



Revista Política y Estrategia Nº 134, (2019)

Editada por: **Academia Nacional de Estudios Políticos y Estratégicos (ANEPE) Chile.**

Lugar de edición: Santiago, Chile

Dirección web:

<http://www.politicayestrategia.cl>

ISSN versión digital: 0719-8027

ISSN versión Impresa: 0716-7415

DOI: <https://doi.org/10.26797/rpye.v0i134>

Para citar este artículo / To cite this article: LEÓN ARZICH, Luis A.,
“*Realism and the Chinese attitudes toward UNCLOS: the South China Sea arbitration as a case study*”.

Revista Política y Estrategia No 134. 2019 pp. 21-54

DOI: <https://doi.org/10.26797/rpye.v0i134.786>

Si desea publicar en Política y Estrategia, puede consultar en este enlace las Normas para los autores:

To publish in the journal go to this link:

<http://politicayestrategia.cl/index.php/rpye/about/submissions#authorGuidelines>



La Revista Política y Estrategia está distribuida bajo una Licencia Creative Commons Atribución 4.0 Internacional.

REALISM AND THE CHINESE ATTITUDES TOWARD UNCLOS: THE SOUTH CHINA SEA ARBITRATION AS A CASE STUDY[∞]

LUIS A. LEÓN ARZICH*

ABSTRACT

The United Nations Convention on the Law of the Sea (UNCLOS) is a multilateral international agreement that was enacted to set some common rules governing the use and transit through the oceans, in light of their status as a vital resource of mankind. It is one of the most successful multilateral treaties ever adopted, with 168 states parties at the time of this writing.

However, we can see compliance is not perfect. Case in point, China has started to reinterpret or outright disregard some provisions of the treaty. In particular, its dismissal of the mandatory dispute resolution provision is the most telling example of the latter. But why would a state want to go against a regime that establishes clear rules for all parties, one that is widely upheld?

The answer has to do with security. This article argues that we can explain China's has dismissed international adjudication under UNCLOS if we are aware of what its security interests are and how in so doing it might increase their relative power vis-a-vis other actors in the region. In other words, if we analyze the People's Republic of China's actions using the theory of international relations known as realism.

Key words: *China; UNCLOS; Realism; International law; South China Sea Arbitration.*

• Juris Doctor (cum laude), New York University School of Law, New York, United States. B.A. Political Science (with Maximum Distinction,) Catholic University of Chile, Santiago, Chile. He is currently a visiting research scholar at New York University's Center for Labor and Employment Law. lla255@nyu.edu, ORCID: <https://orcid.org/0000-0001-9884-1809>. The author wishes to thank Professors Jerome Cohen and Peter Dutton of New York University School of Law for their encouragement and helpful comments during the elaboration of this article, and Professor Roberto Duran of Catholic University of Chile for his comments on a draft version of this article. All remaining errors are solely the author's.

∞ Fecha de recepción: 060519 - Fecha de aceptación: 281119.

EL REALISMO Y LA ACTITUD DE CHINA EN RELACIÓN A LA CNUDM: ARBITRAJE EN EL MAR DEL SUR DE CHINA COMO CASO DE ESTUDIO

RESUMEN

La convención de las Naciones Unidas sobre el Derecho Del Mar (CNUDM) es un acuerdo internacional multilateral, promulgado para establecer algunas reglas comunes cuyo fin es regir el uso y el tránsito a través de los océanos, a la luz de que este estatuto sea un recurso vital para la humanidad. Es uno de los tratados multilaterales más exitosos que se han adoptado, reuniendo 168 Estados parte al momento de su dictación.

Sin embargo, se puede apreciar que el cumplimiento de éste no es perfecto. En particular, China ha comenzado a reinterpretar o hacer caso omiso de algunas disposiciones del tratado. En particular, su rechazo a la disposición obligatoria de resolución de disputas es el ejemplo más revelador de lo anteriormente dicho. Pero ¿Por qué querría un Estado ir en contra de un régimen que establece reglas claras para todas las partes y que es aceptado ampliamente?

Se puede comenzar a vislumbrar una posible respuesta al enfocarse en el concepto de seguridad nacional. El presente artículo plantea que se puede explicar el por qué China se ha restado de los mecanismos de adjudicación -por medio de tribunales internacionales establecidos por la CNUDM- si se tienen en cuenta los elementos que contribuyen a su seguridad nacional y como el reforzarlos puede aumentar su poder relativo en comparación a otros actores de la misma región. Para comprender de mejor manera lo anteriormente expuesto, se analizarán las acciones de la República Popular China bajo el prisma de la teoría de las relaciones internacionales conocida como Realismo.

Palabras clave: *China; CNUDM; Realismo; Derecho Internacional; Arbitraje en el Mar del Sur de China.*

REALISMO E ATITUDE DA CHINA EM RELAÇÃO À CNUDM: ARBITRAGEM NO MAR DO SUL DA CHINA COMO UM ESTUDO DE CASO

RESUMO

A Convenção das Nações Unidas sobre o Direito do Mar (CNUDM) é um acordo internacional multilateral, promulgado para estabelecer algumas regras comuns destinadas a reger o uso e o trânsito através dos oceanos, à luz deste estatuto ser um recurso vital para a humanidade. É um dos tratados multilaterais mais bem-sucedidos que foram adotados, com 168 Estados reunidos na época da sua formulação.

No entanto, pode-se apreciar que o cumprimento deste não é perfeito. Em particular, a China começou a reinterpretar ou ignorar algumas disposições do Tratado. Em particular, a sua rejeição da disposição obrigatória de resolução de litígios é o exemplo mais revelador do que foi dito anteriormente. Mas por que um Estado iria contra um regime que estabelece regras claras para todas as partes e é amplamente aceite?

Pode-se começar a vislumbrar uma possível resposta ao se focar no conceito de segurança nacional. Este artigo sugere que pode ser explicado o porquê da China ter se subtraído dos mecanismos da adjunção – por meio de tribunais internacionais estabelecidos por CNUDM - considerando os elementos que contribuem a sua segurança nacional e como ao reforçá-los pode aumentar seu poder relativo em comparação com outros atores da mesma região. Para entender de melhor maneira o acima exposto, as ações da República Popular da China serão analisadas sob o prisma da teoria das relações internacionais conhecida como Realismo.

Palavras-chave: *China; CNUDM; Realismo; Direito Internacional; Arbitragem no Mar do Sul da China.*

I. INTRODUCTION

There is a well-known anecdote of a French officer reacting in quite the hostile manner to the translation of Henry Wheaton's *Elements of International Law* to Chinese: "who is this man who is going to give the Chinese insight into European international law?" he said, "kill him — choke him off; he will make us endless trouble"¹. As it turns out, events would prove that French officer right: China is well-aware that international law can be used as a tool to achieve policy objectives². Ever since the Nineteenth Century, when China first turned to international law in order to solve a diplomatic crisis³, the country has been no stranger to how useful international law can be — to the point where the People's Republic of China is deeply embedded in the international system nowadays⁴.

This purely instrumental approach — not exactly in vogue nowadays, given the extent to which the field as a whole is driven by normative agendas⁵ — remains as the foremost argument for the importance of international law. International law sets the basis for international regimes, which "reduce transactions and communications costs of negotiating [and] international law could constitute focal points

1 WANG, Tiewa. International Law in Ancient China. Collected Courses of the Hague Academy of International Law, 221 (1): pp. 235-236. 1990.

2 For instance, gaining entry into the World Trade Organization (an international regime set by international law) to bolster its economy.

3 As Tiewa Wang recounts, "the reason for emphasizing the laws of war in Wheaton's book was that a diplomatic incident arose involving the war between Prussia and Denmark of 1864 which furnished an opportunity to apply those relevant parts of international law contained in Martin's translation [of Wheaton.] The new Prussian minister came to China in a man-of-war in the spring of that year. He met three Danish merchant ships off Dagokou and seized them as war prizes. [Chinese Officials] protested on the main ground that the area of water where the seizure took place was China's 'inner ocean,' meaning territorial waters. The fact that the first application of international law led to the successful conclusion of a diplomatic conflict which might have become a serious even convinced high officials [that] international law was useful." Ibid. pp. 232-234.

5 Experts believe Beijing "is not seeking to overturn vital economic and other components of that order from which China itself has benefited for decades. Indeed, China's engagement in the international system is essential to the system's survival..." In: FRAVEL, M. Taylor, ROY, Stapleton, SWAINE, Michael, THORNTON, Suzan and VOGEL, Ezra. China is not an enemy. [Online.] Washington Post, Washington D.C. July 3, 2019. [Accessed September 20, 2019.] Available at: https://www.washingtonpost.com/opinions/making-china-a-us-enemy-is-counterproductive/2019/07/02/647d49d0-9bfa-11e9-b27f-ed2942f73d70_story.html

5 See e.g., international human rights law's ever-expanding influence, or choosing to give priority to *opinio juris* in customary international law, since "judged from the standpoint of the global community of states, it is intrinsically desirable to recognize legal norms that directly advance fundamental ethical principles, even if states have not given any indication by their behavior that this is how they view the interest of the global community." THIRLWAY, Hugh. The Sources of International Law. Oxford, Oxford University Press, 2014. p. 85. Professor Martti Koskeniemi makes a similar argument regarding why international lawyers fail to engage with conservative philosophers and realist thought in the context of an article on Carl Schmitt: "Even as his international law texts have been reflected on by political theorists and international relations experts; international lawyers have not immersed themselves in Schmitt exegesis. This may result from their instinctive avoidance of conflictual items, inextricable from their self-image as representatives of a cosmopolitan peace project and their activist role in precisely the international institutions that Schmitt would have indicted as parts of Anglo-American global hegemony." KOSKENIEMI, MARTTI. Carl Schmitt and International Law. In: MEIERHENRICH, Jens and SIMONS, Oliver. The Oxford Handbook of Carl Schmitt. Oxford, Oxford University Press, 2013. p. 593.

that solved simple coordination problems”⁶. Simply put, the argument is that international law is not about changing the world or “civilizing” nations, but something far more pedestrian: establishing patterns of coordination from which we all can benefit.

The United Nations Convention on the Law of the Sea (UNCLOS) is a regime built along these lines. It is a “lawmaking treaty: a multilateral convention that lays down for the parties to them a whole regime”⁷. In its 320 articles, one can scarcely find provisions that aim to transform the municipal laws of its signatories in service to a higher, moral purpose — human rights come to mind. It is a constitution for the oceans, practically devoid of any normative content of the kind mentioned above. Mere coordination is the name of the game, and this likely explains why the Convention has seen such considerable success in practice. However, what happens in the case of such a regime when one party finds that the rules it has agreed to work against its interests? Because this is what we see with the People’s Republic of China (PRC,) where its interpretation of the Law of the Sea is at odds with most of the world — and which has caused as a result, considerable (but not endless) trouble for other parties who have to deal with the PRC on a regular basis.

