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Arbitration and Diplomacy in the South China Sea: Forging a Solution

Andrew Johnson *

I. INTRODUCTION

The United Nations Law of the Sea Treaty, which delineates the rights and obligations of sovereign nations with regard to the world's oceans, is binding legal authority in the nations that have ratified the agreement.¹ Included among these signatories are China, Vietnam, the Philippines, and other countries bordering the South China Sea, a region rife with conflicting territorial claims.² *Philippines v. China* was a 2016 decision highlighting some of China's actions and claims in the region, notably its "nine-dash line" claim and construction of artificial islands.³

In light of China's subsequent refusal to abide by the Tribunal's decision, many have questioned whether the arbitration process favored under the treaty is truly effective.⁴ Some argue that mere arbitration ignores the historical and political realities of the region and risks alienating China even further from the international community.⁵ These commentators tend to favor a less legalistic route towards resolving the dispute.⁶ Others favor a strengthened arbitration system and believe that greater international pressure is needed to reinforce the Tribunal's decision and China's acceptance of the body's authority.⁷

While understanding the appeal arbitration and other rules-based adjudication has among those favoring internationalism, these approaches ignore many historical and geopolitical dynamics underlying the South China Sea debate. Ignoring these dynamics, such as China's diplomatic and economic leverage or the historical basis for sovereignty claims in the South China Sea, makes it difficult for China and its neighbors to reach a long-term, peaceful solution.

In order to describe the context surrounding the South China Sea disputes, this comment will explore the history of sovereignty in the South China Sea, the adoption of the Law of the Sea Treaty and the Arbitral Tribunal, and the disputes leading

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1. *The United Nations Convention on the Law of the Sea*, OCEANS & L. OF THE SEAS (1998), http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm.

2. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

3. Raul Dancel, *Philippines v. China in the South China Sea: All You Need to Know Ahead of the Hague Ruling*, THE STRAITS TIMES (July 9, 2016), <http://www.straitstimes.com/asia/philippines-v-china-in-the-south-china-sea-all-you-need-to-know-ahead-of-the-hague-ruling>.

4. Ryan Mitchell, *An International Commission of Inquiry for the South China Sea?: Defining the Law of Sovereignty to Determine the Chance for Peace*, 49 VAND. J. TRANSNAT'L L. 749, 754 (2016).

5. *Id.* at 751.

6. *Id.* at 766.

7. Emma Kingdon, *A Case for Arbitration: The Philippines' Solution for the South China Sea Dispute*, 38 B.C. INT'L & COMP. L. REV. 129, 151 (2015).

up to, and including, *Philippines v. China*. After relaying this background, the comment will examine the debate over the Arbitral Tribunal's methods and usefulness in resolving the dispute and articulate a realistic blueprint for true dispute resolution in the South China Sea.

II. HISTORICAL BACKGROUND

A. Law of the Sea Treaty

Prior to the Law of the Sea Treaty, the "Freedom of the Seas" doctrine governed territorial rights to oceanic areas. "Freedom of the Seas" mandated that maritime nations' coastlines remain freely navigable by any country.⁸ Beginning in the twentieth century, however, this principle was challenged by countries that wished to exert sovereign control over natural resources lying outside areas envisioned by the doctrine.⁹ Confrontations, such as the infamous "Cod War," in which Iceland seized a fishing vessel from the United Kingdom for infringing upon the country's fishing rights, ensued during this period.¹⁰

In order to simplify the apportionment of rights and obligations among the world's nations over the oceans and preserve the natural resources therein, the United Nations began contemplating an international treaty.¹¹ The United Nations Convention on the Law of the Sea was completed and adopted in 1982, and finally went into effect on November 16, 1994, when Guyana became the 60th country to ratify the treaty.¹²

The treaty established a framework for the use of the world's oceans by sovereign countries.¹³ The treaty protected the right of "innocent passage," by which countries' naval and merchant ships may enter another country's territorial waters for certain purposes (such as avoiding lengthy detours).¹⁴ In addition, rigid limits to territorial ocean use were established, and countries were able to designate up to 12 nautical miles of sea off their coastlines as sovereign territory.¹⁵ Between 12 and 24 nautical miles off the coastline, countries have limited control over the ocean.¹⁶ This limited control includes some police powers such as prevention of "infringement of [a country's] customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea."¹⁷

Arguably, the most significant grant of sovereign power to signatory countries over the world's oceans is the treaty's establishment of exclusive economic zones ("EEZ").¹⁸ An EEZ enables countries to manage resources in their waters, ocean floor, and subsoil,¹⁹ with the limitation that the "exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the

8. *The United Nations Convention on the Law of the Sea*, *supra* note 1.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *The United Nations Convention on the Law of the Sea*, *supra* note 1.

