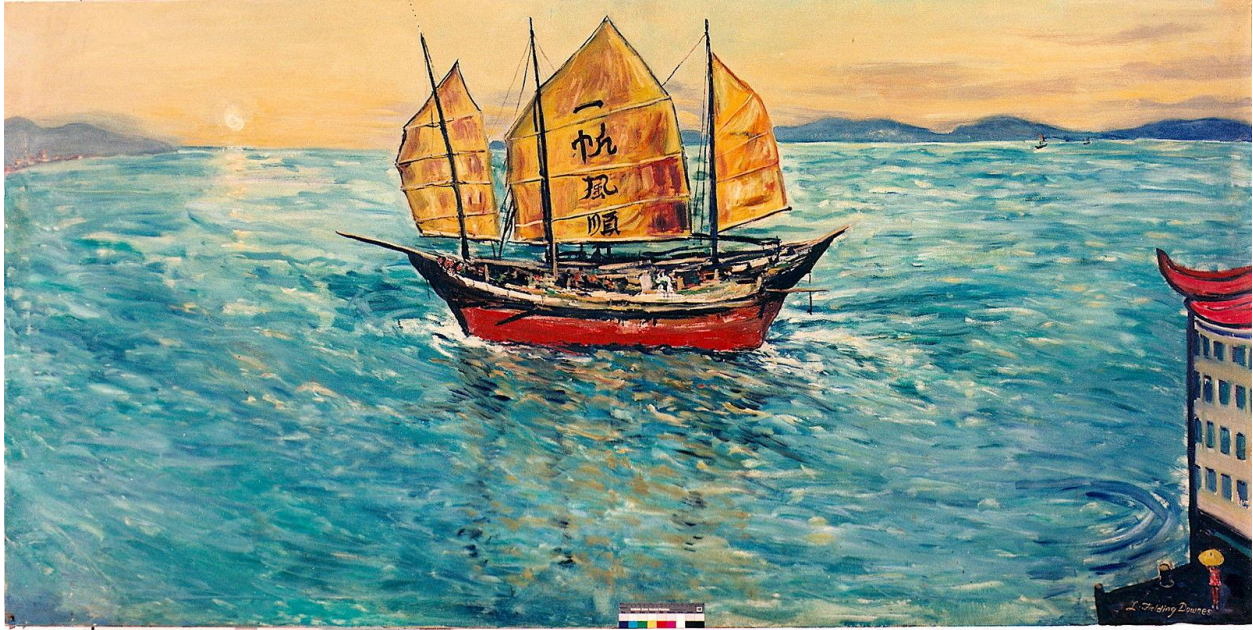


# On China's 9-Dashed Line and Why the Arbitrational Tribunal in Hague Should Dismiss Philippine's Case Against China

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## Introduction

Going by headline news, China’s maritime claims in the S. China Sea is illegal and a menace to international peace. In February, the U.S. issued [a Congressional report](#) that many interpreted as calling China’s “9-dashed” claim to be illegal.<sup>2</sup> In March, the Philippines [filed](#) a 4000+ page memorandum in

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<sup>2</sup> See, e.g., <http://www.brookings.edu/research/opinions/2014/02/06-us-china-nine-dash-line-bader> (“For the first time, the United States government has come out publicly with an explicit statement that the so-called ‘nine-dash line,’ which the People’s Republic of China (PRC) and Taiwan assert delineates their claims in the South China Sea, is contrary to international law.”); <http://www.securitylawbrief.com/main/2014/02/us-says-chinese-maritime-claims-contrary-to-international-law.html> (“U.S. says Chinese maritime claims contrary to international law”); <http://www.rfa.org/english/commentaries/east-asia-beat/claim-02092014205453.html> (“The United States for the first time has explicitly rejected the U-shaped, nine-dash line that China uses to assert sovereignty over nearly the whole South China Sea, experts say, strengthening the position of rival claimants and setting the stage for what could be an international legal showdown with Beijing.”). In reality, [the report](#) did not make specific judgment on China’s nine-dashed claim per se, but did make a general assertion that any maritime claim should be derived from land features. See p. 70 of report (emphasizing “that under international law, maritime claims in the South China Sea must be derived from land features. Any use of the “nine dash line” by China to claim maritime rights not based on claimed land features would be inconsistent with international law. The international community would welcome China to clarify or adjust its nine-dash line claim to bring it in accordance with the international law of the sea.”).

support of its [arbitrational proceedings](#) against China. In [the Shangri-La forum](#), Mr. Abe called China's "9-dashed" line a threat to the Freedom and peace.

Most of the accusations are of course non-sense, with most "legal" claims more political than legal in nature. In this article, I will debunk the many misconceptions and rhetoric surrounding China's claims, clarify and demystify China's claims, as well as give reasons why the arbitration case brought by Philippines ought to be dismissed.

## Background

China's so-called "9-dashed" (originally "11 dashes") was [first promulgated by R.O.C. in 1947](#) and made officially public in 1948. The original "11 dashes" were changed from "11 dashes" to "9 dashes" after the P.R.C. and Vietnam negotiated a settlement in 1953 over the Beibu Bay area. The Chinese government based its S. China Sea claims on historical title dating back to the Xia dynasty (21st - 16th B.C.).<sup>3</sup> According to the Chinese government, China was the first to discover S. China Sea and its various island groups, the first to name, map, study, use, and patrol islands and surrounding seas, the first administration and to exert jurisdiction over the area, and, after Japan had occupied the S. China Sea in WWII, the sole government to accept Japan's surrender and retake possession over the region.<sup>4</sup>

The Philippines first began formally claiming islands within the S. China Sea in 1978 through the issuance of [Decree 1596](#).<sup>5</sup> Categorically rejecting China's historical claims, the Philippines government advances two legal bases for its claims.<sup>6</sup> First, it bases its claims on the contention that most of the land features in the S. China Sea were in fact "newly discovered" and *terra nullius*. Second, it argues that because no nation has any historical claims in the S. China Sea, and to the extent that its EEZ/ECS (i.e. a 200 nautical mile exclusive economic zone (EEZ) and an extended continental shelf (ECS) up to 150 NM further provided by the UNCLOS) do not overlap with others, Philippines has preferential right over all others – including China – to claim islands, rocks, reefs, shoals, etc. within its EEZ/ECS.<sup>7</sup>

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<sup>3</sup> See, e.g., [http://www.fmprc.gov.cn/mfa\\_eng/topics\\_665678/3754\\_666060/t19231.shtml](http://www.fmprc.gov.cn/mfa_eng/topics_665678/3754_666060/t19231.shtml), [http://usa.chinadaily.com.cn/china/2015-10/30/content\\_22328967.htm](http://usa.chinadaily.com.cn/china/2015-10/30/content_22328967.htm)

<sup>4</sup> See, e.g., <http://www.chinausfocus.com/peace-security/is-the-nine-dash-line-in-the-south-china-sea-legal/> ; "International Law and the Dispute over the Spratly Islands: Whither UNCLOS?", XAVIER FURTADO Contemporary Southeast Asia, Vol. 21, No. 3 (December 1999), pp. 388-90 (including comment by Zhou En-lai, then PRC's foreign minister, responding to the draft of the San Francisco Treaty, outlining PRC's position on the S. China Sea).

<sup>5</sup> See, e.g., FURTADO, p. 392 ("It was not until 1978 that the Philippine Government laid a formal claim to these islands through the issuance of Decree 1596.")

<sup>6</sup> See, e.g., FURTADO, p. 392.

<sup>7</sup> See Carpio's 2014 speech, pp.3-10; <http://www.chinausfocus.com/peace-security/interpreting-the-u-shape-line-in-the-south-china-sea/>

## Is China Running from the Court?

One of the most glaring misconceptions tossed about is the notion that China must be running away from the law when China refuses to submit to arbitration. The reason that China has not submitted is because it believes the issues at dispute between Philippines and China to be *political* and not *legal*.

To see why China has been so adamant, a brief review of Philippines's claims is helpful.<sup>8</sup> In a [speech given in 2014](#), Justice Carpio outlined Philippines's case as follows:

*The Philippines's arbitration case against China is solely a maritime dispute and does not involve any territorial dispute. The Philippines is asking the tribunal if China's 9-dashed lines can negate the Philippines's EEZ as guaranteed under UNCLOS. The Philippines is also asking the tribunal if certain rocks above water at high tide, like Scarborough Shoal, generate a 200 NM EEZ or only a 12 NM territorial sea. The Philippines is further asking the tribunal if China can appropriate low-tide elevations (LTEs), like Mischief Reef and Subi Reef, within the Philippines's EEZ. These disputes involve the interpretation or application of the provisions of UNCLOS.*

*The Philippines is not asking the tribunal to delimit by nautical measurements overlapping EEZs between China and the Philippines. The Philippines is also not asking the tribunal what country has sovereignty over an island, or rock above water at high tide, in the West Philippine Sea.*

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## Adjudicating China's Historical Claims under the UNCLOS

The first claim is clearly meant to be a dagger directed at China's historic claims in the S. China Sea, pitting China's historic "9-dashed" line vs. Philippines's EEZ/ECS. Traditionally, Chinese scholars have argued that China's claims represented "historic waters," a position that the "Lee Teng-hui" administration of the R.O.C. also affirmed in a 1993 Policy Guideline paper. In his 2014 speech on the UNCLOS case, however, Justice Carpio spent almost his entire speech<sup>9</sup> discrediting China's historic claims one way or another, calling it "ridiculous" and "preposterous."<sup>10</sup> Even if China did have a historical claim, Justice Carpio argues, they are no longer valid since the UNCLOS does not recognize "historic title" outside the specific cases of "historic bays" and "territorial seas."