What explains this result? UNCLOS provisions are the codification of policy choices; as such, trying to understand China’s actions merely by reference to the terms of the articles therein would not take us very far. An interdisciplinary approach is needed, and here this paper will use one of international relations’ main theories, realism, to explain the PRC’s course of action. Realism attempts to explain a state’s actions based on the lack of any authority with coercive power above states (anarchy in terms of art) and the distribution of power. In short, this article argues that a realist approach to international law can explain why China has opted to reinterpret or outright ignore UNCLOS provisions that is in breach of: because upholding those rules is counterproductive from a security perspective.

China’s dismissal of the South China Sea arbitration and its rejection of UNCLOS’ dispute settlement provisions as mandatory provides the perfect case study for a realist understanding of international law. On one hand, we have an international regime that comes close to a value-neutral set of rules. On the other hand, the South China Sea is an strategically-critical zone for China, one where its security interests would not be well-served by complying with the majority understanding of UNCLOS as of today. Realism predicts protection of a country’s security interests would prevail over complying with the established rules, regardless of the reputation costs, and this is exactly what has happened. Thus, we will examine China’s attitude toward UNCLOS’ dispute settlement mechanism in the context of the South China Sea arbitration as the main case study, but other Law of the Sea issues will be summarized as needed. This article will proceed as follows: first, Part

6 STEINBERG, Richard. *Wanted, Dead or Alive: Realism in International Law*. In: DUNNOCK, Jeffrey and POLACK, Mark. *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*. Cambridge, Cambridge University Press, 2012. p. 156.

7 THIRLWAY, Hugh. *Op. Cit.* p. 33.

It will provide a summary account of realism, as well as what that framework would look like when applied to international law. Part III will examine China's position toward UNCLOS' dispute settlement provisions and provide an account of how realism can account for the PRC's actions. We will rely on a textual analysis of official documents released by China, the South China Sea decision, and articles by academics. Part IV will then summarize what lessons, at a greater degree of generality, can be learned from looking at China's actions from a realist framework. Finally, Part V concludes.

II. THE THEORY: REALISM

A Brief Outline of Realism

Before proceeding to an account of the South China Sea arbitration, it would be helpful to specify what we understand as realism⁸. Following the political scientist Robert Gilpin, we can state that all realist theories share three basic assumptions: 1) international relations between states are essentially a realm of conflict⁹; 2) the pursuit of power is the primary determinant of state conduct in the international system: a rational response to the persistent possibility of conflict, since power grants the means to provide for a state's safety¹⁰; and 3) that states are the most important actors in the international arena¹¹. We will provide a brief account of these basic assumptions before sketching out what a realist theory of international law might look like.

First, conflict is a constant in the international system. The term of art used by realist scholars to describe this state of affairs is anarchy, which can be roughly defined as "the absence of a universal sovereign or worldwide government"¹². In addition, realist scholars also highlight the fact that states differ greatly in their capabilities; what Hans Morgenthau referred to as the "extreme inequality of nations"¹³. Since there is no ultimate legal authority, one cannot rule out a priori that a State "will not be invaded, overrun, conquered, and pillaged"¹⁴. In other words, since there is no supranational sovereign, states find themselves competing in the international arena for scarce resources, with uncertainty about the intentions of

8 We are aware of the differences between the strands of the theory (classical realism, neorealism, neoclassical realism, and others.) However, due to space constraints, we will provide the reader with a minimalistic conception of realism, based on the elements that are shared by all interpretations.

9 GILPIN, Robert. *The Richness of the Tradition of Political Realism*. In: KEOHANE, Robert. *Neorealism and its Critics*. New York, Columbia University Press, 1986. p. 304.

10 *Ibid.* p. 305.

11 *Ibidem.*

12 LOBELL, Steven, RIPSAN, Norrin and TALIAFERRO, Jeffrey. Introduction: Neoclassical realism, the state and foreign policy. In: LOBELL, Steven et. al. *Neoclassical Realism, The State and Foreign Policy*. Cambridge, Cambridge University Press, 2009. p. 4.

13 MORGENTHAU, Hans. *Politics Among Nations*. 7th ed. New York, McGraw-Hill, 1993. p. 8.

14 KIRSCHNER, Jonathan. The tragedy of offensive realism: Classical realism and the rise of China. *European Journal of International Relations*, 18 (1): p. 55. 2010. Note that, as Kirschner clarifies, the point is not that States will be conquered, but that "realists assume that states must be alert to the possibility that war could occur and are sensitive to the potentially catastrophic consequences of defeat." *Ibidem.*

other competing units being the default state of affairs¹⁵. Because of this pervasive uncertainty, fear is the norm, and it is only rational that states act under its compulsion. To realists, Thucydides' contention that men are primarily motivated by fear holds true to this day¹⁶.

Given these two conditions taken together, it is no wonder each state feels compelled to provide for their own security. "The aspiration for power on the part of several nations, each trying either to maintain over overthrow the status quo, leads of necessity to a configuration that is called the balance of power"¹⁷. The balance of power serves to create "a precarious stability in the relations between the respective nations, a stability that is always in danger of being disturbed and, therefore, is always in need of being restored"¹⁸.

Second, the international system is one of self-help¹⁹. This has major consequences for the way in which states act. Since there is no superior authority to protect states from violence, states need to gather the means to do so by themselves — and the way they do this is through the accumulation of power. Simply put, "statesmen think and act in terms of interest defined as power"²⁰. And while power as a concept does not have a "one size fits all" definition that states will pursue at all times²¹, it is something states will nevertheless attempt to maximize. Which aspect of power a state will prioritize will "depend upon the political and cultural context"²² in which a nation finds itself, and as we will see in China's case, the answer is often military strength. Realism holds states will seek to maximize power, however they choose to construe the concept.

Finally, while realism does not contend that states are the only actors that matters in international relations, it is a core belief of the theory that they are the principal actors in the system. As Kenneth Waltz would assert, "states are the

15 LOBELL, Steven, RIPSAN, Norrin and TALIAFERRO, Jeffrey. Op. Cit. p. 15.

16 In GILPIN, Robert. Op. Cit. p. 305. The international system could also be compared to Thomas Hobbes' state of nature, since "in such condition, there is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth, no navigation, nor use of the commodities that may be imported by sea; no commodious building, [n]o arts; no letters; no society, and which is worst of all, continual fear, and danger of violent death." Thomas Hobbes, *LEVIATHAN*, Chapter XIII.

17 *Ibid.* p. 187.

18 *Ibid.* p. 193. Of direct relevance to this paper is the following quote by Morgenthau: "the competition between the United States and China [for] control of the countries of Southeast Asia offers another example of this pattern." *Ibidem*.

19 WALTZ, Kenneth. *Anarchic Order and Balances of Powers*. In: KEOHANE, Robert. *Neorealism and its Critics*. New York, Columbia University Press, 1986. p. 100. According to Waltz, the international system is one of self-help since "each of the units [i.e., states] spends a portion of its effort, not in forwarding its own good, but in providing the means of protecting itself against others." *Ibid.* p. 101. This is logically consistent with the discussion on uncertainty above.

20 MORGENTHAU, Hans. Op. Cit. p. 5.

21 For instance, Edward Hallett Carr classifies power into three categories: military power, economic power and power over opinion. CARR, Edward Hallett. *The Twenty Years Crisis, 1919-1939: An Introduction to the Study of International Relations*. 2nd ed. London, Palgrave MacMillan, 2016. p. 102. Likewise, Hans Morgenthau also divides power in several categories. Among them, geography, natural resources, industrial capacity, military capacity, population, the quality of a state's diplomacy and of its government. MORGENTHAU, Hans. Op. Cit. pp. 127-186.

22 MORGENTHAU, Hans. Op. Cit. p. 11.

unit whose interactions form the structure of international political systems”²³. One needs only to look at the most important international organization — the United Nations — to see that its membership is defined in terms of states, providing support for Waltz’ point. Likewise, and directly relevant for purposes of this essay, individuals and other non-state actors might be in the process of becoming ever more important actors in the international system, but the common understanding is that despite a few exceptions, states are the main subjects of international law²⁴. Hence, the primacy of the state in the international system over all other actors is a key tenet of realism.

Realism and International Law

International lawyers do not look fondly upon realism. “Realism is the theory international lawyers love to hate”²⁵. After all, a plausible argument could be raised at this juncture that the relations between states are nowadays not as precarious as realists would have us believe, thus there should not be much use for a theory that — in a popular strawman version — postulates that “international law does not matter”²⁶. In particular, critics of realism would argue that international law serves to provide some much-needed stability in the relations between states, and that the implications of anarchy have been overstated. Basically, they would argue that international law matters. The error here by opponents of realism is assuming realists dismiss international law out of hand, when they do not: in the words of Hans Morgenthau, one of realism’s foremost proponents, “during the four hundred years of its existence international law has in most instances been scrupulously observed”²⁷. There might have been flagrant violations of especially notorious instruments of international law — such as the Briand-Kellogg Pact or the United Nations Charter — but that does not mean the body of law as a whole should be dismissed. Rather, when one focuses on compliance with the “traditional rules of international law concerning, for instance, the limits of territorial jurisdiction, the rights of vessels in foreign waters, and the status of diplomatic representatives”²⁸ instead of grand regimes that aim to transform the international system, one can see there is a place for international law in realist thought.

Nevertheless, that does not mean that international law is held in high esteem. Similar to H.L.A Hart’s much-derided chapter about international law in *The Concept of Law*, realists assert international law is something less developed than

23 WALTZ, Kenneth. *Political Structures*. In KEOHANE, Robert. *Neorealism and its Critics*. New York, Columbia University Press, 1986. p. 90.

24 “Despite the increasing range of actors and participants in the international legal system, states remain by far the most important legal persons and despite the rise of globalization and all that this entails, states retain their attraction as the primary focus for the social activity of humankind and thus for international law.” SHAW, Malcolm. *International Law*. 7th ed. Cambridge, Cambridge University Press, 2014. p. 143.

25 STEINBERG, Richard. *Op. Cit.* p. 146.

26 *Ibidem*.

27 MORGENTHAU, Hans. *Op. Cit.* p. 295.

28 *Ibidem*. Ironically enough, the “rights of vessels in foreign waters” is one of the matters that is at issue in China’s interpretation of UNCLOS.

municipal law²⁹: “International law differs from the municipal law of modern states in being the law of an undeveloped and not fully integrated community,” since it “lacks three institutions which are essential parts of any developed system of municipal law: a judicature, an executive, and a legislature”³⁰. This presents serious difficulties when it comes to the actual enforcement and coercive power of international law.