15. United Nations Convention on the Law of the Sea art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397.

16. *The United Nations Convention on the Law of the Sea*, *supra* note 1.

17. United Nations Convention on the Law of the Sea, *supra* note 15, at art. 33.

18. *The United Nations Convention on the Law of the Sea*, *supra* note 1.

19. *Id.*

territorial sea is measured.”²⁰ This provision affects fish stocks, oil, and many other important natural resources.²¹ The EEZ is also subject to the exclusive jurisdiction of the country that the zone falls within for the following activities: “the creation and use of artificial islands, installations, and structures; marine scientific research; [and] the protection and preservation of the marine environment.”²²

B. South China Sea

The Law of the Sea Treaty has particular salience in the South China Sea. Stretching for 1.4 million square miles,²³ the South China Sea is home to about one-third of international shipping.²⁴ The Strait of Malacca, lying between Indonesia and Malaysia, is particularly important for international shipping as it serves as a conduit for Pacific countries, such as China and Japan, to access the Indian Ocean.²⁵

In addition to its significance in global trade, the South China Sea is also rich in natural resources.²⁶ The sea holds significant fish stocks that account for about 12 percent of total fish caught globally.²⁷ Additionally, eleven billion barrels of oil reserves and 190 trillion cubic feet of natural gas reserves are believed to be contained in the South China Sea.²⁸ The vast richness and importance of the area has induced numerous countries, including China, Vietnam, the Philippines, Taiwan (ROC), and Malaysia, to lodge contradicting claims of sovereignty and usage rights over its area. The Law of the Sea treaty has served as an instrument for assisting in the adjudication of these claims.²⁹

It should be noted that the notions of ownership and sovereignty are very complicated when applied to the South China Sea.³⁰ Both the historical and cultural connections that China and the Philippines hold within the South China Sea must be explored in significant detail to better understand what interests, beyond purely economic or strategic concerns, each country has in the region.³¹

The South China Sea has been home to numerous cultures throughout recorded history, which had a fundamentally different understanding of the concept of sovereignty.³² Despite having few indicators of belonging to a nation-state in the modern sense, China has had interests in the South China Sea for many centuries.³³ Maritime Silk Road trade routes, which preceded the land routes, date back to the

20. United Nations Convention on the Law of the Sea, *supra* note 15, at art. 57.

21. *The United Nations Convention on the Law of the Sea*, *supra* note 1.

22. United Nations Convention on the Law of the Sea, *supra* note 15, at art. 56.

23. Republic of Phil. v. China, PCA Case Repository No. 2013-19, Award (July 12, 2016).

24. *How Much Trade Transits the South China Sea?*, CHINAPOWER, <https://chinapower.csis.org/much-trade-transits-south-china-sea/> (last updated Oct. 27, 2017).

25. *Id.*

26. Yanmei Xie, *South China Sea: The Positions and the Facts*, INT’L CRISIS GRP. (July 8, 2016), <https://www.crisisgroup.org/asia/south-east-asia/south-china-sea/south-china-sea-positions-and-facts>.

27. *Id.*

28. *Id.*

29. *Why is the South China Sea Contentious?*, BBC NEWS (July 12, 2016), <http://www.bbc.com/news/world-asia-pacific-13748349>.

30. Mitchell, *supra* note 4, at 759.

31. *Id.* at 811.

32. *Id.*

33. Christopher R. Rossi, *Treaty of Tordesillas Syndrome: Sovereignty Ad Absurdum and the South China Sea Arbitration*, 50 CORNELL INT’L L.J. 231, 231 (2017).

Qin and Han dynasties roughly two thousand years ago.³⁴ In addition, many expeditions were conducted by the Chinese government in the South China Sea during the Ming and Qing dynasties in China.³⁵ These expeditions typically had military and economic purposes, a fact which seems to support the Chinese government's claims of historic rights to the region.³⁶

These expeditions were not a permanent recurring part of Chinese foreign policy, and ceased for about five hundred years before the United States gave China a naval vessel that could reach the islands.³⁷ This fact should not be mistaken for an indication that there was no Chinese presence in the South China Sea during the intervening years. For example, French navigators found Chinese activity on the shores of Tempest Isle in 1929, and Chinese ships were seen delivering goods to the islands.³⁸ This might bolster China's claims of historic rights to at least the islands in that vicinity, though very few ethnic Chinese actually resided on the islands.³⁹

Even if China was not aggressively claiming parts of the South China Sea prior to recent decades, it appears that other countries did not begin to actively challenge Chinese presence in the South China Sea before the 1930's.⁴⁰ France arguably played a seminal role in the reversal of the traditional ambiguity of the South China Sea's sovereignty when it declared discovery and sovereignty over the Paracel and Spratly Island chains, a move vociferously opposed by China and Japan.⁴¹ Later in that decade, the Japanese Empire began to occupy and colonize Southeast Asia and eventually declared complete control over the South China Sea in 1939.⁴² It was only in this era that sovereignty over the South China Sea became an important geopolitical issue.⁴³

