempt at maritime boundary delimitation or formal dispute resolution with their South China Sea neighbors. This is not to suggest that China's expansion is solely due to U.S. acquiescence. However, the failure to outwardly rebuke China and stand in defense of American allies in the region cannot be ignored.<sup>214</sup>

## VII. The Way Forward

The current situation in the South China Sea highlights a gap in the regime of the law of the sea. Despite the arbitral tribunal's findings, and largely due to the award's non-binding nature, the questions of sovereignty over various maritime features remain unresolved. This international drama is unfolding with no clear resolution in sight. The South China Sea situation is not merely a regional problem—as seen by the volume of media coverage within the United States, frequent comments from senior government and military officials, and recent FONOPs by the U.S. Navy—there is worldwide interest in resolution of some form or another. The United States can drastically influence this resolution, and should do so.

### A. The United States Must Accede to the UNCLOS

First and foremost, the United States must ratify and accede to the UNCLOS. There are many scholarly articles decrying the fact that the United States is the only major industrial nation that has not ratified the law of the sea.<sup>215</sup> Included in those articles are many strategically valid reasons to push for U.S. ratification, but this article will only address one. A common refrain from American UNCLOS opponents is that the United States has successfully exerted naval force throughout the globe and protected vital maritime interests for years without relying on membership.<sup>216</sup> Viewed through this pragmatic lens, any potential benefit of ratifying the

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<sup>213</sup> *Safeguarding American Interests in the East and South China Seas: Hearing Before the S. Comm. On Foreign Relations*, 114th Cong. (2015) (statement of David Shear, Assistant U.S. Sec'y of Defense for Asian and Pacific Sec. Aff.).

<sup>214</sup> For instance, despite commenting on the South China Sea since at least 1995, State Department officials refrained from specifically commenting on China as an instigator of unrest until August, 2012. Fravel, *supra* note 145, at 7.

<sup>215</sup> See, e.g., Gallagher, *supra* note 45, at 1; Kieran Dwyer, *UNCLOS: Securing the United States' Future in Offshore Wind Energy*, 18 MINN. J. INT'L L. 265 (2009); Julie A. Paulson, *Melting Ice Causing the Arctic to Boil Over: An Analysis of Possible Solutions to a Heated Problem*, 19 IND. INT'L & COMP. L. REV. 349 (2009); Wallace, *supra* note 91.

<sup>216</sup> Steven Groves, *The Law of the Sea: Costs of U.S. Accession to UNCLOS*, HERITAGE FOUND'N (June 14, 2012), <http://www.heritage.org/research/testimony/2012/06/the-law-of-the-sea->

UNCLOS must be outweighed by the potential for the United States to become subservient to an international body, thereby risking what has already been achieved.

However, the current situation in the South China Sea exposes this argument as untenable by providing a clear example of a situation where the scope of any U.S. response is significantly limited. It is simply not enough to rely on the development of “customary international law” to help resolve lingering vagaries in the convention.<sup>217</sup> Moreover, absent participation as a member, the United States cannot resist attempts to alter the UNCLOS in a way that would be inconsistent with U.S. interests, which could trump customary international law.

Rather, to protect U.S. maritime interests across the entire maritime domain, the United States must play an active role within the framework of the UNCLOS. Only through accession can the United States partake in the various institutions and governing bodies established by the UNCLOS.<sup>218</sup> Only through accession can the United States face maritime adversaries and enforce valid maritime zones via Freedom of Navigation operations with a straight face.<sup>219</sup> And only through accession can the United States encourage reform of the treaty to address current shortfalls. That said, as with any negotiation, the United States must be willing to sacrifice to achieve net positive results.

#### B. The UNCLOS Should Be Amended

In an exhibition of leadership on the international stage, immediately following ratification and accession of the UNCLOS, the United States should push for a major amendment to the treaty to strengthen the compulsory dispute resolution processes. Undertaking such an action would amount to a herculean effort. If the Senate will not take a vote on the UNCLOS as it currently stands, voting on a treaty that removes more national decision-making from the United States

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convention-treaty-doc-103-39 (citing Mr. Groves’s testimony before the U.S. Senate Committee on Foreign Relations on June 14, 2012).