First and foremost, from the absence of a legislature above the states comes a lack of legal clarity — to know what treaties bind a particular state, one must examine all the treaties it has concluded³¹. But the study could not stop here, since one also needs to examine the reservations and declarations a state has made to a treaty. In the case of reservations, an additional issue arises where we must determine whether they are proper either because the treaty itself may forbid reservations to, like UNCLOS does in general³², or because in the case of human rights treaties, the treaty committee might have found that a reservation against a certain provision goes against the object and purpose of the treaty and thus should be held invalid³³. Realists also point out that treaties need to be interpreted, and at this juncture complications are bound to arise: states “will naturally interpret and apply the provisions of international law in the light of their particular and divergent conceptions of the national interest”³⁴. This leads to fragmentation, a persistent problem in international law: states may assert divergent interpretations of treaty clauses, and it is not necessarily the case that a judicial organ will clarify the meaning. Even assuming a judicial organ clarifies a treaty term in a decision, there is no guarantee that states will abide by that understanding. All because international law lacks an executive authority in charge of enforcing the rules.

Lack of an executive authority in the international system has further consequences. Realists also hold that international law is “generally” observed by nations, due to reciprocity concerns³⁵. Regardless, this does not change the fundamental fact that anarchy is the rule; the international system is one of self-help, where no superior authority exists above states. The consequence is, as Morgenthau puts it,

29 “In form, international law resembles [a] regime of primary rules.” HART, Herbert Lionel Adolphus. *The Concept of Law*. 2nd ed. Oxford, Oxford University Press, 1994. p. 227.

30 CARR, Edward Hallett. *Op. Cit.* p. 159.

31 MORGENTHAU, Hans. *Op. Cit.* p. 297.

32 Article 309 of UNCLOS sets the general rule: reservations are forbidden unless a particular provision allows for them. This will be relevant when discussing China’s actions regarding the convention.

33 A paradigm example of this kind of invalid reservations would be reservations to Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women. For an overview of the issue, see UNITED NATIONS. Reservations to CEDAW. [Online.] New York, United States. [Accessed March 25, 2019.] Available at: <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>

34 MORGENTHAU, Hans. *Op. Cit.* p. 300.

35 “Most rules of international law are formulated in legal terms such identical or complementary interests. It is for this reason that they generally enforce themselves [and] voluntary compliance prevents the problem of enforcement from arising altogether.” *Ibid.* p. 313. Richard Steinberg notes, for example, that “the law of treaties is easily accepted because it is in every state’s self-interest to have a system that enables Pareto-improving contracts. Similarly, the customary law of diplomatic immunity is easily accepted because it is in every state’s interest to support unfettered communication between states.” STEINBERG, Richard. *Op. Cit.* p. 162.

that if one state violates the rights of another, the state on the receiving end “has the right to help itself if it can: that is to say, if it is strong enough in comparison with [the aggressor state] to meet the infringement of its rights with enforcement actions of its own”³⁶. In practice, this leaves smaller states at the mercy of great powers or more powerful states, with their only recourse is to ally themselves with more powerful states that may have an interest in keeping the aggressor state in check — that is, small states can only obtain redress through the operation of the principle of balance of power. It is here that the concept of power and the national interest resurfaces, since “whether such assistance will be forthcoming is a matter not of international law but of the national interest as conceived by the individual nations”³⁷.

Therefore, it would be correct to say a realist theory of international law holds that law plays a secondary role to politics in the international system. That “law, like politics, is a meeting place for ethics and power”³⁸, and not something which predetermines its operation. International law is not a “civilizer of nations.” But it would be mistaken to say that international law is completely irrelevant. Here we go back to the topic of regimes first mentioned in the introduction, in the sense that establishing rules and institutions that facilitate cooperation would leave states better off than in its absence, but also that “if an international law contradicts the long-term interests of a powerful state, then it will not comply with it”³⁹. This latter assertion is at the basis of its article, and the South China Sea arbitration provides an exemplary case study on how this is exactly what happens.

III. The Issue: Dispute Settlement Under UNCLOS and the Philippine Arbitration

UNCLOS purports to be a constitution for the oceans, but it could scarcely fulfill such a lofty role in the absence of a mechanism to settle disputes arising under the rules of the convention. Much like other constitutions, its provisions are not necessarily applicable in a mechanical manner, which is bound to give rise to interpretative issues. Without a dispute-settlement mechanism, and in case of conflict, each country is free to hold its own interpretation of the provisions at issue — which can very well be diametrically opposite. Hence, it is no wonder the Convention has built-in dispute resolution provisions in Part XV.

The need for an impartial third party to decide how the law should be interpreted appears clear to the drafters. In the absence of an arbiter, the result is that the whole apparatus ends up being politics, not law. But even in the presence of law — of a politically neutral international regime that has been entered into by most countries — the South China Sea dispute has ended up as an example of raw power politics in reality. This section examines China’s position regarding

36 MORGENTHAU, Hans. *Op. Cit.* p. 311.

37 *Ibid.* p. 312.

38 CARR, Edward Hallett. *Op. Cit.* p. 165.

39 STEINBERG, Richard. *Op. Cit.* p. 150.

UNCLOS' compulsory dispute resolution procedure, since this case is the most salient example of how China (and indeed, any powerful state) is wont to proceed when international law stands opposite to its national interest. In particular, this section will focus on what China considers the duty to negotiate entails and how the issue was dealt with in the South China Sea arbitration. But first, an overview of the issue.

China's maritime claims in the South China Sea originate — though they are not based exclusively on — the 1953 nine-dash line map, which the PRC holds reflects “the voyages of Chinese vessels in and across [the South China Sea] beginning 2000 years ago, interrupted by Western subjugation of China and other Asian states”⁴⁰. The claims made by China are ambiguous; indeed, not even Chinese scholars agree on what the PRC's claim of right is about⁴¹. The nine-dash map issue is a complicated, multifaceted one, and we do not have the space to cover it in a way that would do it justice. What matters for purposes of this article is to note that “fully 50 percent of global maritime commerce passes through [the South China Sea], as do 90 percent of East Asian energy imports. The South China Sea is therefore a key artery sustaining the global economy. Additionally, it is a major east-west pipeline for the flow of forces from the Pacific Ocean to the Indian Ocean and vice versa”⁴². Clearly, this location is one the most strategically-important places on Earth. It is no surprise, then, that China seeks to strengthen its position in this maritime space.

The South China Sea arbitration emerged as a consequence of China and the Philippines both claiming sovereignty over the Paracel and Spratly Islands. After prolonged negotiations, both countries were unable to reach an agreement. In response, the Philippines put in motion the dispute settlement procedure under UNCLOS. Before we proceed, it is necessary to give an overview of the provisions at issue. Articles 279 and 280 of the Convention provide the general principles that must govern the dispute settlement procedure, both of which should be seen as a restatement of Article 33(1) of the UN Charter⁴³. Article 279 provides that

40 WALLACE, Dustin. An analysis of Chinese Maritime Claims in the South China Sea. *Naval Law Review*. 63 (1): p. 149. 2014.

The claim of right is also reflected in Article 2 of China's 1992 Law on the Territorial Sea and the Contiguous Zone, where it is claimed that “Diaoyu Island, Penghu Islands, Dongsha Islands, Xisha Islands, Nansha (Spratly) Islands and other islands” are part of the People's Republic of China. *Law on the Territorial Sea and the Contiguous Zone*. Beijing, February 25, 1992. Available at: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf

41 For instance, according to Jiao Yongke, the areas enclosed by the nine-dash line are “water areas over which China has a *historic proprietary title*, they constitute China's specific exclusive economic zone, or historic exclusive economic zone.” In DUPUY, Florian and DUPUY, Pierre-Marie. *A Legal Analysis of China's Historic Rights Claim in the South China Sea*. *American Journal of International Law*, 107 (1): p. 132. 2013. For another Chinese scholar, Su Hao, China's “claims and interests in the South China Sea are based on its *historical rights* and international law.” *Ibid.* p. 176.

42 DUTTON, Peter. *A Maritime or Continental Order for Southeast Asia and the South China Sea?* *Naval War College Review*, 69 (3): p. 7. 2016.

43 Article 33(1) of the UN Charter reads as follows: “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”

the parties must seek the peaceful settlement of their disputes⁴⁴, while Article 280 provides for the principle of free choice of means in dispute resolution⁴⁵. Thus, UNCLOS sets up a two-tier system for dispute resolution: parties first must attempt to settle disputes between themselves, and if they are unable to do so, the mandatory dispute settlement mechanism kicks in.

Under Article 280, parties to UNCLOS must attempt to settle any dispute that arises between themselves by means of their choosing. UNCLOS is silent regarding what alternative procedures the parties can resort to, but by application of the *in pari materia* canon of construction we can rely on Article 33(1) of the UN Charter and state that at least, such procedures include “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement [and] resort to regional agencies or arrangements”⁴⁶. Finally, Article 300 of the Convention provides for the general application of the principle of good faith throughout the Convention⁴⁷.

If the parties fail to settle their disputes through means of their own choosing, then Article 281(1) applies. Analytically speaking, Article 281(1) has been read to set up two requirements that must be met before the mandatory dispute settlement procedure of UNCLOS can be activated. First, commentators and jurisprudence have read into the article an exhaustion requirement: “the disputing Parties must have exhausted dispute settlement procedures on the basis of mutual agreement”⁴⁸. As Professor Bing Bing Jia of Tsinghua University notes, the agreement “does not have to be formal, but could exist by conduct or through the practice of the parties concerned, and it could well be *ad hoc*”⁴⁹. However, and as a way of narrowing down the obligation, the International Tribunal for the Law of the Sea held in the 1999 “Southern Bluefin Tuna” cases that state parties are “not obliged to pursue procedures under Part XV, section 1, of the Convention when [they] conclude that the possibilities of settlement have been exhausted”⁵⁰. Anticipating the next part of this section, this is one of the contentions China raised — that bilateral negotiations with the Philippines could not be considered exhausted at the point when the Philippines activated the compulsory dispute settlement procedure. This requirement should be read together with Article 283 of UNCLOS, which has the effect of creating a duty on the parties to a conflict to exchange views as a preliminary measure to any further steps⁵¹.

44 “States parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means.”

45 “Nothing in [Part XV] impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.”

46 Article 33(1) UN Charter.

47 Article 300 reads as follows: “States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right”.

48 TANAKA Yoshifumi. *The International Law of the Sea*. Cambridge, Cambridge University Press, 2012. p. 421.

49 Permanent Court of Arbitration. *Barbados v. Trinidad and Tobago*. 2006. par. 205.

50 International Tribunal for the Law of the Sea. *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures. 1999. par. 56.

51 TANAKA, Yoshifumi. *Op. Cit.* p. 421.

The second requirement established by Article 281(1) is that any agreement made by the parties “does not exclude any further procedure” under the Convention — in other words, resort to the compulsory dispute settlement mechanism always remains a possibility. Once it has been determined the compulsory dispute settlement procedure of UNCLOS applies, there are four possible venues where the dispute could be settled, according to Article 287(1): the International Tribunal for the Law of the Sea; the International Court of Justice; “an arbitral tribunal constituted in accordance with Annex VII” and “a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein”⁵². The South China Sea arbitration was conducted under a tribunal constituted according to Annex VII of UNCLOS.