Despite the interests that China may have had historically in the region, the Chinese Government was slow to claim sovereignty over significant portions of the South China Sea until very recently.⁴⁴ For example, an imperial map dating to 1897 made no mention of the infamous "nine-dash line," the importance of which will be explained in the next paragraph.⁴⁵ Ownership claims of portions of the South China Sea do not appear to have begun until 1909, when the Chinese Government began arguing that Pratas Shoal was historically Chinese.⁴⁶ This contention appears to have been a reaction against an increasingly imperialistic Japan, which had claimed the shoal.⁴⁷ The Cairo Declaration of 1943 made reference to Japanese claims in the South China Sea and stated that all illegal acquisitions of Chinese territory by

34. *Id.* at 260.

35. *Id.*

36. *Id.* at 280.

37. *Id.* at 261.

38. Mitchell, *supra* note 4, at 779.

39. *Id.* at 779-80.

40. *Understanding China's Position on the South China Sea Disputes*, INST. FOR SEC. & DEV. POL'Y (June 2016), <http://isdip.eu/publication/understanding-chinas-position-south-china-sea-disputes>.

41. Mitchell, *supra* note 4, at 764.

42. *Id.*

43. *Id.*

44. Rossi, *supra* note 33, at 243.

45. *Id.* at 255.

46. *Id.* at 255-56.

47. *Id.* at 256.

Japan would be returned to China.⁴⁸ This statement is often used by those sympathetic to China as evidence that sovereignty over a substantial portion of the South China Sea was meant to revert to China.⁴⁹ However, the Cairo Declaration only pertained to certain Japanese acquisitions: Manchuria, Taiwan, and the Penghu Islands.⁵⁰

Additionally, the Declaration failed to mention the “nine-dash line,” which now serves as the centerpiece of China’s claims of sovereignty over the majority of the South China Sea.⁵¹ Simply stated, the nine-dash line refers to a U-shaped demarcation used in Chinese maps marking islands and other formations over which China asserts sovereignty.⁵² China claims all land and sea within the nine-dash line, an area which envelops most of the South China Sea.⁵³ The nine-dash line (or more precisely its forerunner, the eleven-dash line) did not actually make its first appearance until a government map from 1948.⁵⁴ At this point, the sovereignty of the territories which had been annexed by Japan was in limbo due to the Allied victory in World War II.⁵⁵ After a 1951 international agreement required Japan to renounce its claims in the South China Sea, its neighbors, including China, began to claim large portions of the sea as sovereign territory.⁵⁶

This complicated history has exacerbated the inextricability of the territorial disputes between China and its neighbors. The Arbitral Tribunal’s purpose is to unravel this complexity by analyzing countries’ competing claims through a rules-based judicial lens under the United Nations Law of the Sea Treaty.

III. ARBITRATION UNDER THE LAW OF THE SEA TREATY

The arbitration Tribunal described in Annex VII of the Law of the Sea Treaty requires significant description.⁵⁷ This description should be prefaced by noting that, in addition to the Arbitral Tribunal, parties may also select the International Tribunal for the Law of the Sea, International Court of Justice, and a special Arbitral Tribunal under Annex VIII of the treaty.⁵⁸ The Arbitral Tribunal may be utilized by any party to a given dispute through written notification to the other parties.⁵⁹ This notification must include both the claim being brought and the rationale underlying this claim.⁶⁰ Because the Arbitral Tribunal’s authority to hear cases is limited in scope, the party bringing the claim must invoke the specific provisions of the treaty that authorize it.⁶¹

The parties to the dispute will then be able to nominate four arbitrators, “each of whom shall be a person experienced in maritime affairs and enjoying the highest

48. *Id.* at 251.

49. Rossi, *supra* note 33, at 251.

50. *Id.*

51. *Id.* at 257.

52. Kingdon, *supra* note 7, at 134.

53. *Id.*

54. Rossi, *supra* note 33, at 257.

55. Mitchell, *supra* note 4, at 764.

56. *Id.*

57. United Nations Convention on the Law of the Sea, *supra* note 15, at Annex VII, art. 1.

58. *The Tribunal*, INT’L TRIBUNAL FOR THE L. & SEA, <https://www.itlos.org/the-Tribunal/> (last visited Sep. 21, 2018).