The issue of the juridical regime of "historic waters" [has actually been raised several times](#) since the very first United Nations Conference on the Law of the Sea. In 1962, the Secretariat even produced [a preliminary study](#) on the topic. By the 19<sup>th</sup> session (1967), however, negotiators decided to [drop efforts](#)

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<sup>8</sup> Because the formal documents Philippines has filed with UNCLOS is [under seal and still unavailable to the public](#), I will refer to the many statements Philippine officials – most notably [Justice Antonio T. Carpio](#) of the Philippines Supreme Court – have publicly articulating Philippines's legal positions.

<sup>9</sup> See Carpio's 2014 speech, pp. 10-17. The entire speech is merely 21 pages long.

<sup>10</sup> See Carpio's 2014 speech, pp. 11 & 12.

[to codify the regime](#) due to its complexity, “considerable scope,” and “political problems.”<sup>11</sup> It was feared that continued efforts would “seriously delay the completion of work on the important topics already under study.”

Since the purpose of the UNCLOS has always been about the commercial and economic sharing of maritime resources, and not about imposing a framework for solving politically sensitive or sovereignty disputes, the drafters finally found it appropriate to leave the matter alone.

Justice Carpio likes to argue that the UNCLOS “kills”<sup>12</sup> categorically all historical claims but the truth is that not only does the UNCLOS leave the issue of “historic title” alive and well, but also guarantees all signatories the right to opt out of arbitration over any “disputes involving historic title.”

The I.C.J. has also affirmatively confirmed the existence of “historic water.” While there may not exist a precise specific definition for “historic water,” “historic water” generally refers to “‘historic titles’ or historic reasons in a way amounting to a reservation to the [traditional] rules set forth. [T]he matter continues to be governed by general international law ... which does not provide for a single ‘régime’ for ‘historic waters’ or ‘historic bays’, but ... for a particular régime for each of the concrete, recognized cases of ‘historic waters’ or ‘historic bays’.”<sup>13</sup>

The I.C.J. has never taken aside between major powers over long, bitter disputes over historic title. A commentator even went as far as to note that no I.C.J. panel will have the gumption to strip title to even minor islands from a major power like Japan.<sup>14</sup> If so, I’d like to see if any panel will have the gumption to strip China’s title to a much broader area, based on a much longer history.

Philippine’s recent strategy to [adjudicate China’s historic claims within the framework of the UNCLOS](#) appears especially disingenuous given that both the Philippines and China have always understood that the UNCLOS did not infringe or modify their sovereignty claims in the S. China Sea. In its ratification statements, for example, the Philippines declared that the UNCLOS did not prejudice its “sovereign

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<sup>11</sup> [http://legal.un.org/ilc/summaries/8\\_4.htm](http://legal.un.org/ilc/summaries/8_4.htm)

<sup>12</sup> <http://www.imoa.ph/press-releases/justice-antonio-t-carpio/> (“China’s 9-dashed line claim simply cannot co-exist with UNCLOS – one kills the other. To uphold China’s 9-dashed line claim is to wipe out centuries of progress in the law of the sea since the time of Grotius. To uphold China’s 9-dashed line claim is to embolden other naval powers to claim wholesale other oceans and seas, taking away the exclusive economic zones and extended continental shelves of other coastal states.”); Carpio’s 2014 speech, pp. 8 & 10.

<sup>13</sup> See Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (Judgment) [1992] ICJ Reports 351 at 588-89 citing Continental Shelf (Tunisia/Libyan Arab Jamahiriya) I.C.J. Reports 1982, available at <http://www.icj-cij.org/docket/files/63/9501.pdf>, p. 74. <http://www.icj-cij.org/docket/files/63/9501.pdf>

<sup>14</sup> See, e.g., <http://www.eastasiaforum.org/2013/02/17/japan-china-relations-a-grand-bargain-over-the-senkaku-diaoyu-islands/> (Even if Japan does not have “a water-tight case” to Diaoyu islands, “Japan can confidently assert that, in displaying peaceful and continuous exercise of jurisdiction, it has assiduously protected its claim of evidence of title. Besides, it may be reasonably sure that no international court will have the gumption to strip a sovereign of (disputed) territory that it has administered from a point of time that predates the court’s establishment itself.”)



rights” to claim a vast, “picture frame” body of water surrounding its territory as its “internal waters,” a right defined in “Treaty of Paris” and derived from *historic title* dating back to its colonial era.<sup>15</sup> The UNCLOS also did not prejudice its “sovereignty ... over ... territory ... such as the Kalayaan Islands[] and the waters appurtenant thereto ... [,] sovereignty ... over ... [its archipelagic] sea lanes” or its full, complete “authority to enact legislation to protect its sovereignty, independence and security.” Further, Philippines’s “submission for peaceful resolution ... of disputes under article 298 shall not be considered as a derogation of Philippines sovereignty.”

China for its part “reaffirm[ed] its sovereignty over all its archipelagos and islands” and associated “territorial seas and the contiguous zones” and in 2006 exercised its right not to accept any binding arbitration process as allowed under Article 298.

Some may wonder why China refuses to submit to arbitration when some nations – such as Thailand and Cambodia over the Preah Vihear Temple and surrounding areas<sup>16</sup> (or Peru and Chile over their maritime boundaries<sup>17</sup>) – have. In each of these other cases, there existed substantial shared political understanding and/or historical narratives from which a Tribunal could tease out a “legal framework” on which to adjudicate. In each case, an explicit political decision had been taken at some point in time to submit voluntarily to arbitration. The same cannot be said of the current disputes.

However “ridiculous” or “preposterous” Philippines officials may publicly express China’s historical claims to be, Chinese officials no doubt privately feel similar about Philippines’s history. First, there is the “[comic opera](#)” of a [Tomas Cloma](#) – a businessman who claimed to have “discovered” the Spratlys in the 1950s, who subsequently proclaimed the Spratlys to be *res nullius* and claimed it for “Freedomland” – later renamed Colonia – and who later “sold” all his titles to the Philippines government (for 1 peso in 1974 after being imprisoned for publicly impersonating to be an “Admiral”<sup>18</sup>). Then, there is Philippines’s

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<sup>15</sup> See, e.g., [http://mercury.ethz.ch/serviceengine/Files/ISN/27159/ipublicationdocument\\_singledocument/85ffbfef-7723-4725-a63c-d3de4a37d1d1/en/WP111.pdf](http://mercury.ethz.ch/serviceengine/Files/ISN/27159/ipublicationdocument_singledocument/85ffbfef-7723-4725-a63c-d3de4a37d1d1/en/WP111.pdf), p. 17-19 (good summary of Philippines’ controversial claims); [Philippines ratification statement #7](#) (“The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation.”)

<sup>16</sup> See ICJ’s [recent decision](#) as well as the Court’s original [1961 preliminary decision](#) regarding jurisdiction based on declarations bade by both countries to submit to jurisdiction.

<sup>17</sup> The court documents can be found [here](#). ICJ derived jurisdiction from Article XXXI of the American Treaty on Pacific Seulement (Pact of Bogotà) of 30 April 1948 explicitly referring to jurisdiction to the ICJ. See [Peru memorandum filed 2009-03-20](#), p. 2 for relevant passages of the treaty.

<sup>18</sup> See, e.g., <http://opinion.inquirer.net/6789/the-spratlys-marcos%E2%80%99-legacy-or-curse> (“In 1974 Marcos threw Cloma in a Camp Crame cell, on grounds of “usurpation of authority” – his drinking buddies at the National Press Club (he wrote for the Manila Bulletin’s shipping section) called him “Admiral.” ... He was released several months later when he turned over all claims to the islands under a “Deed of Assignment and Waiver of Rights” to the Marcos government –for one peso. Then in 1978, basing his claim on Cloma’s discovery of the islands, Marcos formally annexed the archipelago and made it a municipality of Palawan through Presidential Decree No. 1596.”); <http://archive.today/7Kmk8> (“In the Philippines, the Spratly Islands came to prominence when, in 1956, a successful lawyer-businessman, known to many as ‘Vice-Admiral’ Tomas Cloma, Sr., issued an open notice to the world about his claim to the group of islands, islets, coral reefs, shoals, and sand cays comprised within what he called Freedomland and the nearby seven-island group, the Spratly islands. ... Fondly called by friends and admirers

ensuing joining the S. China Sea land grab fray in the 1970's based on what the Philippines now concedes to be a "defunct" title<sup>19</sup> from Tomas Cloma.