To finalize our overview of UNCLOS’ compulsory dispute settlement procedure, it is important to note that not every issue covered by UNCLOS is subject to the compulsory dispute resolution mechanism. Article 298(1) sets out three types of matters that a state can exclude from Part XV of the Convention: first, “disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles”⁵³; second, “disputes concerning military activities [and] disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under [Article 297(2) or (3)]”⁵⁴; and third, disputes involving the UN Security Council, unless it “decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in [UNCLOS.]”⁵⁵ Exclusion is not absolute, but under Article 298(2), the consent of the state that has made a declaration under Article 298(1) is required for a matter falling into one of these categories to be settled using UNCLOS’ dispute resolution procedures⁵⁶.

The issue of historic rights — that will be briefly covered later in this article — had bearing on the threshold question of whether the arbitration was admissible or not. China made a declaration in 2006 stating they would not accept disputes arising under any of the three categories in Article 298⁵⁷. Article 298 of UNCLOS allows a state to opt-out of the dispute settlement procedures that rule issues arising under Articles 15, 74 and 83, as long as those issues concern “sea boundary delimitations, or those involving historic bays or titles”⁵⁸. However, as the Tribunal in the South China Sea decision said, after tracing back the history of the usage

52 UNCLOS Article 287(1).

53 UNCLOS Article 298(1)(a)(ii).

54 UNCLOS Article 298(1)(b).

55 UNCLOS Article 298(1)(c).

56 As an aside, Articles 297(2)(a) and 297(3)(a) completely exclude from the compulsory dispute settlement regime disputes concerning maritime scientific research or fishing. TANAKA, Yoshifumi. *Op. Cit.* p. 427.

57 UNITED NATIONS. *Declarations and Statements to UNCLOS*. [Online.] New York, United States. [Accessed April 5, 2019.] Available at: https://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification

58 Article 298 UNCLOS.

of the term historic title, the concept of historic rights claimed by China does not fit into any of these categories, since historic rights is not a synonym of historic title⁵⁹. Even so, before the tribunal came back with its decision on admissibility, China also raised three arguments to show why, assuming the matter could be subject to arbitration, it was improper to activate Part XV of UNCLOS in this case.

The issue of what can be considered negotiations under Article 281(1) of UNCLOS is the first issue that China raised. According to the Chinese position, there was an agreement between China and the Philippines to deal with the disputes at issue in the South China Sea — an agreement that, according to Professor Jia, can be found in the “Declaration on the Conduct of Parties in the South China Sea” of November 4, 2002⁶⁰. Specifically, Professor Jia points to paragraph 4 of this document, which is worth quoting: “The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means [through] friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea”⁶¹. Together with subsequent statements between the Presidents of China and the Philippines issued in 2004 and 2011, this purportedly shows that “there exists a genuine and, indeed, solemn agreement between them [to negotiate] in light of the documented commitment of the parties to the present dispute”⁶².

China contended there was an agreement to negotiate with the Philippines, and in its Notification and Statement of Claims, the Philippine government recognizes the existence of negotiations going back to 1995⁶³. Two critical issues arise at this juncture: 1) what exactly is enough to comply with the duty to negotiate, and 2) for how long negotiations must extend until the threshold of exhaustion is reached. With regard to the first point, the PRC argued that the Philippines had not complied with its duty to negotiate. In response, the Philippines argued that “the Philippines and China have been exchanging views on these disputes in attempts to achieve negotiated solutions”⁶⁴ for seventeen years, to no avail. China, however, considered this process to be a mere exchange of views. Relying on an ICJ case, “Georgia v. the Russian Federation,” the PRC asserted that “the concept of negotiations [...] requires — at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolve the issue”⁶⁵.

59 Permanent Court of Arbitration. In the Matter of the South China Sea Arbitration, Award. 2016. par. 225.

60 JIA, Bing Bing. The Issue of Admissibility in Inter-State Arbitration. In: TALMON, Stefan and JIA, Bing Bing. The South China Sea Arbitration: A Chinese Perspective. London, Hart Publishing, 2014. p. 111.

61 Refer to the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea. Available in: THAO, Nguyen. The 2002 Declaration on the Conduct of Parties in the South China Sea: A Note. *Ocean Development and International Law*, 34 (3): pp. 282-285. 2003.

62 JIA, Bing Bing. *Op. Cit.* p. 113.

63 REPUBLIC OF THE PHILIPPINES. Notification and Statement of Claim on West Philippine Sea. [Online.] January 22, 2013. Par. 26. [Accessed April 7, 2019.] Available at: <https://seasresearch.files.wordpress.com/2014/12/notification-and-statement-of-claim-on-west-philippine-sea.pdf>

64 *Ibid.* par. 1.

65 PEOPLE’S REPUBLIC OF CHINA. Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (December 7, 2014.) [Online.] December 7, 2014. Par. 46. [Accessed April 7, 2019.] Available at: http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml

An exchange of views based on an issue could not constitute negotiations under this view, being little more than letting the other party know where one stands. Furthermore, the subject matter of the exchanges of views between the two countries had not always concerned the dispute at issue and how it should be solved, following the provisions of the Convention⁶⁶. Finally, “despite the Philippines having been repeatedly invited by China in the past to commence mechanisms of consultation and negotiation”⁶⁷ the Philippines failed to respond, and instead called for both parties to proceed to “a dispute settlement mechanism”⁶⁸.

The second issue raised by China, arguing in the alternative and assuming negotiations were taking place, is exhaustion. As Professor Jia correctly notes, “in international law, the relevance and impossibility for success of the negotiating process must be considered fully before drawing any conclusion as to the exhaustion of the venue of negotiations”⁶⁹. This is a high threshold, but perhaps this interpretation is right when it comes to UNCLOS, considering the structure of Part XV — compulsory settlement of disputes is supposed to be a measure of last resort. However, he goes even further: “The genuineness of the attempt to negotiate must be shown *until there is no possibility* for a final solution”⁷⁰. “No possibility” is an incredibly high threshold, one that would in practice allow negotiations to take place for decades and decades on end, but Professor Jia is not alone in holding this position. The Chinese government followed this line of argument, as it can be seen in the 2014 “Position Paper on the South China Sea Arbitration,” where the PRC plainly states that “China and the Philippines have agreed to settle their relevant disputes by negotiations, *without setting any time limit* for the negotiations, and have excluded any other means of settlement”⁷¹.

Finally, China also argues there has been an abuse of rights by the Philippines in commencing arbitration procedures, which would go against the principle of good faith codified in Article 300 of UNCLOS. The argument goes as follows: Article 287 of UNCLOS can be initiated unilaterally, and that fact is not in dispute. However, “that [unilateral] character is obviously subject to the provision of Article 281(1) UNCLOS”⁷². Both parties had agreed to negotiate, but negotiation is interpreted by China to have an extremely high threshold for exhaustion. Under this view, since the Philippines triggered the compulsory dispute resolution mechanism before the point of exhaustion was reached when it brought a claim against China,

66 Ibid. par. 50.

67 JIA, Bing Bing. Op. Cit. pp. 119-120.

68 REPUBLIC OF THE PHILIPPINES. Response of the DFA Spokesperson to the Recent Statement of the Chinese Ministry of Foreign Affairs on the West Philippine Sea Issue (July 15, 2013.) [Online.] July 15, 2013. Par. 5. [Accessed April 7, 2019.] Available at: <https://www.dfa.gov.ph/dfa-releases/332-response-of-the-dfa-spokesperson-to-the-recent-statement-of-the-chinese-ministry-of-foreign-affairs-on-the-west-philippine-sea-issue>

69 JIA, Bing Bing. Op. Cit. p. 117.

70 Ibid. p. 119.

71 PEOPLE'S REPUBLIC OF CHINA. Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (December 7, 2014.) [Online.] December 7, 2014. Par. 44. [Accessed April 7, 2019.] Available at: http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml

72 JIA, Bing Bing. Op. Cit. p. 129.

what it did was to “avoid its obligation to negotiate under Articles 279 and 281(1), and its obligation to do so in good faith under Article 300”⁷³. An alternative basis for China to claim abuse of right by the Philippines concerns the subject matter of the arbitration: assuming the Philippines claims’ deal with territorial sovereignty, and that the Philippines knows that “China has never accepted any compulsory procedures in respect of those claims”⁷⁴, bringing the claim would be an abuse of right.

The tribunal in the *South China Sea* arbitration took on each of China’s claims, and in its “Award on Jurisdiction and Admissibility” of October 2015, dismissed them all. First, regarding the issue of whether there were negotiations, the tribunal decided in the affirmative. The tribunal did not specify the scope of the duty to negotiate⁷⁵. Instead, it simply stated that “the Philippines did seek to negotiate with China concerning the disputes presented in these proceedings and that its obligations, both under the Convention and customary law, have accordingly been satisfied”⁷⁶ through multiple bilateral discussions between China and the Philippines, among other instances the tribunal chose to point out as evidence⁷⁷.

The tribunal also considered whether the duty stated in Article 283 of UNCLOS — the exchange of views — was satisfied in this case. It held, following the “*Artic Sunrise*” case, that Article 283 UNCLOS requires an exchange of views not on the substance of the dispute, but rather on the means through which the dispute will be settled.⁷⁸ This requirement, according to the tribunal, was met in this case, since “the record indicates that the Parties continued to exchange views on the means to settle the disputes between them until shortly before the Philippines initiated [the] arbitration”⁷⁹. To support this point, the tribunal referenced a bilateral consultation meeting between China and the Philippines on January 14, 2012⁸⁰, and a “*Nota Verbale*” by the Philippines dated April 26, 2012⁸¹. The court also indicated the parties were at an impasse at this point, since the Philippines “favored either multilateral negotiations involving other ASEAN Member States or the submission of the Parties’ disputes to one of the third-party mechanisms contemplated in the Convention [while] China, in turn, was adamant that only bilateral talks could be considered”⁸². Therefore, concluded the tribunal, the Philippines had discharged its obligation under Article 283 of UNCLOS and initiating the compulsory dispute settlement mechanism was proper⁸³.

73 Ibid. p. 130.

74 PEOPLE’S REPUBLIC OF CHINA. Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (December 7, 2014.) [Online.] December 7, 2014. Par. 84. [Accessed April 7, 2019.] Available at: http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml

75 Permanent Court of Arbitration. In the Matter of the South China Sea Arbitration, Award on Jurisdiction and Admissibility. 2015. par. 347.

76 Ibidem.

77 Ibid. par. 348.

78 Ibid. par. 160.

79 Ibid. par. 337.

80 Ibid. parrs. 337-339.

81 Ibid. parrs. 340-341.

82 Ibid. par. 342. The tribunal pointed out in the same paragraph that the same pattern could be observed throughout the course of negotiations.