59. United Nations Convention on the Law of the Sea, *supra* note 15, at Annex VII, art. 1.

60. *Id.*

61. Mitchell, *supra* note 4, at 760.

reputation for fairness, competence and integrity.”⁶² These arbitrators will be added to a list maintained by the United Nations Secretary-General, unless the arbitrator is later dismissed by the country that nominated the arbitrator.⁶³ If dismissed, the arbitrator will retain the ability to serve on Tribunals until proceedings have completed.⁶⁴

The Tribunal will include five members, with each party selecting one member to serve as the Tribunal’s national, an individual who is strongly recommended to be selected from the aforementioned arbitrator list.⁶⁵ The country initiating the action will select its national first and will include its selection in the notification to the other party previously mentioned.⁶⁶ Upon receiving this notification, the other party will have thirty days to appoint its own national.⁶⁷ In the event that the other party fails to appoint someone as national within that time frame, the initiating party is entitled to request an appointment within two weeks of the thirty day deadline’s lapse.⁶⁸ The President of the International Tribunal for the Law of the Sea will then be empowered to fill the appointment, unless the parties have chosen another individual to make the appointment.⁶⁹

The President’s selection will come from the lists created by the parties, with all selections being made within thirty days of receiving the request.⁷⁰ The other three Tribunal members require a consensus of the parties; they will generally be selected from the aforementioned list and will not be residents of the disputing countries unless the countries’ representatives agree to that arrangement.⁷¹ If the parties have failed to either appoint the President or select all of the members of the Tribunal within sixty days of the notification, any party to the dispute will have the right to request an appointment within two weeks of the deadline’s lapse.⁷²

The disputing parties will be required to provide the Tribunal with “all relevant documents, facilities and information.”⁷³ Additionally, the Tribunal will be entitled to “call witnesses or experts and receive their evidence and to visit the localities to which the case relates.”⁷⁴ Each party to the dispute will be required to pay an equal amount towards the operation of the Tribunal unless the circumstances of the dispute require a different arrangement.⁷⁵ Arbitral decisions require a simple majority (the President votes in cases of a tie), and at least half of the Arbitral members must be present and voting to reach a verdict.⁷⁶ If one party refuses to defend its case, the other party can request that the Tribunal still issues an award.⁷⁷ Awards issued by the Tribunal cannot be appealed, except by consent of the parties in advance of

62. United Nations Convention on the Law of the Sea, *supra* note 15, at Annex VII, art. 2.

63. *Id.*

64. *Id.*

65. United Nations Convention on the Law of the Sea, *supra* note 15, at Annex VII, art. 3.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. United Nations Convention on the Law of the Sea, *supra* note 15, at Annex VII, art. 3.

71. *Id.*

72. *Id.*

73. *Id.* at Annex VII, art. 6.

74. *Id.*

75. *Id.* at Annex VII, art. 7.

76. *Id.* at Annex VII, art. 8.

77. United Nations Convention on the Law of the Sea, *supra* note 15, at Annex VII, art. 9.

an appellate review, but either party may submit an argument to the Arbitral Tribunal issuing the decision, regarding “the interpretation or manner of the implementation of the award.”⁷⁸

As is evident in the foregoing description, the Arbitral Tribunal is partially premised on the notion that parties operate in good faith and can be fully participatory in the dispute resolution process. The existence of mechanisms handling instances of a country’s refusal to participate is an indication of the desirability of those circumstances. *Philippines v. China* shows that the Arbitral Tribunal, while well-intentioned, has significant limitations when used between parties that are less conciliatory than those imagined by the framers of UNCLOS.

IV. PHILIPPINES V. CHINA

The parameters of the Law of the Sea Treaty and its arbitration process, the historical importance of the South China Sea, and the ongoing disagreements regarding sovereignty of the waters within the region culminated in the arbitration case *Philippines v. China*.⁷⁹ This case began on January 22, 2013, when the Philippines provided China with notification of its intent to invoke the Law of the Sea Treaty to settle a number of longstanding disputes between the two nations.⁸⁰

The Philippines put forth a number of claims, many of which were highly technical and will not be addressed in this comment.⁸¹ The central, and arguably most controversial, claim by the Philippines was that China could not exert control over parts of the South China Sea falling outside of China’s EEZ by mere reference to China’s “historical rights” to the region.⁸² More specifically, the Philippines posited that the “nine-dash line” frequently claimed as part of China’s sovereign sphere by those in its government can only extend to areas in which countries can exert control under the Law of the Sea Treaty.⁸³

China’s objections were immediate and forceful.⁸⁴ The country’s government argued that the Philippines’ claims centered upon territorial sovereignty, and that such claims are not addressed by the Law of the Sea Treaty.⁸⁵ China additionally argued it had entered into bilateral agreements with the Philippines and other Southeast Asian countries, and that continued bilateral dispute resolution was a mutual obligation of the countries’ respective governments.⁸⁶ Finally, China’s government had previously committed itself to noninvolvement in compulsory arbitration involving maritime issues.⁸⁷ The Chinese government could, as argued, determine its own parameters for adoption of the Law of the Sea Treaty, without running afoul of international law.⁸⁸

78. *Id.* at Annex VII, art. 11-12.