<sup>217</sup> China’s Position Paper in response to the Philippines highlights this point well; if the matters under dispute involve interpretations of the technical provisions of the UNCLOS, then the United States can hardly opine how that dispute should be resolved. Especially concerning disputes of territorial sovereignty, which are highly fact dependent, customary international law will never provide clear guidance beyond any one specific case.

<sup>218</sup> See *supra* Section II.A. Of note, the United States was refused the opportunity to attend the presentation of evidence before the arbitral tribunal in the Philippines arbitration against China because it is not a member of the UNCLOS. The Republic of the Philippines vs. the People’s Republic of China, Ninth Press Release (Perm. Ct. Arb. Nov. 30, 2015), <http://www.pcacases.com/web/sendAttach/1524>.

<sup>219</sup> Although the United States considers the navigational provisions of the UNCLOS to be customary international law, as stated by President Reagan in his Ocean’s Policy Statement of 1984, the United States should no longer rely on this policy. As the prime enforcer of freedom of navigation rights throughout the globe, the United States cannot, in good faith, claim to police an area of the law that is formalized but the United States has failed to ratify, especially when there is no objection to those specific provisions. See *Eight National Security Myths*, *supra* note 186.

would be a tough sell. Though an amendment would be difficult to accomplish, the effort is still worthwhile.

Disputes over territorial sovereignty have long been left to be resolved by the parties' choice of methods. Even with the significant advances of international law over the past century, this has been a matter left to the discretion of states. However, the UNCLOS itself, as a comprehensive treaty creating specific rights and responsibilities, already differs from the body of international law related to the land. Indeed, "The hallmark of the modern state . . . has always been its exclusive sovereignty over a defined territory. This emphasis on exclusive dominion was incompatible with the use of the oceans."<sup>220</sup> Perhaps the question of sovereignty as it relates to the sea *should* be treated differently.

First, Article 297 should be amended to include disputes concerning territorial sovereignty when those disputes relate directly to maritime entitlements. As discussed above, the question of sovereignty underpins nearly every maritime dispute. Providing a forum to resolve these disputes will greatly enhance the predictability and stability of the law of the sea regime. Primarily, it will guide issues to resolution rather than allowing for long-simmering disputes with no clear path to resolution. Additionally, if territorial sovereignty issues related to maritime entitlements were more routinely considered via adjudication or arbitration,<sup>221</sup> a body of international jurisprudence would follow, thereby providing further predictability and order.

Second, Article 298 should be amended to remove the optional exception to compulsory dispute resolution for disputes of maritime boundary delimitation.<sup>222</sup> Delimitation is the most frequent cause of action in accordance with Part XV of the UNCLOS, resulting in the peaceful and final resolution of many overlapping maritime claims.<sup>223</sup> When invoked, the process clearly works.<sup>224</sup> Delimitation analysis focuses on equitable results; although each delimitation is extremely fact-dependent, the end-state remains—establishing fair and stable boundaries for all parties. Maritime boundary delimitation is clearly as important to the law of the sea regime as the question of territorial sovereignty, and the governing treaty should be empowered to resolve these frequent and important disputes.

Ironically, these proposals would substantially raise the hurdle before U.S. ratification, as "giving up sovereignty" is one of the major points of opposition to the UNCLOS as it stands

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<sup>220</sup> KLEIN, *supra* note 48, at 7.

<sup>221</sup> This article does not propose changing the ability to choose a forum that is already established in the UNCLOS Article 287. Forcing the selection of one forum over another would only cause dispute among member states, as many states harbor significant distrust of certain international bodies. *See* KLEIN, *supra* note 48, at 53–59.

<sup>222</sup> Conversely, the optional exceptions to compulsory resolution related to military activities and matters under the purview of the U.N. Security Council should remain in Article 298.

<sup>223</sup> Evans, *supra* note 58, at 255.