83 Ibid. par. 343.

Second, when it comes to the exhaustion requirement, the tribunal was swift to reject China's claim of exhaustion as a requirement for activating the dispute settlement procedure. Quoting the 1998 "Cameroon v. Nigeria" case, the court simply stated that "neither in the [United Nations] Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to [international adjudication]"⁸⁴. Moreover, even though both parties were far from reaching an agreement, this does not prove negotiations were not conducted in good faith, but rather proves the existence of "mutually incompatible views as to how such talks should be conducted"⁸⁵. Since it appeared to the Philippines that negotiations could not proceed any further, it was proper for it to judge it was necessary to activate the compulsory dispute settlement mechanism. As the International Tribunal for the Law of the Sea stated in the case "Land Reclamation by Singapore in and around the Straits of Johor," "a State Party is not obliged to pursue procedures under Part XV, Section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted"⁸⁶, an authority that goes directly against both of China's contentions for denying exhaustion: that negotiations had not taken place, or alternatively, that they are taking place and there is no time limit to them.

Finally, the South China Sea Arbitration tribunal summarily dismissed China's claims of abuse of rights. Noting that China has not made a claim that the Philippines has breached Article 300 of UNCLOS, but rather is basing its claim in the principle of good faith which is codified in said article, the tribunal held that "the mere act of unilaterally initiating an arbitration under Part XV in itself cannot constitute an abuse of rights"⁸⁷ since, and as the tribunal held in "Barbados v. Trinidad and Tobago", "article 286 confers a unilateral right, and its exercise unilaterally and without discussion or agreement with the other Party is a straightforward exercise of the right conferred by the treaty, in the manner there envisaged"⁸⁸. The tribunal also notes that an alternative avenue to claim abuse of rights would be under Article 294 of the Convention, but since China has not made such a claim, the tribunal is under no need to make a determination⁸⁹.

Unsurprisingly, China did not accept any of the tribunal's determinations, much like it rejected the South China Sea arbitration wholesale⁹⁰. In its July 7, 2016 position paper — issued after the decision in the Philippine arbitration case had

84 Ibid. par. 345.

85 Ibid. par. 349.

86 Cited in: Ibid. par. 350.

87 Ibid. par. 126.

88 Ibidem.

89 Ibid. par. 128.

90 See, for example, the following quote: "With regard to the award rendered on 12 July 2016 by the Arbitral Tribunal in the South China Sea arbitration established at the unilateral request of the Republic of the Philippines [the] Ministry of Foreign Affairs of the People's Republic of China solemnly declares that the award is null and void and has no binding force. China neither accepts nor recognizes it." CHINA statement on ruling on South China Sea Arbitration. [Online.] GMA News Online. Quezon City, Philippines, July 12, 2016. [Accessed April 4, 2019.] Available at: <http://www.gmanetwork.com/news/news/nation/573414/china-statement-on-ruling-on-south-china-sea-arbitration/story/>

been released — China restated its position regarding the compulsory settlement mechanism. Namely, that “by unilaterally initiating arbitration, the Philippines [had] violated China’s right to choose means of dispute settlement of its own will”⁹¹ and that it had acted in bad faith⁹². What is most remarkable about this case is not the particular legal issues concerning Part XV of UNCLOS the tribunal had to grapple with (and their eventual clarifications,) but rather what the entire episode tells us about the way the PRC approaches international law: a dismissal of judicial methods of dispute settlement, with an undisputed preference for bilateral negotiation — where no other dispute settlement procedure is deemed acceptable⁹³.

There are a couple brief lessons we can gather at this juncture. From a realist perspective, the PRC has acted quite rationally: as the strongest superpower in the region, China can negotiate with its neighbors from a position of strength. Moreover, if its position is not strong enough at the outset, nothing stops the PRC from acting to improve it — as it did with regard to the Philippines, which no wonder explains why China insisted so strongly on negotiations not being subject to any sort of time limit. Furthermore, despite technically losing in the arbitration, China has barely incurred in any costs. This is consistent with the realist understanding of the effects of a violation of international law; as Stephen Krasner says “a state that transgresses international legal rules will be punished only if other more powerful states want to do it”⁹⁴. Likewise, no state so far has shown enough willingness to make China incur costs for “maintaining its aggressive South China Sea policies while escaping sanction for its non-compliance”⁹⁵. It is only to be expected, then, that if a similar situation arises, China will act in the same way. An argument to the contrary can be raised, that “states enhance their stature, and with it their influence, when they demonstrate that they are law-abiding, including by complying with international judgments and awards”⁹⁶. Inasmuch as that China will never be able to discredit the award, this is right. Compliance would seem the path of least resistance for a normal state. China, however, is not a normal state: it is a military superpower. A state can also “enhance its stature, and with it its influence” by maximizing their power and exerting control over others, which is exactly what realist theory would predict and what China has done in this case.

91 PEOPLE’S REPUBLIC OF CHINA. China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea (July 13, 2016). [Online] Par. 117. Available at: http://www.fmprc.gov.cn/nanhai/eng/snhwtlclwj_1/t1380615.htm

92 *Ibid.* par. 118.

93 See, for example, *Ibid.* par. 116: “[China and the Philippines] have chosen to settle the relevant disputes through negotiation and to exclude any third-party procedure, including arbitration.”

94 KRASNER, Stephen. Realist Views of International Law. Proceedings at the Annual Meeting of the American Society of International Law, 96 (1): p. 266. 2002.

95 KU, Julian. Assessing the South China Sea Arbitral Award after One Year: Why China Won and the U.S. is Losing. Lawfare [Online.] July 12, 2017. [Accessed: April 3, 2019.] Available at: <https://www.lawfareblog.com/assessing-south-china-sea-arbitral-award-after-one-year-why-china-won-and-us-losing>.

96 REICHLER, Paul. The Path to a Just and Lasting Peace in the South China Sea. U.S.-Asia Law Institute. [Online.] November 10, 2016. [Accessed: April 3, 2019]. Available at: <https://usali.org/publications/reichler-paul-s-the-path-to-a-just-and-lasting-peace-in-the-south-china-sea>
Caveat emptor: Paul S. Reichler represented the Philippines in the arbitration.

IV. Beyond the South China Sea Arbitration: China, UNCLOS, and General Lessons from Realism

A realist theory of international law should not be taken to assert that the way a state will act can be mechanically predetermined. “Structure [...] informs the environment in which all states act, but [all] states, and especially great powers, enjoy considerable discretion with regard to how they will pursue their goals and what sacrifices they will make in the face of constraints”⁹⁷. In this regard, China did have a choice: it could have accepted the arbitral decision, and subsequently negotiated with the Philippines to preserve its interest. It did not. But that is not unexpected: China has taken a minority position — that of disregarding the Philippine Arbitration⁹⁸ — but this is precisely the same course of action it has undertaken regarding the interpretation of other UNCLOS rules that may prejudice its security interests. Simply put, the PRC approach to the South China Sea arbitration is not an outlier, but the rule. That is the reason we are able to draw generalizable lessons from this episode.

China employs the same legal strategy — taking a minority position that better serves its security interests — in other contentious issues of the Law of the Sea. First, UNCLOS provides for the right of innocent passage through the territorial sea in Article 17 of the convention. While most states hold this provision extends to warships — which results in warships not needing to notify or request permission from the host state, receiving the same treatment that merchant ships would⁹⁹ — China holds a narrow definition, where a warship does require prior permission or authorization before it can pass through another state’s territorial waters¹⁰⁰. The same situation can be seen when it comes to the legality of holding military exercises in the Exclusive Economic Zone (EEZ): most countries have taken the position

97 KIRSCHNER, Jonathan. Op. Cit. p. 55.

98 Data from ARBITRATION SUPPORT TRACKER [Online.] Asia Maritime Transparency Initiative. [Accessed April 7, 2019.] Available at: <https://amti.csis.org/arbitration-support-tracker/>

99 See, for instance, the 1989 *Uniform Interpretation of Norms of International Law Governing Innocent Passage* between the United States and the Soviet Union. The document holds in paragraph two that “all ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.” TANAKA, Yoshifumi. Op. Cit. p. 92. Only forty parties to UNCLOS hold a different understanding. Ibidem.

100 AGYEBENG, William. Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea. *Cornell International Law Journal*, 39 (2): 396. 2006. The reasons are, no doubt, based on the PRC’s internal security. As one Senior Chinese Admiral has said, “China consistently opposes so-called military freedom of navigation, which brings with it a *military threat* and which challenges and disrespects the international law of the sea.” Quoting Admiral Sun Jianguo, deputy chief of China’s Joint Staff, in O’ROURKE, Ronald. *Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress*. [Online.] Congressional Research Service, 2019, p. 28. [Accessed on: April 7, 2019.] Available at: <https://fas.org/sqp/crs/row/R42784.pdf>. Note that China has expressed its opposition to this rule since it was codified in the 1958 *Convention on the Territorial Sea and the Contiguous Zone*, since to the PRC, the requirement to ask for permission or notification was (and still is) within the sovereign rights of the coastal state. In ZOU, Keyuan. *Innocent Passage for Warships: The Chinese Doctrine and Practice*. *Ocean Development and International Law*, 29 (3): p. 200. 2009.

that military activities are authorized in the EEZ¹⁰¹. China again finds itself in the minority position, which holds that states do not have the right to conduct military activities in the EEZ of third states, and that coastal states have jurisdiction to regulate said activities¹⁰².

Finally, there is the matter of the PRC's maritime claims in the South China Sea based on historic rights¹⁰³. The Chinese position is that "UNCLOS does not properly address the issue of historic rights [since] it does not have any provision for the definition of historic rights or their specific connotation and denotation"¹⁰⁴. However, the majority understanding is that once a party has entered UNCLOS, it only has the rights specified therein, and those do not include historical rights¹⁰⁵. This is because one of the objectives behind the adoption of the Convention was to establish "a legal order for the seas" which settles "all issues relating to the law of the seas"¹⁰⁶. From this factor, it can be inferred that the "system of maritime zones created by the Convention was intended to be comprehensive and to cover any area of sea or seabed"¹⁰⁷, which highlights the need the framers felt to establish a legal regime that superseded all other existing norms at the time.

101 The proof of this statement can be found by negative inference. Out of all UNCLOS signatories, the "Nations that restrict military activities in the EEZ include: Bangladesh, Brazil, Burma, Cape Verde, China, India, Indonesia, Iran, Kenya, Malaysia, Maldives, Mauritius, North Korea, Pakistan, the Philippines, Portugal and Uruguay." In PEDROZO, Raul. Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone. *Chinese Journal of International Law*, 9 (1): p. 27. 2010. Captain Pedrozo also adds Benin, Congo, Ecuador, Liberia, Peru, Somalia and Togo, which are the nations claiming a territorial sea over 12 nautical miles, as well as Cambodia, Sudan and Syria, who claim security jurisdiction in their contiguous zone.