From China's perspective, it is truly incomprehensible how the Philippines can in good faith declare the Spratlys – long documented, charted and claimed by China (and perhaps Vietnam) – to be *terra nullius*. It is equally baffling how the Philippines can in good faith claim the whole of Spratlys after the U.S. had explicitly stated to the Philippines in 1946 at the turn of Philippines's independence that no part of the Spratlys was Philippines territory.<sup>20</sup>

In bringing a case against China in which "historic title" takes front and center stage, the Philippines is asking a UNCLOS tribunal to raise *sua sponte* issues that were not only never negotiated but that were explicitly dropped in the drafting of the UNCLOS, to articulate a judicial regime that had escaped the grasp of thousands of legal experts working across two and a half decades through some 15 convention sessions, to engage in a wild goose chase going back thousands of years over China's historical title applying today's International norms, and – based solely on the "wisdom" of five men's sense of politics, history, and equity – to pronounce a resolution that is final, just, and legitimate!<sup>21</sup>

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as 'Admiral', Tomas Cloma's important role in contemporary history, came when in one of his fishing expeditions in the later 1940s, he 'discovered' a batch of uninhabited islands and newly emerged reefs just off Palawan in the South China Sea. ... In 1972, when Martial Law was declared in the Philippines, 'Admiral' Tomas Cloma was imprisoned for four months for 'impersonating a military officer by being called an 'admiral'."

<sup>19</sup> See, e.g., [http://en.wikipedia.org/wiki/Tom%C3%A1s\\_Cloma](http://en.wikipedia.org/wiki/Tom%C3%A1s_Cloma) ("There are Philippine claims that they acquired the territory through that document. However the fact is that from August 1974, Cloma no longer had any territorial or sovereign rights to convey.[7] In 2014 The Philippines sought adjudication of territorial dispute with China at the International Court of Arbitration.[8] In its pleadings, the Philippines abandoned efforts to assert succession to the Cloma Claim, and instead asserted a 200-mile territorial claim under EEZ Law of the Sea. As a consequence, Colonia is now the only successor claimant to the Cloma territory.[9]")

<sup>20</sup> [http://en.wikipedia.org/wiki/Territorial\\_disputes\\_in\\_the\\_South\\_China\\_Sea#cite\\_ref-ed.\\_Kivim.C3.A4ki\\_2002\\_45-1](http://en.wikipedia.org/wiki/Territorial_disputes_in_the_South_China_Sea#cite_ref-ed._Kivim.C3.A4ki_2002_45-1), referencing [http://books.google.com/books?id=CNVf9R\\_L5FAC&pg=PA11#v=onepage&q&f=false](http://books.google.com/books?id=CNVf9R_L5FAC&pg=PA11#v=onepage&q&f=false).

<sup>21</sup> Cf., see, e.g., Historic Bays in International Law - An Impressionistic Overview, by L.F.E. Goldie, pp. 215-219, available at <http://surface.syr.edu/cgi/viewcontent.cgi?article=1166&context=jilc> (explaining that the reason that the drafters of the various of UNCLOS never included substantive definitions and rules on historic title was because of the "difficulty in reaching a consensus for casting into binding, indeed mandatory language, the specific international law rules governing the topic" and of the "political problems which could not be resolved by the purely juridical ... or by other entirely objective and equally excellent scientific expositions. ... [T]he International Law Commission and the two Conferences were unable to strike a satisfactory balance between the interests of states with authentic claims to adjacent sea areas based on long usage, and those of states that opposed particular claims to historic bays which their neighbors asserted, or states that in general imposed strict standards for the recognition of historic rights in order to vindicate the freedom of the seas and oppose, as a matter of principle, the facilitation of enclosures in ocean regions. ... [A]fter two studies by the United Nations Secretariat and three United Nations Conferences on the Law of the Sea, the world seems as far as ever from finding a universally acceptable definition of the concept.")

The closer one looks, the more Philippines's arbitration looks to be more a part of a public relations stunt<sup>22</sup> than a sincere effort rooted in law to resolve disputes. No one should accuse China of running away from the Law; it is running away from a circus!

### **Watering down China's Historic Title**

To get around some of the inherent difficulties of trying to adjudicate China's "historic title," some, including Justice Carpio, have also tried to downplay China's historical claims by analogizing it to be more like "historical rights" (representing the traditional right of peoples to access resources in an area) than "historic title" (representing the historical rights of sovereigns to exert jurisdiction over an area). According to this argument, when nations accept the various new "sui generis" the UNCLOS provided, nations should take these new rights and disavow their old "historical rights" as part of a total UNCLOS "package."

A problem with applying this argument to China is that China's claims have never been limited the traditional rights of the Chinese people to fish in or obtain minerals from the S. China Sea; they broadly encompass Chinese rulers' right in asserting jurisdiction the area historically. A second problem is that China never got any new "sui generis" rights from the UNCLOS. For centuries before the UNCLOS was drafted, before modern notions international law was even formed, China had already been exploiting the S. China Sea. A final problem is that the very notion that UNCLOS categorically "extinguished" all "historical rights" it itself presumptuous. The text of the UNCLOS is actually silent about "historic rights," neither declaring nor rejecting them. Many signatories have explicitly negotiated to honor each other's "historic rights" within their EEZ,<sup>23</sup> and UNCLOS Tribunals continue to take into account different nations' claims to "historic rights" – albeit to varying degrees – when delimiting maritime boundaries.<sup>24</sup>

### **Adjudicating China's EEZ vs. Others' EEZ under the UNCLOS**

But even if all of China's historic claims were rescinded, none of Philippines's claims would appear to be justiciable in a UNCLOS Tribunal. The reason is not surprising. The UNCLOS granted wholesale new sui generis maritime rights over vast portions of oceans to coastal states – oceans that used to represent the "common heritage of mankind." However, the UNCLOS does not compel any signatory to give up what it considered to be its own – whether it be rocks, islands or waters – in exchange for being a signatory of the UNCLOS. Consequently, the UNCLOS contains little that prescribes how political disputes over islands and rocks or disputes over historic boundaries of water are to be resolved, much less imposed and enforced.

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<sup>22</sup> See, e.g., [http://www.chinadaily.com.cn/world/2014-04/01/content\\_17395448.htm](http://www.chinadaily.com.cn/world/2014-04/01/content_17395448.htm), <http://thediplomat.com/2014/04/the-philippines-unclos-claim-and-the-pr-battle-against-china/>

<sup>23</sup> See e.g. [http://cil.nus.edu.sg/wp/wp-content/uploads/2011/12/Beckman\\_MIMA\\_SCS\\_Conference\\_12-13\\_Dec\\_2011\\_draft\\_10\\_Dec1.pdf](http://cil.nus.edu.sg/wp/wp-content/uploads/2011/12/Beckman_MIMA_SCS_Conference_12-13_Dec_2011_draft_10_Dec1.pdf), note 26 and surrounding texts.

<sup>24</sup> See e.g. [http://cil.nus.edu.sg/wp/wp-content/uploads/2011/12/Beckman\\_MIMA\\_SCS\\_Conference\\_12-13\\_Dec\\_2011\\_draft\\_10\\_Dec1.pdf](http://cil.nus.edu.sg/wp/wp-content/uploads/2011/12/Beckman_MIMA_SCS_Conference_12-13_Dec_2011_draft_10_Dec1.pdf) pp. 9-10.



## China's "9-dashed" Line

Consider Justice Carpio's first claim on China's "9-dashed" line. China officially affirmed its 2009 [submission to the UNCLOS commission regarding the limits of the continental shelf](#) that its "9-dashed" line is independently cognizable as China's EEZ/ECS line.<sup>25</sup> Without historical references, Justice Carpio's first claim would degenerate trivially into what happens when one nation's EEZ/ECS intersect another's. Unfortunately, the UNCLOS provides no answer since the UNCLOS neither prescribes precedential rights nor boundary rights when maritime boundaries overlap.

The Philippines might call for the Tribunal to assess independently China's "9-dashed" line – i.e. to assess how much overlap China's maritime zones can legitimately overlap that of Philippines. But given the fact that sovereignty of many islands is disputed and that the UNCLOS does not prescribe how island disputes are resolved, that may be easier said than done.<sup>26</sup> Recently, scholars Robert Beckman and Clive Schofield [argued](#) that even were China to limit its EEZ/ECS claims to those derivable from just the 12 largest islands in the Spratlys – and even were China to accept an "equidistant line/median" delimitation<sup>27</sup> as the starting point of negotiations – the loss to China's maritime claims would be "minimal." So unless the island disputes are settled in a way that is completely prejudicial to China's interests, there most likely will remain large overlaps in maritime claims between China and Philippines.

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<sup>25</sup> In the document, China declared "indisputable *sovereignty* over the islands in the South China Sea and the adjacent waters" and "*sovereign rights and jurisdiction* over the relevant waters as well as the seabed and subsoil thereof," without making any reference to "historic title." The language "sovereignty" is a term of art used in the UNCLOS for claims over land features and surrounding territorial (see, e.g., Articles 1-3), and "sovereign rights and jurisdiction" a term of used for claims over EEZ/ECS (see, e.g., Articles 55, 56, 59, 76, 77, 242, and 246). Hence the document can be read to mean that historical claims aside, China believes its "9-dashed" line is also independently cognizable under the UNCLOS.