79. Mitchell, *supra* note 4, at 754.

80. *Id.* at 757.

81. *Republic of Phil.*, *supra* note 23.

82. *Id.*

83. *Id.*

84. Mitchell, *supra* note 4, at 758.

85. *Id.*

86. *Id.* at 770.

87. *Id.*

88. *Id.* at 763.

Ultimately, the Arbitral Tribunal issued a ruling largely favorable to the Philippines' positions.⁸⁹ Its most sweeping pronouncement was that the Law of the Sea Treaty prevented China from making claims over portions of the South China Sea that fall outside the country's EEZ under UNCLOS.⁹⁰ This decision effectively made many of China's actions in the South China Sea, such as its construction of artificial islands, illegal under international law.⁹¹ While many in the international community believed that China would abide by the Arbitral Tribunal's decision in order to avoid being characterized as an international pariah, the Chinese Government did not acquiesce to the Tribunal's decision and has seemingly faced little international resistance for its irresponsible conduct.⁹²

In determining whether China had sufficient grounds for refusing to recognize the Arbitral decision, it is worthwhile to individually consider each of China's objections.⁹³ The Chinese Government claimed that the core of the Philippines' complaint involved questions of sovereignty, which are beyond the scope of the Law of the Sea Treaty.⁹⁴ This is true to a large extent.⁹⁵ The treaty ignores questions of sovereignty and instead determines maritime rights for the sovereign territories of the countries subject to the treaty.⁹⁶ Given that the bulk of the complaints issued by the Philippines were dependent upon determining the sovereignty of territories in the South China Sea, the Tribunal distinguished historic title, which it had no jurisdiction to consider, and historical rights.⁹⁷ It then found that it did have jurisdiction over historical rights based upon the need to determine "the source of maritime entitlements of China in the South China Sea."⁹⁸ This distinction is at least dubious and is a legitimate Chinese concern.⁹⁹

However, it is important to note the reasoning for that distinction; the Tribunal believed that it could not adjudicate the major issues between the parties without determining whether China had legitimate historical rights in the South China Sea.¹⁰⁰ Further, the Tribunal expressed frustration that China had declared historic rights in the South China Sea without defining the parameters of this declaration.¹⁰¹ This created a complicated situation for the Tribunal, as China had neither sufficiently defined its central defense nor accepted the Tribunal's scrutiny of it.¹⁰² Despite the difficult hand that the Arbitral Tribunal had been dealt, its failure to articulate its jurisdiction in a clear manner, let alone a manner accepted by both parties

89. Mitchell, *supra* note 4, at 759; see Republic of Phil. v. China, PCA Case Repository No. 2013-19, Award (July 12, 2016).

90. Republic of Phil. v. China, PCA Case Repository No. 2013-19, Award (July 12, 2016).

91. Mitchell, *supra* note 4, at 762.

92. Kor Kian Beng, *China President Xi Dismisses Hague Arbitration on South China Sea But Says 'Committed to Peace'*, THE STRAITS TIMES (July 12, 2016), <http://www.straitstimes.com/asia/east-asia/china-dismisses-hague-ruling-maintains-sovereignty-over-south-china-sea>.

93. Fu Ying, *Why China Says No to the Arbitration on the South China Sea*, FOREIGN POL'Y (July 10, 2016), <http://foreignpolicy.com/2016/07/10/why-china-says-no-to-the-arbitration-on-the-south-china-sea/>.

94. *Id.*

95. Sreenivasa Rao Pemmaraju, *The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility*, 15 CHINESE J. OF INT'L L. 265, 302 (2016).

96. *Id.*

97. *Id.* at 303.

98. *Id.*

99. *Id.*

100. Pemmaraju, *supra* note 91, at 303.

101. *Id.*

102. *Id.*

subject to the dispute, was a clear limitation on the Tribunal's effectiveness in the dispute.

The Chinese Government additionally stated that even if the propriety of the actions of the Arbitral Tribunal were not objectionable under UNCLOS, the actions still run counter to a decision that China made in 2006.¹⁰³ That decision reiterated China's refusal to recognize arbitration in "disputes concerning maritime delimitation."¹⁰⁴ In making this assertion, China was articulating the viewpoint that international organizations hold their power subject to the consent of individual nations comprising the organizations' treaties.¹⁰⁵ This interpretation of the applicability of international law runs contrary to international norms, in which parties to international treaties are expected to adopt these treaties wholesale, unless otherwise stated in the treaty itself.¹⁰⁶ While this approach to treaty interpretation is not novel, and is in fact similar to the United States' approach to international law,¹⁰⁷ China's advocacy of this treaty interpretation does not appear to be in good faith and is detrimental to viable dispute resolution with the Philippines.