102 It is beyond the scope of this article to go in full detail here. However, we can say that China employs two arguments: First, Article 56(1)(b)(ii) of UNCLOS allows a coastal state to regulate marine scientific research. However, as Professor Zhang Haiwen points out, "it is impossible to draw a sharp distinction between" marine scientific research and other data collection activities, since "[m]any of the technologies used for hydrographic surveying and marine scientific research are both similar and relatively recent innovations." ZHANG, Haiwen. Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ. *Chinese Journal of International Law*, 9 (1): pp. 42-43. 2010. Thus, China takes the position that it has the right to regulate surveys done by military ships, and Article 9 of the 1998 Exclusive Economic Zone and Continental Shelf Act should be read in this way. Second, military activities involve the use (and demonstration) of force, they can be construed to be a threat — albeit issues of imminence would arise — and thus against Article 2(4) of the United Nations Charter and Article 301 of UNCLOS, which follows the Charter when it states that "[i]n exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State." XIAOFENG, Ren and XIZHONG, Cheng. A Chinese Perspective. *Maritime Policy*, 29 (2): p. 142. 2005. Ironically enough, as US Navy Admiral Raul Pedrozo notes, "Chinese ships and aircraft are increasingly operating in foreign EEZs throughout the Asia-Pacific region." PEDROZO, Raul. Op. Cit. p. 16. See *Ibid.* pp. 16-18 for a list of instances where China has conducted military exercises in the EEZ of other countries in the Asia-Pacific region.

103 "Rights over certain land or maritime areas acquired by a State through a continuous and public usage from time immemorial and acquiescence by other States, although those rights would not normally accrue to it under general international law." TANAKA, Yoshifumi. Op. Cit. p. 223.

104 ZHIHUA, Zheng. Why Does China's Maritime Claim Remain Ambiguous? Asia Maritime Transparency Institute [Online.] June 12, 2015. [Accessed April 4, 2019.] Available at: <https://amti.csis.org/why-does-chinas-maritime-claim-remain-ambiguous/>

105 More broadly, "the tribunal considers the text and context of the Convention to be clear in superseding any historic rights that a State may once have had in the areas that now form part of the exclusive economic zone and continental shelf of another State." Permanent Court of Arbitration. In the Matter of the South China Sea Arbitration, Award. 2016. par. 247.

106 UNCLOS Preamble.

107 Permanent Court of Arbitration. In the Matter of the South China Sea Arbitration, Award. 2016. par. 245.

In contrast with the commonly-held image of municipal law as something settled, International law is in a constant state of flux. China joined UNCLOS without making a single reservation, but as a result of its changing security interests, the bargain no longer suits its purposes. Thus, the reinterpretation of the mandatory dispute settlement provisions, as well as other rules that are no longer useful. Said reinterpretation proceeds in the direction of protecting the PRC's security interests — an understandable position, given the strategic importance of the South China Sea — with a view for the Chinese position to become mainstream in the future, given how unfeasible it would be to renegotiate a multilateral treaty such as UNCLOS¹⁰⁸. From a realist point of view, there are three lessons we can draw from China's attitude toward the South China Sea arbitration: first, that military power has primacy, and second, that in line with what realists would expect, the inherent weaknesses of international law provide an opening for China to attempt to re-interpret liberal regimes in a way that favors it. A third and final lesson that we can draw — albeit after a brief examination of China's attitude toward other international regimes — is that there are generalizable lessons to be found about the conduct of Chinese foreign policy in the PRC's approach toward UNCLOS.

The Primacy of Military Power

The primacy of military power can be seen in China's attempt to increase their naval power. Analysts have been aware of the PRC attempt to build "a greater maritime force, a stronger air force and improved military forces"¹⁰⁹. This is openly recognized by the Chinese Government: in the document "China's Military Strategy," issued by the State Council Information Office of the People's Republic of China, naval power occupies a prominent role in the face of "the world economic and strategic center of gravity is shifting ever more rapidly to the Asia-Pacific region [and as] the US carries on its 'rebalancing' strategy and enhances its military presence and its military alliances in the region"¹¹⁰. Naval power plays a central role in enhancing the Chinese position in the region: "The traditional mentality that land outweighs sea must be abandoned, and great importance has to be attached to managing the seas and oceans and protecting maritime rights and interests"¹¹¹. It is with this background in mind that the Chinese reinterpretation or lack of compliance with UNCLOS norms should be understood.

Law by itself does not create security, but is one of many scenarios where the drama of international politics unfolds. For realists, it is unsurprising that law

108 The reinterpretation might not proceed through regular channels (as in, amending the law) but this process is by no means unique to UNCLOS. Article 51 of the United Nations Charter, for example, allows for self-defense, collective or otherwise, "if an armed attack occurs." A strictly textual reading of this provision would foreclose the possibility of preemptive self-defense — striking at an aggressor right before it launches an attack. Instead, almost all states consider this course of action to be legal in international law.

109 JACOBS, Andrew. China, Updating Military Strategy, Puts Focus on Projecting Naval Power. *New York Times*, New York. May 26, 2015. p. A10.

110 DOCUMENT: China's Military Strategy. [Online.] USNI News. Baltimore, United States. May 26, 2015. [Accessed 4 April 2019.] Available at: <https://news.usni.org/2015/05/26/document-chinas-military-strategy>

111 Ibidem.

is not seen as something settled, but as a bundle of norms permanently open to change, moreso when the changes would favor the security interests of the states proposing them. Considering China's geographical situation, its attitudes toward the UNCLOS provisions dealing with security matters and regarding the issue of land reclamation is unsurprising: China's coastline extends over 9,000 miles¹¹², providing ample opportunities for challengers (i.e., the United States) to act against its interests. We cannot be surprised if the PRC seeks to change the existing legal regime in a way that would legally foreclose some of these interventions *a priori*. The same is true when it comes to claims of historic rights over the South China Sea — an issue that was also in question during the Philippine Arbitration. As scholars have noted, the strategic location of the South China Sea is critical to the PRC, even more than the resources therein, since “the Malacca Strait is the main passage for the U.S. Navy to enter the Indian Ocean, and the South China Sea is an important hub linking two oceans and three continents”¹¹³. No wonder, then, that China would employ every legal instrument in its arsenal in order to assert claims over this area.

Robert Kaplan summarizes the core of the issue succinctly: China “faces a far more hostile environment at sea that it does on land”¹¹⁴. This also may help explain why China thinks about the ocean in a territorial manner; namely, the reliance on the concept of the three island chains, which “suggest that the Chinese see all these islands as archipelagic extensions of the Chinese landmass”¹¹⁵. The problem is for China that it does not have yet the blue-water capabilities to ensure sea control over these areas. Thus, the turn to law for the moment — if the current international regime grants the United States Navy the legal right to cross the territorial sea at will, then it is in the Chinese national interest to do its utmost to change it.

The drive to ensure its security can also help explain the extensive process of land reclamation China is engaging in¹¹⁶. While Chinese authorities have claimed that the land reclamation projects are being carried out for civilian purposes¹¹⁷, this outlook is not shared by international observers: “the airfields, berthing areas, and resupply facilities [would] enable China to establish a more robust power projection presence into the South China Sea. Its latest land reclamation and construction will also allow it [to] expand its law enforcement and naval presence farther south into the South China Sea; and potentially operate aircraft that could enable China

112 KAPLAN, Robert. *The Geography of Chinese Power: How Far Can Beijing Reach on Land at Sea?* Foreign Affairs, 89 (1): p. 22. 2010.

113 DUTTON, Peter. *An Analysis of China's Claim to Historic Rights in the South China Sea*. In ZOU, Keyuan and SONG, Yann-Huei. *Major Law and Policy Issues in the South China Sea: European and American Perspectives*. In: London, Routledge, 2014. p. 9.

114 *Ibid.* p. 33.

115 *Ibidem.*

116 “China [has] reclaimed more than 2,900 acres of land. By comparison, Vietnam has reclaimed a total of approximately 80 acres; Malaysia, 70 acres; the Philippines, 14 acres; and Taiwan, 8 acres.” O'ROURKE, Ronald, *Op. Cit.* p. 34.

117 “General Fan Changlong, Vice-Chairman of the Chinese Central Military Commission, sought to reassure his audience at the Xiangshan Forum in Beijing that those construction projects are mainly carried out for civil purposes and will not affect freedom of navigation in the South China Sea.” XINBO, Wu. *Cooperation, Competition and Shaping the Outlook: The United States and China's Neighborhood Diplomacy*. *International Affairs*, 92 (4): p. 855. 2016.

to conduct sustained operations with aircraft carriers in the area”¹¹⁸. Even though other countries have also engaged in land reclamation in the area, none of them have a level of military spending that comes close to China’s¹¹⁹. As a consequence of this process, the PRC has acquired “the capacity to militarize the southern portion of the South China Sea rapidly”¹²⁰.

But land reclamation is not the only thing China can do to increase its security. Limiting military activities in the EEZ economic zone goes in the same direction. Maintaining claims over unspecified historic rights and dealing with any territorial delimitation issues that might arise with its neighbors by bilateral negotiations — where China can bargain from a position of strength — also point in the direction of the same trend of giving an emphasis to security. Law by itself does not provide security, but that does not mean states cannot make use of it as another instrument of foreign policy¹²¹.

The Problems with International Law

Treaty interpretation is rarely a straightforward or mechanical matter. In the international arena diverse interpretations compete with one another, and it is only to be expected that a state as powerful as China will attempt to make its own position prevail. There is a pressing need when studying international politics to acknowledge the realities of power, “both the reality of the power of others and the necessary limitations of one’s own”¹²². It is precisely this realization that leads China to attempt to reinterpret UNCLOS clauses, as part of a wider effort to ensure improve its security in the area. From the Chinese perspective, the presence of a western power of unrivalled strength in the area — the United States — is naturally seen as dangerous, as an attempt by America to “prevent China from dominating the South China Sea and to preserve its own military freedom of action in the re-

118 O’ROURKE, Ronald, *Op. Cit.* pp. 33-35. Additionally, “though too small to support large military units, the islands will enable sustained Chinese air and sea patrols of the area.” WATKINS, Derek. *What China Has Been Building in the South China Sea.* [Online.] New York Times, New York, July 30, 2015. [Accessed 4 April 2019.] Available at: <https://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea.html>

119 According to the Stockholm International Peace Research Institute, China spends approximately 215,000 million dollars in military expenditure. The world’s largest spender is the United States, with 611,000 million dollars in military expenditure. As a matter of comparison, Japan is the second largest spender in the region, with 46,000 million dollars. Numbers are in constant 2015 dollars. See SIPRI MILITARY EXPENDITURE DATABASE [online.] Stockholm, Sweden. [Accessed April 9, 2016.] Available at: <https://www.sipri.org/databases/milex>

120 DUTTON, Peter. *A Maritime or Continental Order for Southeast Asia and South China Sea.* *Naval War College Review*, 5 (1): p. 10. 2010.

121 While there is ample historical precedent of international law used against China, as Tiewa Wang recounts, there is historical precedent where China has seen international law used to put an end to an international dispute. See WANG, Tiewa. *Op. Cit.* pp. 232-234 (recounting how international law was used to solve the issue of the seizure of a Danish merchant ship by the Prussian navy in Chinese “interior waters.”) Naturally, the Chinese attitude toward international law would sour with the imposition of the unequal treaties: “The main features of the unequal treaty system were force and inequality. The treaties were imposed by force or concluded under the threat of force with the purpose of exacting rights and privileges for the foreigners and their countries in flagrant violation of the sovereignty and independence of China, the idea of equality being completed rejected.” *Ibid.* p. 252. For an account of the issue, see *Ibid.* pp. 237-262.