<sup>26</sup> See, e.g., "China, UNCLOS and the South China Sea," Robert Beckman, Asian Society of International Law August 2011, available [here](#) ("UNCLOS has no provisions on how to determine sovereignty over offshore islands. Therefore, UNCLOS is not directly relevant to resolving the dispute over which State has the better claim to sovereignty over the islands."); FURTADO, p. 387 ("UNCLOS, of course, does not seek to resolve territorial disputes."); UNCLOS Article 298 (explicitly excluding "any unsettled dispute concerning sovereignty or other rights over continental or insular land territory" from conciliation proceedings); Carpio 2014 speech ("UNCLOS governs maritime disputes on overlapping maritime zones like overlapping territorial seas, EEZs and ECSs. UNCLOS does not govern territorial disputes, which are sovereignty or ownership issues over land territory like islands or rocks above water at high tide.") Carpio [2013 speech](#) ("UNCLOS governs only maritime entitlements, maritime space and maritime disputes. ... UNCLOS does not govern territorial sovereignty disputes over land or land features in the oceans and seas."). Article 298 also exempts ...

<sup>27</sup> The equidistance principle has been used in many arbitration cases, but does not represent customary international law. See, e.g., North Sea Continental Shelf (Federal Republic of Germany/Netherlands), I.C.J. Reports 1969, [summary of judgment](#) ("The dispute ... related to the delimitation of the continental shelf between the Federal Republic of Germany and Denmark on the one hand, and between the Federal Republic of Germany and the Netherlands on the other. The Parties asked the Court to state the principles and rules of international law applicable, and undertook thereafter to carry out the delimitations on that basis. ... The Court rejected the contention of Denmark and the Netherlands to the effect that the delimitations in question had to be carried out in accordance with the principle of equidistance as defined in Article 6 of the 1958 Geneva Convention on the Continental Shelf, holding: - that the Federal Republic, which had not ratified the Convention, was not legally bound by the provisions of Article 6; - that the equidistance principle was not a necessary consequence of the general concept of continental shelf rights, and was not a rule of customary international law.").

Island disputes aside, China's invocation of Article 298 also separately prevents any Tribunal from independently assessing China's "9-dashed" line. Among the rights Article 298 guarantees all signatories is the right to opt out of binding arbitration over "disputes concerning the interpretation and application of" all rules and laws "relating to sea boundary delimitations" "between States with opposite or adjacent coasts." The scope of the exemption is truly comprehensive, with all rules and laws broadly prescribed to include "international conventions" (including the UNCLOS), "international customs," "general principles of laws recognized by civilized nations," past "judicial decisions" and relevant "teachings of the most highly qualified publicists of the various nations." (Article 298, referencing Articles 15, 74, 83, referencing Article 38 of the Statute of the International Court of Justice).

Article 298 gives such a broad exemption because the drafters of the UNCLOS understood that arbitration over sea delimitation under the UNCLOS can be more about politics than law. If a Tribunal gets to adjudicate issues relating to Philippines's maritime border disputes with China piecemeal, right up to, for example, delimiting "by nautical measurements" their maritime borders, China would be entangled in the very type of politicized arbitration it is supposed to be freed.

### **Claims Whether Rocks like "Scarborough Shoal" Generates 200 NM EEZ**

To see how political sea delimitation under the UNCLOS can be, one needs only to look to Justice Carpio's second claim on whether "rocks" like the "Scarborough Shoal" generates a 200 NM EEZ. Justice Carpio has long argued that none of the islands China claims in the S. China Sea generates a 200 NM EEZ and that the only legitimate baseline China has for claiming an EEZ/ECS in the S. China Sea is Hainan island and China's mainland coastlines. The claim over the EEZ/ECS of "Scarborough Shoal" thus represents only one of many claims Philippines can assert against China – over almost every single land feature claimed by in the S. China Sea.

Disputes over whether an "island" can give rise to an EEZ/ECS center on the application and interpretation of Article 121, a provision notoriously known for its ambiguities. Even Justice Carpio's clear admonition to China that "islands" "which cannot sustain human habitation or economic life of their own" cannot give rise to an EEZ/ECS is at best an oversimplification.

Article 121 is only around 80 words long, but however one reads it, one will not read anywhere of it stipulating whether "islands" "which cannot sustain human habitation or economic life of their own" can or cannot give rise to an EEZ/ECS. Article 121 only stipulates that "rocks which cannot sustain human habitation or economic life of their own" cannot give rise to an EEZ/ECS. But without providing any guidance on what "rocks" – as opposed to "islands" – might be, it leaves open-ended whether or at least how the conditions of human habitability and economic viability might apply to UNCLOS defined regimes of "islands" and "low-tide elevations."

It might at first seem perplexing that such a crucial passage of the UNCLOS is written in such a cryptic and ambiguous manner until one realizes that many important ambiguities were intentionally written into the UNCLOS.<sup>28</sup> Because the UNCLOS was drafted through a consensual process and ratified as a

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<sup>28</sup> See, e.g., <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?id=27159> and <http://www.ukessays.com/essays/law/unclosed-has-not-entirely-addressed-the-problem-of-delimitation->

package – with no room for signatories to make individual reservations – the drafters inevitably resorted to ambiguous languages when disagreements could not be resolved, allowing the UNCLOS to mean different things to different signatories to facilitate its drafting and later its wide adoption. Such was the case with Article 121.

Besides the issue of when “islands” become “rocks,” Article 121 is also cryptically ambiguous about when “rocks” become “rocks which cannot sustain human habitation or economic life of their own.” For example, does “human habitation” require a historic population? If not, can the invention of new technologies – such as desalination technology – change the meaning of what it means to “sustain human habitation”? Does “economic life” require historic economic activities? If so, can historic records of continual, regular fishing and mining in the vicinity of an archipelago prove that the archipelago can sustain “economic life of their own”? If not, does discovery and new methods of extracting oil change the meaning of what it means to “sustain economic life”? Must “islands” or “rocks” “sustain human habitation or economic life of their own” individually or can an archipelago do so in the aggregate?

In his 2014 speech, Justice Carpio mocked China’s position that Taiping Island (Itu Aba) generated an EEZ while Diaoyu Dao (Okinotorishima) in the E. China Sea (in a rare instance where both China and Japan agrees) did not even though Diaoyu Dao is almost 10 times the size of Taiping Island. If Taiping Island ever could support “human habitation,” so could Diaoyu Dao. Such folly at mockery arise from a basic misunderstanding that there exists a universal regime of “island.” Given the explicit ambiguities of Article 121, any attempts to promote a specific “interpretation” of Article 121 – as Philippines is trying to do – becomes an inherently political, extra-legal exercise. It would be more in tune with the spirit of the UNCLOS to encourage disputants in each conflict work out amongst themselves specific regimes that work on a case by case basis instead.

Justice Carpio also referred to the fact that neither Malaysia nor Vietnam asserted a continental shelf from the Spratly islands in their [joint submission in 2009 regarding the limits of their continental shelves](#). Conveniently left out of Justice Carpio’s argument however is the fact it happens to be in every disputants’ advantage save China’s to take such a position<sup>29</sup> and that both Vietnam and Malaysia explicitly conceded in their joint submission of “unresolved disputes in the Defined Area” and of their “wish to assure the Commission, to the extent possible, that this joint submission will not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts.”

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[international-law.php](#). See also <http://islandstudies.oprf-info.org/readings/b00003/> (discussing ambiguities surrounding island regimes defined in Article 121); See, e.g., [http://mercury.ethz.ch/serviceengine/Files/ISN/27159/ipublicationdocument\\_singledocument/85ffbfef-7723-4725-a63c-d3de4a37d1d1/en/WP111.pdf](http://mercury.ethz.ch/serviceengine/Files/ISN/27159/ipublicationdocument_singledocument/85ffbfef-7723-4725-a63c-d3de4a37d1d1/en/WP111.pdf) (discussing controversy surrounding when to use straightline baselines); [https://www.academia.edu/2062121/The\\_South\\_China\\_Sea\\_Dispute\\_Rising\\_Tensions\\_Increasing\\_Stakes](https://www.academia.edu/2062121/The_South_China_Sea_Dispute_Rising_Tensions_Increasing_Stakes) (discussing controversy surrounding when to use straightline baselines).

<sup>29</sup> <http://cil.nus.edu.sg/wp/wp-content/uploads/2013/04/Session-6-Elferink-Do-the-Coastal-States-in-the-SCS-have-a-Continental-Shelf-Beyond-200nm.pdf> (noting that if the UNCLOS is interpreted such that “200-nautical-mile zone does not take precedence over continental shelf beyond that distance” (slide 16) and that “Islands likely to receive no weight in a delimitation involving the coasts surrounding the South China Sea” (slide 17) then “Delimitation in accordance with law factor that would seem to be to the advantage of all states involved save China” (slide 18))

The Philippines has been opportunistically pouncing on various political stances by nations to pronounce the emergence of new customary norms that are to the detriment to China. But as the I.C.J. once observed, for any practice to rise to the level of “customary law,” its acceptance must be “both extensive and virtually uniform” among all States, “including ... States whose interests are specially affected.”<sup>30</sup> Given China’s long standing involvement in the S. China Sea, Philippines’s attempt to unilaterally impose new “customary law” without China’s participation simply will not work.