China's final complaint was that the Tribunal interfered with China's capacity to conduct bilateral agreements with the Philippines to resolve disputes in the South China Sea. China has conducted many territorial agreements in the past, most notably with Vietnam.¹⁰⁸ Through the course of the two countries' negotiations, the China-Vietnam land boundary was clarified, a joint fishing zone was established in the Gulf of Tonkin, and the countries increased their cooperation in trade and maritime activities.¹⁰⁹ However, this peace did come with some cost to Vietnam, which gave up many of its island territories.¹¹⁰

There is little, however, that can force China to accept UNCLOS terms which China does not view as legitimate. The Law of the Sea Treaty does not contain enforcement mechanisms that would implement retaliatory sanctions against China for its non-compliance.¹¹¹ Even if it had contained such mechanisms, however, only international reputational concerns could conceivably stop China from withdrawing from the treaty altogether, and experience has shown that these concerns have little bearing on China's decision-making.¹¹² Even the prospect of sanctions from the United Nations is virtually impossible due to China's permanent UN Security Council membership.¹¹³

It is clear that China prefers bilateral negotiations in the South China Sea, due to its economic and military strength in comparison to its neighboring countries, and believes that arbitration increases leverage for the Philippines, since it diminishes China's diplomatic clout. There are legitimate concerns raised by both sides. China should be encouraged to resolve the disputes with its neighbors in a manner

103. Mitchell, *supra* note 4, at 773.

104. Ying, *supra* note 89.

105. Mitchell, *supra* note 4, at 773.

106. *Id.* at 774.

107. *Id.*

108. Ying, *supra* note 89.

109. Kingdon, *supra* note 7, at 145.

110. *Id.* at 144-45.

111. Mitchell, *supra* note 4, at 766.

112. See, e.g., Ben Westcott & Yong Xiong, *China Legalizes Xinjiang 'Re-Education Camps' After Denying They Exist*, CNN, <https://www.cnn.com/2018/10/10/asia/xinjiang-china-reeducation-camps-intl/index.html> (last updated Oct. 11, 2018).

113. Current Members, UNITED NATIONS SEC. COUNCIL, <http://www.un.org/en/sc/members/> (last visited Sep. 22, 2018).

that emphasizes justice, as opposed to might, but it must also be recognized that any approach to adjudication should recognize China's apprehension about losing leverage in negotiations.

While some of China's concerns were addressed in *Philippines v. China*, they were summarily rejected.¹¹⁴ The Arbitral Tribunal made no apparent effort towards conciliation with the Chinese Government's concerns with its process.¹¹⁵ Overall, it appears the Arbitral Tribunal does not acknowledge the geopolitical dynamics of the South China Sea as they currently stand, making a peaceful agreement between China and the Philippines more unattainable.

While the United States and many other countries, particularly Japan and Australia, have continued to protest China's stance towards the South China Sea, repercussions have largely been limited to "freedom of navigation" operations in disputed portions of the Sea.¹¹⁶ Even the Philippine Government has softened its stance on China since the election of President Rodrigo Duterte,¹¹⁷ though the Philippine public continues to hold a skeptical view of China's claims.¹¹⁸

Most advocates for strong international governance continue to support collective pressure from the international community to coerce China's acceptance of the Arbitral Tribunal's legitimacy.¹¹⁹ While this pressure might postpone or mitigate China's most aggressive ambitions, namely the controversial "nine-dash line" claim, it has little hope of actually resolving territorial disputes in the South China Sea in a manner that all regional countries, including China, would view as reasonable. India's burgeoning economic and military strength might eventually form a bulwark against China's claims in the South China Sea,¹²⁰ but China's current geopolitical strength serves as important leverage for its government. In order to forge a peaceful solution in the South China Sea, an alternative to arbitration which addresses some of China's concerns, some of which are legitimate, is appropriate.

V. ARTICULATING AN ALTERNATIVE TO ARBITRATION

Perhaps the most realistic proposed alternative to arbitration in the South China Sea would be the use of a Commission of Inquiry (COI) to properly recognize China's "historic rights" claims.¹²¹ COIs can be seen as fact-finding exercises by

114. *Republic v. Phil.*, *supra* note 23.

115. *Id.*

116. James Griffiths, *US Calls for Legally Binding Code of Conduct in South China Sea*, CNN, <https://www.cnn.com/2017/08/07/politics/south-china-sea-us-australia-japan/index.html> (last updated Aug. 7, 2017).

117. Ben Blanchard, *Duterte Aligns Philippines with China, Says U.S. Has Lost*, REUTERS (Oct. 19, 2016), <https://www.reuters.com/article/us-china-philippines/duterte-aligns-philippines-with-china-says-u-s-has-lost-idUSKCN12K0AS>.