122 KIRSCHNER, Jonathan. *Op. Cit.* p. 65.

gion”¹²³. Since the Chinese Navy is not yet comparable to the American one, China is using law to complement its military capabilities. And thus comes the turn to law.

Not every possible interpretation is admissible in international law. After all, there are international tribunals that might be called upon to decide on the meaning of vague provisions from time to time. The problem, as realists correctly point out, is that there is no supranational legal authority with the power to enforce those decisions, which means China remains free to reject them. The South China Sea arbitration is a perfect example, and one that shows the PRC intends to treat any disputes that may arise under the convention in the future in a bilateral manner¹²⁴. This is not only consistent with realism, but it is an actual prediction that theorists working under the paradigm would make: “As long as interpretations by international tribunals do not fundamentally shift the balance of rights and responsibilities established in a treaty, then powerful states will generally support and comply with tribunal decisions [but] if interpretations do change the balance of rights and responsibilities to the detriment of powerful states, those states may refuse to comply with the tribunal’s decision”¹²⁵.

China might never be successful in discrediting the award but that does not imply, taken by itself, that the PRC’s strategy was the wrong one. To the contrary, if there is one clear victor from this episode, it is China. In rejecting the arbitral award wholesale, it has sent a signal to the rest of the ASEAN countries that arbitration is not the way forward. Why would it be since it is, for all practical matters, unenforceable? Maybe China will have to figure out how to grant access to resources in the South China Sea to those countries, but any agreement that might be reached will be done pursuant to China’s terms.

Notice, however, that China did not seek to denounce Part XV of the convention, but rather to have it read in accordance with its interpretation. Perhaps the reason why China has chosen to take this approach can be explained by its approach toward the liberal international order. Given its position as a permanent member of the Security Council, China is deeply embedded in the current liberal order rather than the outside player it once was¹²⁶. That said, it is a fact that the PRC’s interpretation of what the international legal system surely is at odds with the common understanding in Europe and the Americas: “China defends a pluralist international order that gives the state ontological priority. The fundamental purpo-

123 XINBO, Wu. Op. Cit. p. 855.

124 This prediction becomes even stronger when one considers how badly China lost in the arbitration. According to Robert D. Williams of Lawfare, of the fifteen issues the tribunal decided, in thirteen of them it made a finding for the Philippines. In WILLIAMS, Robert. Tribunal Issues Landmark Ruling in South China Sea Arbitration. Lawfare [Online.] July 12, 2016. [Accessed: April 5, 2019.] Available at: <https://www.lawfareblog.com/tribunal-issues-landmark-ruling-south-china-sea-arbitration>

125 STEINBERG, Richard. Op. Cit. pp. 162-163.

126 COHEN, Jerome. Chinese Attitudes Toward International Law — And Our Own. Proceedings of the American Society of International Law at its Annual Meeting, 61 (1): p. 113. 1967. Compare to Xi Jinping’s speech at the 19th National Congress of the Communist Party: “China supports the United Nations in playing an active role in international affairs, and supports the efforts of other developing countries to increase their representation and strengthen their voice in international affairs.” JINPING, Xi. Op. Cit. p. 54.

se of the UN Charter, in Beijing's view, is to preserve the sovereignty and territorial integrity of its member states"¹²⁷.

In this regard, we can see that China has consistently defended sovereignty and non-intervention in practice; its voting record at the Security Council "on interventions from Kosovo to Afghanistan and from Iraq to Libya and Syria"¹²⁸ serves as proof. But that is not to say China completely disregards anything that is not state action: as a way of example, China is one of the major troop contributors to United Nations Peacekeeping Operations¹²⁹. Is it possible to reconcile the continued Chinese engagement with the United Nations system with its position on UNCLOS' dispute settlement mechanism analyzed in this article? It is, and the notion of state sovereignty is the key to do so. Sovereignty can be defined as the power of a state or nation to exercise effective and supreme control within a territory (and which) is formally independent of any external or superior authority, including other states and international organizations¹³⁰. Already in the Nineteenth Century, the Chinese gained an awareness that international law can be used to defend the interests of the state¹³¹. and it would be unwise to assert that historical experience plays no role in the political thought of PRC leadership when the Opium Wars are still brought up in policy speeches to this day¹³², as a reminder of how important it is to protect national sovereignty¹³³.

To this day, China sees itself as being part of the developing world, which may be true if one takes into account economic development only. When it comes to its military capabilities, however, the country is no doubt a great power¹³⁴. Nevertheless, it is natural that taking this approach would lead to a perception of insecurity — more so given the United States' constant presence in the area — and it is

127 ZHANG, Yongjin. China and Liberal Hierarchies in Global International Society. *International Affairs*, 92 (4): p.801. 2016.

128 *Ibid.* p. 803.

129 *Ibid.* p. 812.

130 Adapted from LEVINSON, Daryl and GOLDSMITH, Jack. Law for States: International Law, Constitutional Law, Public Law. *Harvard Law Review*, 122 (4): p. 1845. 2009. This definition took two elements of Stephen Krasner's definition of sovereignty. An alternative formulation would be: "Sovereignty is the supreme power of the state to decide independently its internal and foreign affairs in accordance with its own will." T'AO, Ying. A Criticism of Bourgeois International Law Concerning the Question of State Sovereignty. In: COHEN, Jerome and HUNGDAH, Chiu. *People's China and International Law*. Princeton, Princeton University Press, 1974. p. 106.

131 COHEN, Jerome. *Op. Cit.* p. 109.

132 Of note is Xi Jinping's mention of the Opium Wars during in his address to the 19th National Congress of the Chinese Communist Party: "With the Opium War of 1840, China was plunged into the darkness of domestic turmoil and foreign aggression; its people, ravaged by war, saw their homeland torn apart and lived in poverty and despair." JINPING, Xi. Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era. In: 19th National Congress of the Communist Party of China. Beijing, 2017, p. 11. Available at: http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf

133 "We must *put national interests first*, take protecting our people's security as our mission and safeguarding political security as a fundamental task, and ensure both internal and external security, homeland and public security, traditional and non-traditional security, and China's own and common security. We will improve our systems and institutions and enhance capacity-building for national security, and *resolutely safeguard China's sovereignty*, security, and development interests." *Ibid.* pp. 20-21 (emphasis added)

134 "China's international status as the world's largest developing country has not changed." *Ibid.* p. 10.

in this respect that China's engagement with the Security Council and its attempt to change the majoritarian interpretation of UNCLOS norms should be understood: in phrasing the argument in terms of sovereignty, there is an attempt to limit the intervention of states abroad — not out of altruism, but because of first-hand experience¹³⁵. That is why the Chinese reject the mandatory settlement of disputes, because they do not want to leave matters of security outside of their hands. China may incur reputational costs from rejecting the arbitral award, and the result has been a change in the security dynamics of the region, with an increase in mistrust and a greater involvement of the United States in the zone — one that might end creating a Thucydides trap scenario¹³⁶ — but is a rational decision when following the common interpretation of the law would prejudice the PRC's security interests, and one that would find an explanation in a realist analysis of international law and of international relations as a whole.

UNCLOS and Chinese Foreign Policy

Finally, we need to consider how China's attitude toward the Law of the Sea convention can be interpreted when one considers Chinese foreign policy as a whole. Is this realist approach toward UNCLOS an outlier? Is this interest-driven behavior a one-off; something that has no counterpart in China's approach to other international regimes — for instance, how China behaves in the United Nations or in the World Trade Organization — or can it be understood as a natural extension of Chinese foreign policy? Now, China's preference for bilateralism as a means to solve controversies or exert pressure¹³⁷ on other states should be familiar to the reader at this point. However, unlike in the past, the PRC is an active participant in the international system; thus, we can determine what lessons its attitude toward UNCLOS play in China's foreign policy as a whole by keeping our analysis at the regime level. In that regard, I believe the PRC's approach toward UNCLOS fits within a general pattern that can be observed in its foreign policy, but to understand why we must delve briefly into the discussion of whether China is a status quo power or not.

135 This issue was also mentioned in Xi's speech: "China remains firm in pursuing an independent foreign policy of peace. We respect the right of the people of all countries to choose their own development path. We endeavor to uphold international fairness and justice, and oppose acts that impose one's will on others or interfere in the internal affairs of others as well as the practice of the strong bullying the weak." *Ibid.* p. 53.

136 "[C]hina's defensive proactive policy in [the] South China Sea has estranged its relations with most of its neighbors, and planted the seeds of suspicion and mistrust between a rising China and the established United States" and "as the Athenian historian Thucydides famously argued more than 2400 years ago: It was the rise of Athens, and the fear that this inspired in Sparta, that made war inevitable." ZONGYOU, Wei. *China's Maritime Trap*. *Washington Quarterly*, 40 (1): p. 176. 2017. The reason has to do with military readiness: "Military forces on small islands are similar to naval forces on platforms at sea, in that they are vulnerable to first use of force by other military forces in the region. Accordingly, in any crisis in the South China Sea between China and another country's naval forces, each side would receive a benefit from the first use of force." DUTTON, Peter. *Op. Cit.* p. 10.

137 The paradigmatic example would be offering economic and other benefits to countries that recognize Beijing and not Taipei as the rightful government of China. A campaign that, it must be said, has been quite effective: nowadays, only 14 countries (out of 193 countries officially recognized by the United Nations) formally recognize Taiwan. See O'CONNOR, Tom. *Which Countries Still Recognize Taiwan? Two More Nations Switch to China in Less Than a Week*. *Newsweek*. [online]. September 9, 2019. [Accessed November 11, 2019.] Available at: <https://www.newsweek.com/who-recognizes-taiwan-two-change-china-1460559>

The discussion of whether a newly-empowered China will seek to preserve the status quo — as in, keep the architecture of the so-called liberal international order more or less intact — or whether it is a revisionist power that seeks to fundamentally change the rules of the game in a way that it would benefit the PRC has been taking place for almost two decades at this point¹³⁸. This debate is long-ranging and extremely complex, and even offering a satisfactory summary of it would go beyond the scope of the paper. And there is enough evidence to raise a plausible claim for China acting like a revisionist power: for instance, Mark Leonard writes that “The Chinese [...] do not feel inclined to uphold a Western-led international order that they had no role in shaping”¹³⁹, and Sebastian Heilmann et al focus on how “China’s foreign policy is working systematically towards a realignment of the international order through establishing parallel structures to a wide range of international institutions”¹⁴⁰. which would, as a practical matter, reshape the international system in fundamental ways.