In his 2014 speech, Justice Carpio also argued that where China and Philippines’s maritime boundaries overlap, they need to settle their overlapping EEZ/ECS in accordance with “general principles of equity,” such as proportionally based on the length of various island’s coastlines or land area size. However, while China is committed to achieving equitable delimitations of maritime boundaries with its neighbors (see, e.g., its UNCLOS Statements), it needs not submit to Philippines’s notions of equity that takes into account only (select) features of geography and that omits any considerations of history.

Rather than binding arbitration, the appropriate procedure to elicit and scrutinize China’s “9-dashed” line and baselines under the UNCLOS is through *exchange of views* (Article 283) and conciliation procedures (Articles 284, 298). (Article 286 actually requires every signatory the obligation to exchange views before proceeding to binding arbitration.) Through exchange of views, Philippines could have requested China to reveal exactly how its “9-dashed” line is derived under UNCLOS rules,<sup>31</sup> including appropriate baseline and other relevant information. Should disputes arise regarding China’s

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<sup>30</sup> According to the I.C.J. in the widely cited North Sea Continental Shelf Cases, [I.C.J. Reports 1969](#), p. 3, for a widely ratified convention to achieve the status customary international law, two conditions must be fulfilled. “Not only must the acts concerned amount to a settled practice, but they must also be such ... as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by consideration of courtesy, convenience or tradition, and not by any sense of legal duty.” Further, “[a]lthough the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law ... an indispensable requirement would be that within the period in question ... State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked ... and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”

<sup>31</sup> Philippines appears not to have done this. See, e.g., [http://www.bjreview.com.cn/world/txt/2014-04/21/content\\_614465\\_2.htm](http://www.bjreview.com.cn/world/txt/2014-04/21/content_614465_2.htm) (“Furthermore, the Philippines has failed to fulfill the obligation to exchange views with China on the disputes. Article 283 of the UNCLOS says that when a dispute arises between state parties concerning the interpretation or application of the convention, the parties shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means. And in accordance with Article 286 of the convention, if the Philippines fails to fulfill this obligation, it has no right to subject the disputes to compulsory procedures. In fact, the Philippines knows the importance of this obligation, and often regards diplomatic consultations on sovereignty disputes involving Huangyan Island and Meiji Reef as evidence that it has fulfilled the obligation. As previously mentioned, arbitration under the convention should not address any dispute concerning sovereignty over land territory. The Philippines also states explicitly in its notification and statement that it does not “seek in this arbitration a determination of which party enjoys sovereignty over the islands claimed by both of them.” It therefore has no reason whatsoever to use diplomatic consultations on sovereignty disputes as evidence of fulfilling the obligation to exchange views.”)

derivations – for example, if the baselines China uses included “rocks” like the “Scarborough Shoal,” or if China uses “straight baselines” where Philippines deems unwarranted – Philippines could compel China to participate in *conciliation procedures*.

Some may retort that even then, notwithstanding any conciliation results, China is still guaranteed to ultimately prevail by simply appealing to historic title to justify the sections of its “9-dashed” lines not derivable from UNCLOS baselines. But even getting China to elicit which sections of its “9-dashed” line is prescribed by the UNCLOS and only by reference to “historic title” is valuable. Philippines may wish for more, but because the UNCLOS is not a general framework for resolving sovereignty disputes, Philippines must directly negotiate with China.

### Claims over “LTEs”

Philippines’s claim over whether China can claim sovereignty over low-tide elevations (LTEs) also appear to be similarly weak. Under the UNCLOS, the rights explore, manage and exploit the seabed, ocean floor, and subsoil arise solely as part of a nation’s jurisdictional rights over an EEZ/ECS. Hence, whether China has any right over any of these LTEs under the UNCLOS would depend crucially on whether its final delimitation of maritime boundaries with Philippines’s by actual coordinates would encompass any of those LTEs. Ironically for the Philippines, given the fact that the Tribunal has been explicitly asked not to “delimit by nautical measurements” China and Philippines’s maritime boundaries, Philippines’s claim regarding China’s right to specific LTEs, including Mischief Reef and Subi Reef, would appear to be fundamentally impossible to adjudicate.

Further, while the UNCLOS does proscribe rights to LTEs under the regime of EEZ/ECS, it also does not prohibit nations from asserting rights over LTEs independent of EEZ/ECS, as Philippines claims. In 2001, six years after the UNCLOS had entered into force, the ICJ in the Qatar v. Bahrain judgement stated that, “International treaty law is silent on the question whether low-tide elevations can be considered to be ‘territory’. Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations.”<sup>32</sup>

The issue of LTE sovereignty in S. China Sea is made more complicated by the fact that the LTEs in the S. China Sea inevitably belongs to larger chains of archipelago over which sovereignty can undeniably be asserted under, and that at least one party – China (and arguably Vietnam, see below) – has had claimed over such chains over long periods of history.

Even if assuming *arguendo* that UNCLOS and customary International Law does not allow nations to appropriate LTEs today, there is still the issue of China’s historical titles to LTEs in the S. China Sea.

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<sup>32</sup> Qatar v. Bahrain, I.C.J. Reports 2001, pp. 101-102, para. 205. While another panel of judges in 2012 in another proceeding (Judgment in Nicaragua v. Colombia) would state that “low-tide elevations cannot be appropriated” (Nicaragua v. Colombia, I.C.J. Reports 2012, p. 641, para. 26), it did not point to any legal basis for this statement, or possible changes in International Law. It is important to note that under general international law, no tribunal has the power to make law. By corollary, no pronouncements of law by a tribunal *per se* should ever be considered precedential.



Long before the UNCLOS was ratified, many nations did claim title directly to the subsoil and sea bed of its continental shelf by fiat. In fact, that practice – exemplified by the U.S. in Truman Proclamation 2667 in 1945 – eventually became so widely accepted that it was formally acknowledged as accepted customary practice by the eighth edition of Oppenheim’s International Law published in 1955. Since China’s “9-dashed” line was declared in the late 1940’s, China certainly has a case arguing that it too holds leftover “title” over LTEs and even submerged reefs and subsoils from at least those days. China’s ratification of the UNCLOS would not have “extinguished” such titles since under the principles of “non-retroactivity of treaties,” codified in the Vienna Convention on the Law of Treaties of 1969, barring clear intent from China otherwise, China’s ratification would not retroactively make null or void its past claims and relationships.

The problem with even this claim against Chinese LTEs is that it is too premature. Until China is forced to delimit its boundaries in so prejudicial a way as to orphan a substantial number of its LTEs, China is unlikely to assert such titles. The titles are not relevant for

## **Inspecting China’s 9-Dashed Line under General International Law**

Of course International Law is not just about the UNCLOS, or what happens in an International Tribunal. In his 2014 speech, Justice Carpio argued that China’s “9-Dashed” is invalid under General International Law. Declaring that China’s claims is tantamount to making the S. China Sea a “Chinese Lake,”<sup>33</sup> Justice Carpio argued that general International Law recognized such claims only if they are accompanied by 1.) a formal announcement to the international community clearly specifying the extent and scope of the historical claims; 2.) effective exercise of sovereignty over the claimed waters 3.) continuously over a substantial of time; and 4.) recognition, tolerance or acquiesce by other states.

China’s claim fails all four conditions – miserably by Justice Carpio’s account. “China officially notified the world of its 9-dashed line claim only in 2009 when China submitted the 9-dashed line map to the United Nations Secretary General. Not a single country in the world recognizes, respects, tolerates or acquiesces to China’s 9-dashed line claim. China has never effectively enforced its 9-dashed line claim from the time of China’s domestic release of its 9-dashed line map in 1947 up to 1994 when UNCLOS took effect, and even after 1994 up to the present,” according to Justice Carpio.

### **S. China Sea as a Chinese Lake?**

A fundamental flaw with Justice Carpio’s argument is the absurdity of characterizing China’s historical claims as a claim to “interior waters.” I have not yet found any scholar, either inside or outside of China, who would seriously subscribe such a notion. No time in China’s history has China treated the S. China

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<sup>33</sup> See Carpio’s 2014 speech, pp. 9-10; <http://www.imoa.ph/press-releases/justice-antonio-t-carpio/> (“China’s 9-dashed line claim converts the South China Sea into an internal Chinese lake, allowing China to unilaterally appropriate for itself what belongs to other sovereign coastal states, in defiance of UNCLOS. In the apt words of the Director-General of the Maritime Institute of Malaysia, China’s 9-dashed line claim is ‘frivolous, unreasonable and illogical xxx by no stretch of the imagination can the South China Sea be considered by any nation as its internal waters or historic lake.’”).

Sea as its “internal waters.” Even when China possessed the world’s mightiest maritime fleet, Arab, South Asian, and South East Asian traders continued to roam freely the area.

In the modern era, China’s legal commitment to freedom of the seas in the S. China Sea also cannot be made any clearer through its ratification of the UNCLOS in 1982 and its signing of the “[Declaration on the Conduct of Parties in the South China Sea](#)” in 2002. Every time China has been asked to clarify its “9-dashed” line, China has assured that its claims do not hinder the freedom of navigation.<sup>34</sup> As a major trading power with no access to a blue water navy, China has more staked than perhaps any other nation in the world on Hugo Grotius’s notion of *Mare Liberum* (The Free Sea) to keep all the oceans and seas open for commerce. Justice Carpio’s hyping of Chinese claims of a “Chinese Lake” simply has no factual basis.