118. *Filipinos Trust United States Much More than China-Survey*, REUTERS (Oct. 18, 2016), <https://uk.reuters.com/article/uk-philippines-china-poll/filipinos-trust-united-states-much-more-than-china-survey-idUKKCN12I0CG>.

119. Kingdon, *supra* note 7, at 151.

120. Ulises Granados, *India's Approaches to the South China Sea: Priorities and Balances*, WILEY ONLINE LIBR. (Jan. 22, 2018), <http://onlinelibrary.wiley.com/doi/10.1002/app5.223/full>.

121. Mitchell, *supra* note 4, at 783.

an international body, the findings of which serve as a basis for recommendations.¹²² COIs have traditionally been issued in connection with human rights issues;¹²³ for example, a COI on North Korea explored the vicious deprivation of human rights by the country's regime.¹²⁴ COIs are granted wide latitude in the determination of their mandates, which is brought about in four consistent steps: the "establishment of facts" related to the inquiry, the "assessment" of the legal implications of those facts, the determination of "conclusions" from this assessment, and the issuance of recommendations on the matter assessed.¹²⁵

A COI could be quickly instituted through a variety of venues.¹²⁶ Individual countries can unilaterally authorize a COI, though this may be ineffective if such a move is not mutually agreed upon by both the Philippines and China.¹²⁷ Initiating a COI at the international level, therefore, might be accomplished more easily.¹²⁸ This might be done through use of UN Security Council investigation powers under Article 34 of the UN Charter.¹²⁹ It could also take the form of an action by UNCLOS itself, as the entity did when forming the Commission on Limits of the Continental Shelf.¹³⁰ Other possibilities, such as an inquiry from the International Court of Justice or UN Secretary General, also exist.¹³¹

Use of a COI relies more upon fact-finding than determination of legal questions, a factor which might increase the method's palatability with the Chinese government.¹³² While studying historical sovereignty and use of the South China Sea may inevitably extend beyond pure fact-finding exercises, no legal determinations may be drawn from facts gathered outside the COI's original scope.¹³³ However, COI exercises that do extend beyond fact-finding must have the consent of all parties to the dispute.¹³⁴

A COI would also directly investigate the question of sovereignty over the South China Sea,¹³⁵ an inquiry which the Arbitral Tribunal avoided directly sponsoring, but was surreptitiously involved with. Rather than hiding behind the legal façade of "historical rights," the COI could focus upon the sovereignty dispute in a direct manner. Because the overall approach to COI dispute resolution is far more facilitative and less adversarial than arbitration, it might be the only approach which truly brings peace to the South China Sea.¹³⁶

In order to best ensure that the COI does not create further divisiveness, the scope of the inquiry should be sufficiently narrow.¹³⁷ The inquiry might focus upon the Spratly Islands, for example, and engage in fact finding related to the historical

122. UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R, COMMISSIONS OF INQUIRY AND FACT-FINDING MISSIONS ON INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 7 (2015).

123. *Id.*

124. *Id.* at 9.

125. *Id.* at 11.

126. Mitchell, *supra* note 4, at 787.

127. *Id.* at 787.

128. *Id.* at 788.

129. *Id.* at 787-88.

130. *Id.* at 787.

131. Mitchell, *supra* note 4, at 787.

132. *Id.* at 788.

133. *Id.* at 788-89.

134. *Id.* at 773, 789.

135. *Id.* at 789.

136. *Id.*

137. Mitchell, *supra* note 4, at 789.

marks of sovereignty seen in the islands. By focusing on a specific island chain, rather than the entirety of China's "nine-dash line" claim, the inquiry could both avoid inflaming the countries' passions and serve as a workable template for later negotiations between China and its other neighbors.¹³⁸

In a further effort to narrowly focus the inquiry, it could also focus on the period when Japan and France began to make sovereignty claims in the South China Sea.¹³⁹ Both countries have renounced any claims in the South China Sea, allowing investigators to focus upon sovereignty in the Sea immediately prior to the two countries' claims.¹⁴⁰ For our current purposes, we will continue to focus upon the "nine-dash line" claim, and we will not narrow our focus to one period of time when exploring the history of sovereignty in the South China Sea.

The previous discussion of the historical bases for sovereignty in the South China Sea shows the complications that will inevitably arise in fact-finding inquiries regarding sovereignty in the South China Sea.¹⁴¹ The Arbitral Tribunal's focus upon "historic rights" as a confusing proxy for sovereignty displayed ignorance of the nature of ownership in the South China Sea.¹⁴² Prior to Japan's assertions in 1939, it does not appear that any country exerted ownership over a substantial portion of the Sea in a manner that would connote modern conceptions of sovereignty.¹⁴³ This delivers a blow to Chinese assertions that its historical actions in the South China Sea confer a "Greater China" status to the region.¹⁴⁴ At the same time, however, the Arbitral Tribunal seems to have made a mistake in its disregard for China's longstanding, historical presence staked in the Sea, even if such associations do not confer sovereign status.