<sup>224</sup> Although, as Professor Evans discusses, recent cases involving delimitation have signified shifting trends in the process, ranging from established objective principles to results-oriented equitable analyses. *Id.* at 278.

today.<sup>225</sup> Opposition to UNCLOS within the United States is largely ideological. In an unspoken nod to American exceptionalism, opponents voice concerns over giving up any amount of sovereignty to an international body that may rule counter to U.S. desires, or espouse a general opinion of futility with respect to treaty law.<sup>226</sup> Even the U.S. Navy Judge Advocate General's Corps, the primary legal advisor to the U.S. Navy on FONOPs, and strong proponent of ratification, uses the optional reservation of compulsory dispute resolution as an argument in support of ratification.<sup>227</sup>

America is an exceptional nation, but the fear of being told “no” should not forestall efforts to cooperate with the international body. An important element of exceptionalism is leadership, which is a trait often invoked by government officials when describing U.S. foreign interactions.<sup>228</sup> Leadership by example is the bedrock of the U.S. Navy's FONOP program. To enhance international stability and predictability, the United States should be willing to lead by example when it comes to the peaceful resolution of international disputes. While the notion of third party resolution is fundamental to every American's understanding of domestic law, it should be no less fundamental to our understanding of international law.

Had an amended version of the UNCLOS been in effect in 2013, the situation in the South China Sea might look vastly different. First, all competing claims to the features within the Spratly Islands would be subject to adjudication or arbitration. A properly formed judicial body with a clear mandate could implement provisional measures to preemptively hold land reclamation efforts in abeyance. China's participation in arbitration would be assured, lest it risk alienation from the international community. Perhaps FONOPs, in general, would become unnecessary, or at least more mundane, thereby reducing the risk of accidental or unexpected military engagements at sea.

Although the UNCLOS defers greatly to bilateral and regional treaties, those can no more be relied on to resolve these issues than the current version of the UNCLOS. Other than the scorn of neighboring states, regional pacts lack enforceability and genuine interest from the international community beyond the region. For example, the ASEAN DOC has similar shortfalls in that there is no compulsory dispute resolution mechanism; even if it contained compulsory methods, a party like China could unilaterally disregard the provision with little or no repercussions.

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<sup>225</sup> Groves, *supra* note 216.

<sup>226</sup> Gallagher, *supra* note 45, at 911.

<sup>227</sup> Eight National Security Myths, *supra* note 186.

It simply does not get any better than that—not in private contract law nor in treaty law. What this Convention makes clear is that a State party can completely reject all the dispute resolution procedures—on its own terms—for disputes involving maritime boundaries, military activities, and matters before the Security Council.

*Id.*

<sup>228</sup> See e.g., American Leadership in the World, <https://www.whitehouse.gov/the-record/foreign-policy> (last visited July 31, 2016).



The risk to modifying the UNCLOS stands that membership will significantly decrease. However, it is worth noting that relatively few of the member states have made use of the right to reserve the compulsory dispute resolution that is afforded by Article 298.<sup>229</sup> Perhaps the strongest negative impact to not acceding to the UNCLOS is international stigma. Faced with an enforceable treaty, a state like China could simply choose to walk away from the UNCLOS altogether to maintain its claims in the South China Sea. In that case, political and diplomatic isolation would be the appropriate response. This makes ratification by the United States all the more important.

## VIII. Conclusion

The treaty resulting from the third conference on the law of the sea is a remarkable achievement. It brought significant stability to the maritime domain. For the most part, states can confidently exert claims of sovereignty and sovereign rights over the seas and expect recognition and due regard from other states. But the treaty also reflects the world politics of the 1970s and 1980s. Just as the law of armed conflict evolves as weapons and tactics change, the law of the sea should evolve as naval power shifts and natural resources become more sacred.

In light of the comprehensive nature of the UNCLOS, it is somewhat preposterous to allow such an important question as disputed claims of sovereignty to have no legal recourse. Recognizing the inherent struggle between national independence and international harmony, rule-making and order must override pragmatism at some point. This is one of the values of a system of laws to begin with—to establish predictability, order, and equity among various parties. There is a distinct difference between the law of the sea and other areas of international law. As Ambassador Pardo stated, the oceans are a “common heritage of mankind,” and the world has recognized the need to implement rules and regulations that trump national independence.<sup>230</sup>

The world should take the next step. The United States can lead this change by ratifying the UNCLOS and accepting compulsory dispute resolution for maritime boundary delimitation, then advocating for compulsory processes for questions of territorial sovereignty related to maritime entitlements. The United States should not be afraid of subjecting its interests to the rules of an international body. If bound to defend maritime claims in court, the United States should be able to do so because those claims will always be in agreement with the principles of the UNCLOS.

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<sup>229</sup> KLEIN, *supra* note 48, at 228.

<sup>230</sup> Sohn, *supra* note 33, at 287.