### Re-evaluating Justice Carpio’s “Interior Waters” Test

Even if one must apply Justice Carpio’s stringent “Interior Waters” Test to China’s historical claims, one ought to apply it at least with the right history, e.g. using the appropriate time frame! Contrary to Justice Carpio’s assertions, China’s historical claims do not date back to 1947, but to much earlier times. China’s 2009 [submission to the UNCLOS commission regarding the limits of the continental shelf](#) did not represent a formal announcement of historic title; it was merely a document China deposited in response to Vietnam’s and Malaysia’s joint submission regarding their the outer limits of the continental shelf as provided for under the UNCLOS<sup>35</sup>.

### Formal Declarations

To find China’s historical “announcements,” one must go back further in history. Chinese ships have long left markers, plaques, and memorials on shores across the S. China Sea. Many of these can still be found as relics today. It is true that the ancient Chinese were not necessarily saying “keep out,” this is “mine” because it was not their norm to do so. China did not assert jurisdiction by fiat or declarations (as nations do today), but cumulatively through regular, persistent, continuous patrols and surveillance spanning several dynasties, and later becoming the dominant exploiter of the area.

China did not formulate the notion of keeping others from claiming its maritime areas until the Europeans, during colonial times, began encroaching on Chinese activities and sovereignty. In 1883, when Germany began surveying Spratlys and Paracels, China protested and Germany withdrew. In 1884-5, when France began surveying Paracels, China too protested and France withdrew. Following

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<sup>34</sup> See, e.g., <http://books.google.com/books?id=45mcY5XoseMC&pg=PA65#v=onepage&q&f=false> (“In response to concerns expressed by the US State Department in May, 1995, the PRC Foreign Ministry Spokesman Chen Jian stated that China while safeguarding its sovereignty over the Nansha Islands, and its marine rights and interests, China will fulfill its duty of guaranteeing freedom of navigation and overflight in the South China Sea according to international law. China reiterated this position as recently as 21 June 2011.”). See also <http://www.scmp.com/comment/insight-opinion/article/1044729/china-isnt-seeking-limit-freedom-navigation-south-china-sea>; [http://www.chinadaily.com.cn/china/2012-06/04/content\\_15473024.htm](http://www.chinadaily.com.cn/china/2012-06/04/content_15473024.htm); [http://www.chinadaily.com.cn/china/2013livisiteasia/2013-10/10/content\\_17019063.htm](http://www.chinadaily.com.cn/china/2013livisiteasia/2013-10/10/content_17019063.htm)

<sup>35</sup> See Article 76, paragraph 8; [http://www.un.org/Depts/los/clcs\\_new/issues\\_ten\\_years.htm](http://www.un.org/Depts/los/clcs_new/issues_ten_years.htm) (“The decision provides that, for a State for which the Convention entered into force before 13 May 1999, the date of commencement of the 10-year time period for making submissions to the Commission is 13 May 1999.”); [Robert C Beckman Tara Davenport, “CLCS Submissions and Claims in the South China Sea,”](#) footnote 3 and surrounding texts;

China's loss in the Sino-French War and ceding a sizable amount of territory to the French, China persuaded France to jointly declare with China as part of the [Convention Concerning the Delimitation of the Border between China and Tonkin of 1887](#) that all "isles ... east of the meridian of 105° 43' longitude east of Paris" belonged to China.<sup>36</sup> In 1909, after finding that Japan had erected several buildings on Pratas Islands, China protested and Japan retreated.<sup>37</sup> Fearing further incursions, the Qing government organized a military expedition that same year to survey islands in the S. China Sea and to plant flags and markers.<sup>38</sup>

WWII would soon engulf Asia, with Japan formally annexing Korea in 1910 and invading China proper in 1931. Even then, a weakened and fractured China would continue to make formal declarations and announcements when others violated its historic titles. In 1927 when Japan claimed sovereignty over the Spratlys and Paracels, declaring them to be *terra nullius*, China protested. In 1931, when France followed suit and asserted sovereignty over parts of the Paracel islands (reinterpreting the line in the 1887 Convention to apply only within the Gulf of Tonkin), China too protested.<sup>39</sup> In 1946 after the conclusion of WWII, the R.O.C. would repel France's attempt to seize the Paracels and again sent ships

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<sup>36</sup> See, e.g., [http://en.wikipedia.org/wiki/Territorial\\_disputes\\_in\\_the\\_South\\_China\\_Sea#cite\\_note-Wortzel.2C\\_Higham\\_1999-32](http://en.wikipedia.org/wiki/Territorial_disputes_in_the_South_China_Sea#cite_note-Wortzel.2C_Higham_1999-32) ("The 1887 Chinese-Vietnamese Boundary convention signed between France and China after the Sino-French War said that China was the owner of the Spratly and Paracel islands."); <http://books.google.com/books?id=rFu-hR8msh4C&pg=PA180#v=onepage&q&f=false> ("China's claims to the [Xisha (Paracel) and Nansha (Spratly)] islands are based on historic usage by Chinese fishermen as early as 200 B.C.E. and on the 1887 Chinese-Vietnamese Boundary Convention."); <http://books.google.com/books?id=83BlxG7lg2cC&pg=PA76#v=onepage&q&f=false> ("The Chinese ... in 1887 ... sign[ed] a treaty that, among other provisions, apparently assigned the Paracel [Xisha] and the Spratlys [Nansha] to China."); FURTADO, p.? regarding The Convention Respecting the Delimitation of the Frontier Between China and Tonkin of 1887.

<sup>37</sup> See, e.g., <http://v.ifeng.com/news/world/2014005/01ca3d23-5910-4b18-aeae-cceacec9f81a.shtml> (about 8 minutes in); the Japanese government's wording of the dispute is interestingly captured in archive of this [Singapore newspaper article](#) announcing that Japan would retreat if China would prove ownership of island, provided Japanese citizens there are protected. Apparently China did, and Japan retreated.

<sup>38</sup> See, e.g., <http://v.ifeng.com/news/world/2014005/01ca3d23-5910-4b18-aeae-cceacec9f81a.shtml> (around 9:30 into video)

<sup>39</sup> See, e.g., <http://paracelspratlyislands.blogspot.com/2008/01/examine-chinas-claims.html> ("http://paracelspratlyislands.blogspot.com/2008/01/examine-chinas-claims.html"); <https://scholarspace.manoa.hawaii.edu/bitstream/handle/10125/2541/Vietnamese%20Claims%20to%20the%20Truong%20Sa%20Archipelago%20%5BEd.%20Spratly%20.pdf?sequence=1> ("The Convention specifically states that islands located to the east of this line belong to China and islands lying west of it belong to Annam," but the terminus of the red line was left undefined.[37] In his book *The Sino-Vietnamese Territorial Dispute*, Pao-min Chang made this analysis of the red line ambiguity: To terminate it at the Vietnamese coast would confine its applicability to the [Bac Bo] Gulf, or, in a more liberal sense, to the entire sea area off Vietnam . . . the second interpretation also allows one to apply the red line to all the islands in the seas off Vietnam.[38] It was the more liberal interpretation of the accords that the Chinese adopted and which gave rise to their claim of sovereignty over the Truong Sa. Following China's protest, France briefly engaged in diplomacy over the issue with Peking, but the effort did not produce a solution. Seven months later, the 1933 French expedition to the Truong Sa Archipelago was launched amid continued Chinese protests.[39] ");

to survey various islands in the S. China Sea and to plant markers and flags.<sup>40</sup> In 1947, wary of further French designs, a civil-war torn R.O.C. hastily declared its “9-dashed” line, officially publishing it in 1948.

Some have pointed out that China’s historical maritime claims could not be valid since before 1948 it had never delimited a maritime boundary. That is taking history out of context. The notion of demarcating maritime boundaries did not materialize until the latter part of the twentieth century.<sup>41</sup> Even on land, many political boundaries in Asia were not demarcated until the 20<sup>th</sup> century. People may argue about the “legal weight” of China’s historical declarations, but to say China never did formally announce its claims is to blatantly ignore history.

### **Effective control over a substantial amount of time**

Second, regarding the requirement that China needed to exercise *effective control continuously and over a substantial amount of time*, one also should not be limited only to the history from 1947 onward. While the notion of “control” – even that over land – today vs. that a century, two century, a millennia ago will necessarily be different, today, one can find administrative records and historical maps documenting China’s assertion of jurisdiction going back to at least the Yuan Dynasty. Since at least the Song Dynasty, China had regularly surveyed, charted, patrolled, administered, and exploited the S. China Sea.

Some – including Justice Carpio – have argued that China’s historical claims cannot be valid because some of China’s own documents appear to show that China did not consider the S. China Sea to be under its jurisdiction. In looking to historical claims, however, one should avoid taking specific “facts” out of context, at the expense of ignoring overwhelming trends. A privately published map, for example, should not be given the same weight in assessing areas of political “boundary” as say an official map published by the government. A map that focuses on land features and populated areas showing Hainan as southernmost feature of the Chinese world should also not be taken to trump another map from the same era that carefully charts trade routes, isles, rocks and fishing grounds in the S. China Sea showing the Spratlys as the southernmost feature of the Chinese world. The fact that China through its long history has enforced different policies in the S. China Sea – for example at times encouraging trade and at times even banning trade (but never fishing) – is also not inconsistent with China’s general historical claims to the area.