An effective COI would bring these historical factors to light in a way that the more legalistic Arbitral Tribunal would not.¹⁴⁵ A COI would likely recognize the history of sovereignty in the South China Sea for what it is; a highly nuanced and complicated topic which cannot be resolved merely by looking through the lens of the modern nation-state.¹⁴⁶ This fact-finding mission, if successful in altering the paradigm, could in turn lay the groundwork for good faith negotiations between the Philippines and China in the future. Conversely, it might be posited that a COI does little to truly resolve the issues facing China and the Philippines. It is admittedly a small step towards dispute resolution between the parties, but its goal is narrowly focused upon bringing the two countries back to the bargaining table, and it has significant promise in achieving that purpose.

To alleviate concerns that a COI would produce mere negotiations with no discernable progress, countries such as the United States could continue to exert pressure on the parties by maintaining its naval presence in the region.¹⁴⁷ While the United States has traditionally been the sole participant in so-called "Freedom of

138. *Id.* at 787.

139. *Id.* at 789.

140. *Id.*

141. *Id.* at 767.

142. *Id.* at 766.

143. Mitchell, *supra* note 4, at 764.

144. *Id.*

145. *Id.* at 796.

146. *Id.* at 764-65.

147. James Kraska, *South China Sea Ruling: Implications for Quad Interests*, U.S. NAVAL WAR COLL. 3, http://thf_media.s3.amazonaws.com/2017/PDFs/FINAL%20Kraska%20-%20Heritage%20SCS%20Paper%20February%208.pdf.

Navigation” exercises,¹⁴⁸ recent incidents in the region have prompted closer naval coordination among Pacific allies.¹⁴⁹ This increased coordination has been termed the “Quad” alliance, and its goals are primarily to challenge China’s growing hegemony in the Asia-Pacific region.¹⁵⁰ Currently, the Quad alliance members are the United States, Japan, India, and Australia; recently, the United Kingdom and France have reported interest in joining the coalition.¹⁵¹

It has been suggested that Quad countries engage in expansive “Freedom of Navigation” exercises, to which all four countries extensively contribute, in order to reframe the struggle as not being solely between the United States and China, but rather a sizeable contingent of nations opposing Chinese aggrandizement.¹⁵² The goal of these operations, as stated earlier, will be to encourage the parties, specifically China, to negotiate and engage in a COI in good faith. The less confrontational and more facilitative nature of the COI may lead the Chinese government to conclude that it is in the country’s best interest to comply.

It bears repeating that this is not a perfect solution to the territorial disputes between China and the Philippines. The tensions between the countries result from a messy combination of chaotic geopolitics and ambiguous history, making it difficult to find a realistic path forward that both countries view as equitable. The hope from this proposal is an alleviation of tension and the first steps towards dispute resolution. Its success, more than anything else, is dependent upon the involved actors forging and preserving a peaceful solution in the South China Sea.

VI. CONCLUSION

The unique historical and geopolitical factors involved in the South China Sea dispute may not be significantly alleviated with a Commission of Inquiry, but it could at least be seen as a significant, positive step towards peaceful resolution between China and the Philippines. If successful, it could also serve as an example for other South China Sea disputes between China and its neighbors. The proposal would, at the very least, be far less likely to alienate either party, given the facilitative nature of COIs.

It is likely that the most significant resistance to this proposal will come from those who are sympathetic to the position of the Philippines and its allies, as the Philippines has weaker diplomatic and military capabilities than China. Opponents may argue that reliance upon a Commission of Inquiry would further weaken the bargaining power of the Philippines. This argument ignores the current context of the dispute between China and the Philippines, as the status quo has done nothing to strengthen diplomatic pressure from the Philippines. The Philippines has in fact succumbed to many Chinese demands and has embraced bilateral negotiations with China over the Spratly Islands.

Greater international pressure alone cannot change this dynamic, particularly when China is increasingly replacing the United States as the main cultural and

148. *Id.* at 6.

149. *Id.* at 3.

150. *Id.*

151. Emanuele Scimia, *New Alliance Could Emerge in Indo-Pacific*, ASIA TIMES (Mar. 4, 2018), www.atimes.com/new-naval-alliance-emerge-indo-pacific/.

152. Kraska, *supra* note 144, at 6.

economic leader in East Asia. The status quo may in fact be the most useful allocation of power for proponents of Chinese imperialism. It does little to promote the interests of either those who are sympathetic to the Philippine government's position, or to those who desire greater respect for China on the world stage. While other realistic alternatives may exist for South China Sea dispute resolution between China and the Philippines, a COI is the option with the greatest chance of effectuating peace in the region.