Where the issue of control does become difficult for China is in the 20<sup>th</sup> century. Not only did Japan seize control of the S. China Sea in WWII, different nations since the 1970’s have come to occupy various islands and reefs in the S. China Sea. Many appear to have accepted a consensus that possession equals sovereignty in the S. China Sea. The Philippines, for example, seem almost proud about beaching a WWII warship of Ren’ai reef (Ayungin Shoal) in 1999, stationing a small garrison aboard and keeping the

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<sup>40</sup> See, e.g., <http://v.ifeng.com/news/world/2014005/01ca3d23-5910-4b18-aeae-cceacec9f81a.shtml> (around 11 minutes into video)

<sup>41</sup> See, e.g. <http://uchicagogate.com/2014/02/06/so-long-and-thanks-for-all-the-fish-understanding-the-icj-ruling-on-the-chile-peru-border-dispute/> (“Maritime boundaries are notoriously tricky and their demarcation was largely ignored until the latter part of the twentieth century.”)

ship firmly stranded despite Chinese protests.<sup>42</sup> Vietnam has at times bragged about the number of land features it occupies in the S. China Sea. While this situation is not likely to change dramatically so long as China continues to [exercise restraint](#) and abide by its 1992 pledge not to use force to resolve disputes in the S. China Sea,<sup>43</sup> International Law must also not be myopic to China's bigger history. If International Law must deem possession – whether by Japan in WWII or others more recently – to be a more legitimate source of sovereignty than China's historical claims, then China – adhering to this “modern convention” – may have no recourse but to re-militarize its claims.

### **With recognition, tolerance or acquiescence by other states**

Finally, on the norm that historic title to “interior waters” must be asserted *with the recognition, tolerance or acquiescence by other states*, it is notable that no other powers (save possibly Vietnam) claim to have ever exerted jurisdiction or opposed China's jurisdiction in the S. China Sea before the 20<sup>th</sup> century. The fact that none of the disputed islands were included in any colonial transfer agreements and the fact that many disputants in the 1970's believed that the Spratly islands were only recently “discovered” corroborate this general state of affairs.

Vietnam represents a unique challenge to China's claim as the only other disputant to make a claim based on history. A review of Vietnam's claim to historic title however shows that Vietnam's claims may have arisen more out of historic opportunism<sup>44</sup> than fact. Vietnam claims that it exerted jurisdiction over the Paracels and Spratlys going back to as early as 1600's. But cross referencing Vietnam and China's records (by tidal descriptions, maps, etc.), it appears that Vietnam's earlier historical references of “Hoang Sa” (now Paracels) and “Truong Sa” (now Spratlys) actually referred to various off-shore islands, not to islands that are hundreds of nautical miles from its shores. In Western maps, what is known as the Paracels steadily migrated steadily northward and westward throughout the 1800's from off-shore locations along Vietnam's coast to the much larger and farther group of islands known today as the Paracels. Something similar appears to have happened in Vietnamese maps for “Hoang Sa” (“黄沙”) and “Truong Sa” (“长沙”).<sup>45</sup>

Even taking Vietnam's historical claims as facially valid, Vietnam cannot escape fact that for most of the last two centuries, until the 1970's, it either recognized or acquiesced to China's jurisdiction over the Paracels and Spratlys. By Vietnam's own admission, it had abandoned interest over Paracels and Spratlys for most of the 19<sup>th</sup> and 20<sup>th</sup> century.<sup>46</sup> As late as 1956, Deputy Foreign Minister Ung Văn Khiêm

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<sup>42</sup> See, e.g., <http://english.peopledaily.com.cn/90883/8265133.html>,

<http://english.peopledaily.com.cn/98649/8572620.html> and

<http://english.peopledaily.com.cn/90883/8582862.html>

<sup>43</sup> <http://english.sina.com/china/2012/0426/462194.html>

<sup>44</sup> At the 7th Plenary Session of the U.N. Assembly in 1951, Prime Minister Tran Van Huu of Vietnam had stated, ominously, "As we must frankly profit from all the opportunities offered to us to stifle the germs of discord, we affirm our rights to the Spratly and Paracel islands, which have always belonged to Vietnam."

<sup>45</sup> See, e.g., <http://v.ifeng.com/news/world/2014005/01ca3d23-5910-4b18-aeae-cceacec9f81a.shtml> (12:50 - 23:56 minutes)

<sup>46</sup> See, e.g., Furtado p. 391 (“The government in Hanoi argues that Vietnamese emperors had effectively administered the Spratly archipelago since the 1800s. ... While Hanoi concedes that it lost interest and failed to



of N. Vietnam declared that the Paracels and Spratlys were historically Chinese territory. In a diplomatic note in 1958, N. Vietnam affirmed its acceptance of China's declaration formally incorporating the Paracels and Spratlys as part of P.R.C. territory.<sup>47</sup> Some argue that N. Vietnam's statements in the 1950's had no "legal force" to confer "title" to China since N. Vietnam did not actually possess these islands at the time, and further since these statements were not made as part of any former treaty. From China's perspective, it does not need Vietnam to confer "title" that it never had. These references merely represent concurrent evidence corroborating Vietnam's historical acceptance of China's title.

An abundance of such references can be found right up to the mid 1970's,<sup>48</sup> including for example a statement in Vietnamese communist party's official newspaper on May 9, 1965 concerning U.S. declaration of a "theater of war" over Vietnam and surrounding regions (referring to the Paracels as Chinese territory), official maps published under Vietnam's Bureau of Survey and Cartography as late as 1972 (referencing the Paracels and Spratlys in Chinese names), official grade text books published by Vietnam's Education Press as late as 1974 (describing the Spratlys and Paracels as part of P.R.C. territory).<sup>49</sup>

China does not dispute that various nations are involved in sovereignty disputes in the S. China Sea. But the historical fact remains that none of today's disputants – Vietnam included – contested China's claims until the 1970's.<sup>50</sup> Many disputants today continue to refer to the open-ended nature of Japan's renouncement for a legal basis to assert their claims, but few bother to ask why the San Francisco Peace Treaty is relevant. Did Japan have a bona fide title to start with?

## Concluding Thoughts

From China's perspective, the core of today's disputes is not legal, but political, the genesis of which can be traced to the way WWII ended. At the conclusion of WWII, with China plunging into civil war, China became isolated. Neither the R.O.C. nor P.R.C., for example, would be invited to the San Francisco Peace Conference in 1952. When Japan renounced all claims to the Spratly and Paracel islands under the San Francisco Peace Treaty, it did so without designating any beneficiary.<sup>51</sup> Japan's renouncement –

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effectively administer the archipelago, it maintains that it regained its right ... upon independence from France when it inherited France's territorial holdings in the area.").

<sup>47</sup> See <http://la.china-embassy.org/eng/news/t1163381.htm> (Annex 3). See also, e.g., <https://scholarspace.manoa.hawaii.edu/bitstream/handle/10125/2541/Vietnamese%20Claims%20to%20the%20ruong%20Sa%20Archipelago%20%5BEd.%20Spratly%20.pdf>, [http://www.worldstatesmen.org/Paracel\\_Spratly.html](http://www.worldstatesmen.org/Paracel_Spratly.html).

<sup>48</sup> See, e.g., <http://la.china-embassy.org/eng/news/t1163381.htm> (Annex 4 and 5)

<sup>49</sup> [http://www.chinadaily.com.cn/opinion/2014-06/13/content\\_17584176\\_2.htm](http://www.chinadaily.com.cn/opinion/2014-06/13/content_17584176_2.htm) (in 1965, in response to a declaration of a "theater of war" by the US government over Vietnam, the Vietnamese government issued a statement on May 9, 1965, stating that US's inclusion of "the entire Vietnam, 100 nautical miles off its coasts as well as some waters of the territorial sea of China's Xisha Islands" as the "theater of war" for the US armed forces, constitutes a direct threat to the security of Vietnam and its neighboring country.)

<sup>50</sup> See, e.g., <http://www.chinausfocus.com/peace-security/interpreting-the-u-shape-line-in-the-south-china-sea/>

<sup>51</sup> In August 1951, Zhou En-lai had responded to the San Francisco Treaty this way: "In fact, the Paracel Archipelago and Spratly Island, as well as the whole Spratly Archipelago ... have always been Chinese territory. Though occupied for some time during the war of aggression unleashed by Japanese imperialism, they were taken over by

notwithstanding the *Potsdam and Cairo Declarations* – reveals a post WWII political environment whereby the major powers would openly disrespect China’s historical claims, creating the ideal cover for various disputants in the 1970’s to assert their own claims.

The argument that China’s historical “9-dashed” line must be illegal without others’ approval simply has no legal precedence. Just because N. Korea may not recognize S. Korea’s borders, for example, does not mean that it is “illegal” for S. Korea to enforce what it considers to be its borders. The U.S. position that China’s historical claims can only be limited to land features is also presumptuous. Whether China’s claim is legal or not depends on the precise bundle of rights asserted, not the extent of its “9-dashed” line. “Customary international law” has never been about black and white.

Consider Truman Proclamations 2667 and 2668, for example. In 1945, the U.S. declared by simple fiat that it exercised jurisdiction with respect to all “Natural Resources of the Subsoil and Sea Bed of the Continental Shelf” and “Coastal Fisheries in Certain Areas of the High Seas.” This still form the legal basis by which the U.S. claims much of its maritime resources today even though – at least when it was first declared – it was technically “illegal.” So even without the UNCLOS, China might legitimately argue that it too has the right under general international law to declare similar jurisdictions over underwater resources within its “9-dashed” line, as long as it takes care to note, as the Truman Proclamations did, that such assertion of “titles” would not in any way affect the freedom of navigation through the waters above.<sup>52</sup>

Even if China were to limit freedom of navigation somewhat within its “9-dashed” line – such as requiring prior notification for foreign military surveillance – it is not entirely clear whether such actions would contravene “customary international law.” In 1939, for example, to prevent the resupplying of Axis ships in South American ports, United Kingdom and the United States bilaterally declared the Panama Declaration of 1939 to establish a 200 nautical mile maritime zone of security and neutrality in which non Allied ships would not be allowed.<sup>53</sup> The idea of “200 nautical miles” associated with today’s EEZ came from this Declaration.

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the then Chinese government following Japan's surrender. The Central People's Government of the People's Republic of China declares herewith: The inviolable sovereignty of the People's Republic of China over Spratly Island and the Paracel Archipelago will by no means be impaired, irrespective of whether the American-British draft for a peace treaty with Japan should make any stipulations and of the nature of any such stipulations.” The above is as quoted in Furtado, p. 389-90.

<sup>52</sup> For additional examples of unilateral declarations and bilateral agreements asserting rights in submarine areas during the 1940s, see, e.g., Lauterpacht, H. 1950. Sovereignty over Submarine Areas. British Yearbook of International Law, London, Oxford Univ. Press. (1951): 379-383.

<sup>53</sup> See, e.g., <http://www.fao.org/docrep/s5280t/s5280t0p.htm> (“While some of the concepts expressed in the Truman Proclamation found their way into the Convention, the true parents of the exclusive economic zone concept were certain Latin American states. In 1947, the declaration made by the President of Chile on 23 June 7 and Decree 781 of 1 August by the Government of Peru established maritime zones of 200 miles. ... The source of the "mystical" 200-mile limit has recently been traced by Armanet. Although the motivation for the establishment of the zone was economic, Armanet suggests that the legal precedent was derived from a map in a magazine article discussing the Panama Declaration of 1939 in which the United Kingdom and the United States agreed to establish a zone of security and neutrality around the American continents in order to prevent the resupplying of

In 1960, Indonesia declared that “since time immemorial the Indonesian archipelago has constituted one entity,” it would consider all water ringed by straight lines connecting its outermost islands to be its “internal waters” that would be opened only to foreign ships in “innocent passage” – as defined by Indonesia.<sup>54</sup> Indonesia enacted its laws despite almost universal international condemnation.<sup>55</sup> After over two decades of intensive lobbying, Indonesia – with the support of fellow archipelago states (most importantly, Philippines) – would finally succeed in getting Indonesia’s notion archipelago waters included in the UNCLOS (observers have noted that the rules promulgated seemed to fit Indonesia’s and Philippines’ requirements exactly<sup>56</sup>). With the wide adoption of the UNCLOS, official diplomatic protests against Indonesia would cease,<sup>57</sup> although the meaning of what “innocent passage” means – a notion that was left ambiguous in the UNCLOS – within that regime is still widely disputed.<sup>58</sup>

In light of the various regimes of the seas that the community of nations has promulgated in the past, including the many *sui generis* regimes UNCLOS itself created, history shows that “customary international law” should give China plenty of space to articulate its own modern regime in the S. China Sea that preserves its historical rights if it so chooses.<sup>59</sup> Some might argue that the UNCLOS is de facto the new “customary law.” But as Ambassador Koh, second president of the Third UN Conference, explained immediately after UNCLOS ‘82 was completed, even if some passages of UNCLOS do reflect long-established “customary international law,” “the argument that ... the Convention codifies customary law or reflects existing international practice is factually incorrect and legally

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Axis ships in South American ports. The map showed the width of the neutrality zone off the Chilean coast to be about 200 miles. This became the basis for the 200-mile limit.”)

<sup>54</sup> See, e.g., *The Law of the Sea, Practice of Archipelagic States*, by Office for Ocean Affairs and the Law of the Sea of U.N. 1992, available at -

<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/publications/E.92.V.3.pdf>, pp. 45-46.

<sup>55</sup> See, e.g., (2009) 23 A&NZ Mar LJ, p. 149. available at

<http://www.austlii.edu.au/au/journals/ANZMarLawJl/2009/15.pdf>

<sup>56</sup> See, e.g., (2009) 23 A&NZ Mar LJ, p. 150 (“The fact that Indonesia meets this requirement almost perfectly, demonstrates that baseline requirements defining archipelagic states under LOSC were specifically tailored to meet its geographical circumstances.”)

<sup>57</sup> See, e.g., (2009) 23 A&NZ Mar LJ, p. (“Whilst not immediately giving it the force of law outside of the LOSC signatories, the inclusion of the archipelagic concept in such an important treaty gave the concept significant standing. Signatories to the LOSC were bound to accept it but as time has progressed, the archipelagic concept has received acceptance by the international community as being valid in customary international law. Indonesia has claimed archipelagic status since 1957 and until the LOSC this was denied by many nations. Since LOSC these protests have ceased and in 1996,<sup>89</sup> 1998<sup>90</sup> and 2002,<sup>91</sup> Indonesia enacted legislation declaring its status as an archipelagic state which has received no protests from other nations (including non-LOSC signatories).”).

<sup>58</sup> See, e.g.,

[http://mercury.ethz.ch/serviceengine/Files/ISN/27159/ipublicationdocument\\_singledocument/85ffbfef-7723-4725-a63c-d3de4a37d1d1/en/WP111.pdf](http://mercury.ethz.ch/serviceengine/Files/ISN/27159/ipublicationdocument_singledocument/85ffbfef-7723-4725-a63c-d3de4a37d1d1/en/WP111.pdf) pp. 10-20 (discussing controversies over interpretations of “innocent passage”); Florian H.Th. Wegelein, *Innocent Passage after the coming into force of the UN Convention on the Law of the Sea*, 1982, available at <http://www.seerecht.org/wegelein/iptext.htm>.

<sup>59</sup> Compare, e.g., <http://www.informationdissemination.net/2009/03/some-thoughts-on-unclos-and-customary.html> (arguing against the U.S. joining the UNCLOS since “joining the treaty would be an end to this flexibility we enjoy under customary international law”);

[https://www.academia.edu/6034810/The\\_Concept\\_of\\_Archipelagic\\_State\\_and\\_the\\_South\\_China\\_Sea\\_UNCLOS\\_State\\_Practice\\_and\\_Implication](https://www.academia.edu/6034810/The_Concept_of_Archipelagic_State_and_the_South_China_Sea_UNCLOS_State_Practice_and_Implication), pp.219-39 (discussing implications of archipelagic waters in the S. China Sea disputes)

insupportable.”<sup>60</sup> The UNCLOS’ wide acceptance per se also does not make UNCLOS “customary law” since that would conflate broadly ratified conventions with “customary international law.”<sup>61</sup>

The Philippines arbitration against China will be an important test case for the UNCLOS. In 2008, the Philippines rescinded an agreement made just three years earlier between the Philippines, Vietnam and China to jointly explore energy resources in the S. China Sea and proceeded to unilaterally issue exploration licenses to the disputed areas. In 2013, Philippines decided to rely on legal proceedings instead of diplomacy to be the basis of negotiations. Hopefully, the Tribunal will rapidly dismiss the case, sending a clear message to all disputants that the UNCLOS was never meant to be a framework for settling sensitive sovereignty disputes. If the disputants desire a more politically robust framework for resolving sensitive sovereignty disputes, they must negotiate for one. In the interim, perhaps all will come to a renewed consensus that practical and cooperative joint exploitation agreements will return far more than what each can possibly gain through bitter protracted fights for explicit sovereignty.

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<sup>60</sup> See, e.g., [http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol\\_XVII/a\\_conf-62\\_sr-193.pdf](http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_XVII/a_conf-62_sr-193.pdf), paragraph 48 (“The argument that, except for Part XI, the Convention codifies customary law or reflects existing international practice is factually incorrect and legally insupportable. The regime of transit passage through straits used for international navigation and the regime of archipelagic sea lanes passage are only two examples of the many new concepts in the Convention. Even in the case of article 76, on the continental shelf, the article contains new law ... therefore ... a State which is not a party to this Convention cannot invoke the benefits of article 76.”); <http://www.informationdissemination.net/2009/03/some-thoughts-on-unclos-and-customary.html> (“When the United States does not ratify UNCLOS, a treaty purporting to codify customary law, and then chooses not to cite its predecessor in applicable court decisions, this codification becomes more questionable.”)

<sup>61</sup> For example, both the “1977 Additional Protocols to the Geneva Conventions” (providing many rules for protection of Victims of International and non-International Armed Conflicts) and “the Rome Statute for the ICC” (establishing international criminal court) are widely ratified but not considered customary international law. The U.S. has explicitly rejected both and feels no legal obligation to subject itself to either.