Without disregarding the points raised above, I believe the authors err in concluding the PRC is a revisionist power. It is true that China is establishing a set of alternative institutions — the Asian Infrastructure and Investment Bank, the Shanghai Cooperation Organization and the Silk Road Economic Belt come to mind as the most salient examples. Nevertheless, that is not the whole story. As Andrew Nathan points out, one also must keep in mind that China participates “in almost all of the major international regimes in which it is eligible to participate”¹⁴¹. Some of these regimes it complies fully, “when the demonstrable benefits outweigh the economic and political costs”¹⁴², with some it complies partially but with a view toward full compliance¹⁴³, and in others — such as the United Nations’ human rights system or even the United Nations system as a whole — is an active participant, if only to shape it “in ways that blunt that regime’s ability to embarrass or influence the Chinese government”¹⁴⁴.

138 As an example, Alastair Iain Johnston — discussing this very subject back in 2003 — found back then that the “PRC has become more integrated into and more cooperative within international institutions than ever before. Moreover, the evidence that China’s leaders are actively trying to balance against U.S. power to undermine an American-dominated unipolar system and replace it with a multipolar system is murky.” JOHNSTON, Alastair Iain. *Is China a Status Quo Power?* *International Security*, 27 (4): p. 49. 2003. Much has changed since then; as Stig Stenslie and Chen Gang recognize, Xi Jinping “has fundamentally shifted China’s strategic gravity from a three-decades-long focus on domestic economic development to an outward expansion of its influence.” STENSLIE, Stig and CHEN, Gang. *Xi Jinping’s Grand Strategy: From Vision to Implementation*. In: ROSS, Robert and BEKKEVOLD, Jo Inge (eds.) *China in the Era of Xi Jinping*. Washington D.C., Georgetown University Press, 2016, para. 20 [e-book version].

139 LEONARD, Mark. *Why Convergence Breeds Conflict*. *Foreign Affairs*, 92(5): p. 127. 2013.

140 HEILMANN, Sebastian, RUDOLF, Moritz, HUOTARI, Mikko and BUCKOW, Johannes. *China’s Shadow Foreign Policy: Parallel Structures Challenge the Established International Order*. *China Monitor*, 18: p. 1. 2014. Available at:

https://www.merics.org/sites/default/files/2018-01/China_Monitor_18_Shadow_Foreign_Policy_EN.pdf

141 NATHAN, Andrew. *China’s Rise and International Regimes: Does China Seek to Overthrow Global Norms?* In: ROSS, Robert and BEKKEVOLD, Jo Inge (eds.) *China in the Era of Xi Jinping*. Washington D.C., Georgetown University Press, 2016, para. 18 [e-book version].

142 NATHAN, Andrew. *Op. Cit.* para. 41. Examples provided by the author are “the international postal regime, the air travel regime, the international police regime (e.g., Interpol), the international arbitration regime, international sports law, and the international tourism regime.” NATHAN, Andrew. *Op. Cit.* para 40.

143 For an extended elaboration of this issue, using China’s attitude toward the WTO and the IMF as cases of study, see NATHAN, Andrew. *Op. Cit.* para 49-54, and 55-58 respectively.

144 NATHAN, Andrew. *Op. Cit.* para. 65. Note that in doing so, China is also working to uphold another key

Rather, it appears the truth lies somewhere in the middle: while China does not reject most international regimes outright, it does seek to transform them when doing so would be convenient. “China is not wedded to traditional positions when its interests dictate a change in international norms”¹⁴⁵. Indeed, as some Chinese scholars note, international governance nowadays requires that “members of the international community participate in the process of global governance and in the process of designing, formulating, and implementing international rules”¹⁴⁶. And of course, the realities of power dictate that China would have a leading role in this process. This is precisely what is happening when it comes to UNCLOS: the current bargain does not suit China’s interests, so it is working within the terms of the treaty itself to transform it, albeit radically. This is not any different from how China acts when it comes to other international regimes: it is simply taking whatever actions that would allow it to maximize its power, and that is how its actions should be understood. Believing, even for a second, that the PRC could be “socialized” into accepting and behaving exactly as western powers wanted once it was a full participant in the international system was an exercise in unrestrained hubris, and a notion that reflects an idealistic approach toward international law that policy-makers would be well-advised to disregard.

V. Conclusion

This essay serves as an evidence point for the realist contention that powerful states will disregard international law when it does not serve their interests. The issue of UNCLOS’ dispute settlement provisions serves to underline this point: China is intent on reading it out of the Convention. Other powerful states who are also actors in East Asia – namely the United States and Japan – are not forced to accept this result. Why would they, when they can throw their weight around? But the South China Sea arbitration has sent a powerful message to ASEAN countries that there is nothing to gain from resorting to judicial dispute settlement mechanisms. In the end, not even the most morally value-neutral international regime was a match for the realities of power. That is not to say that realism can account for every action that China is taking in the international plane. For example, the existence of the belt and road initiative is an indication that China sees value in

norm of the international system: sovereignty. In fact, as the author notes, “China has found widespread support among other states for the proposition that it is up to each state to interpret how its international human rights obligations are interpreted and implemented within its domestic political system.” NATHAN, Andrew. Op. Cit. para. 62. See, for example, Resolution 37/23 of the Human Rights Council in 2018, “Promoting mutually beneficial cooperation in the field of human rights,” originally introduced by the People’s Republic of China, and which calls for “cooperation and constructive dialogue” instead of accountability for human rights violations, and also for “mutually beneficial cooperation,” but only “upon the request of and in accordance with the priorities set by the States concerned.” The resolution was adopted by a vote of 28 to 1, with the only country voting against it being the United States. HUMAN RIGHTS COUNCIL. Resolution 37/23, “Promoting mutually beneficial cooperation in the field of human rights,” A/73/53 (23 March 2018.) Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/258/79/PDF/G1825879.pdf?OpenElement>

145 NATHAN, Andrew. Op. Cit. para. 75.

146 QIN Yaqing. *Global Governance Failure and Ideational Reconstruction for a Sustainable World Order*. In: SHAO Binhong (ed.) *China under Xi Jinping: Its Economic Challenges and Foreign Policy Initiatives*. Leiden, Netherlands. 2015, p. 112.

international cooperation. Indeed, until 2014, China's policy could be summed up as diplomacy serving the economy. Not only that, but this approach is consistent with the way China had acted since 1978. It is telling, then, that when the existing law (or interpretation of the law) threatened China's security interests, the realist perspective prevailed.

In this sense, China's actions with regard to UNCLOS can also tell us general lessons about its attitude toward international law. Namely, that there is something to be gained from looking at international law from a perspective that prioritizes power and security above mere reputational gains, and that is a lesson policy-makers and analysts would be well-advised to keep in mind. Law can work in the service of security, but this is not a given: power needs to be actively considered in the conduct of foreign relations for this to be the case, and realism provides a theoretical framework to account for this factor. That is why it would be prudent to expect this will not be China's last attempt at redefining the substantive content of a global regime. The People's Republic of China will, no doubt, remain as an active participant in the international system, but as the PRC gradually builds up its military capabilities and economy, the resulting international legal order might be unrecognizable from its current shape.

BIBLIOGRAPHIC REFERENCES

- AGYEBENG, William. Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea. *Cornell International Law Journal*, 39 (2): pp. 371-399. 2006.
- ARBITRATION SUPPORT TRACKER [Online.] Asia Maritime Transparency Initiative. [Accessed April 7, 2019.] Available at: <https://amti.csis.org/arbitration-support-tracker/>
- CARR, Edward Hallett. *The Twenty Years Crisis, 1919-1939: An Introduction to the Study of International Relations*. 2nd ed. London, Palgrave MacMillan, 2016. 360p.
- CHINA statement on ruling on South China Sea Arbitration. [Online.] GMA News Online. Quezon City, Philippines, July 12, 2016. [Accessed april 4, 2019.] Available at: <http://www.gmanetwork.com/news/news/nation/573414/china-statement-on-ruling-on-south-china-sea-arbitration/story/>
- COHEN, Jerome. Chinese Attitudes Toward International Law — And Our Own. *Proceedings of the American Society of International Law at its Annual Meeting*, 61 (1): pp. 108-116. 1967.
- COHEN, Jerome and HUNGDAH, Chiu. *People's China and International Law*. Princeton, Princeton University Press, 1974. 874p.
- DOCUMENT: China's Military Strategy. [Online.] USNI News. Baltimore, United States. May 26, 2015. [Accessed 4 april 2019.] Available at: <https://news.usni.org/2015/05/26/document-chinas-military-strategy>
- DUPUY, Florian and DUPUY, Pierre-Marie. A Legal Analysis of China's Historic Rights Claim in the South China Sea. *American Journal of International Law*, 107 (1): pp. 124-141. 2013.
- DUTTON, Peter. An Analysis of China's Claim to Historic Rights in the South China Sea. In ZOU, Keyuan and SONG, Yann-Huei. *Major Law and Policy Issues in the South China Sea: European and American Perspectives*. In: London, Routledge, 2014. pp. 57-74.
- DUTTON, Peter. A Maritime or Continental Order for Southeast Asia and South China Sea. *Naval War College Review*, 69 (3): pp. 5-13. 2016.
- FRAVEL, M. Taylor, ROY, Stapleton, SWAINE, Michael, THORNTON, Suzan and VOGEL, Ezra. China is not an enemy. *Washington Post*, Washington D.C. July 3, 2019. [Accessed september 20, 2019.] Available at: https://www.washingtonpost.com/opinions/making-china-a-us-enemy-is-counterproductive/2019/07/02/647d49d0-9bfa-11e9-b27f-ed2942f73d70_story.html
- GILPIN, Robert. The Richness of the Tradition of Political Realism. In: KEOHANE, Robert. *Neorealism and its Critics*. New York, Columbia University Press, 1986. pp. 301-323.

- HART, Herbert Lionel Adolphus. *The Concept of Law*. 2nd ed. Oxford, Oxford University Press, 1994. 315p.
- HEILMANN, Sebastian, RUDOLF, Moritz, HUOTARI, Mikko and BUCKOW, Johannes. *China's Shadow Foreign Policy: Parallel Structures Challenge the Established International Order*. *China Monitor*, 18. 2014. Available at: https://www.merics.org/sites/default/files/2018-01/China_Monitor_18_Shadow_Foreign_Policy_EN.pdf
- HUMAN RIGHTS COUNCIL. Resolution 37/23, "Promoting mutually beneficial cooperation in the field of human rights," A/73/53 (23 March 2018.) Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/258/79/PDF/G1825879.pdf?OpenElement>
- INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA. *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures. 1999. par. 56.
- JACOBS, Andrew. *China, Updating Military Strategy, Puts Focus on Projecting Naval Power*. *New York Times*, New York. May 26, 2015, p. A10.
- JINPING, Xi. *Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era*. In: 19th National Congress of the Communist Party of China. Beijing, 2017. Available at: http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf
- JOHNSTON, Alastair Iain. *Is China a Status Quo Power?* *International Security*, 27 (4): pp. 5-56. 2003.
- LEVINSON, Daryl and GOLDSMITH, Jack. *Law for States: International Law, Constitutional Law, Public Law*. *Harvard Law Review*, 122 (4): pp. 1791-1868. 2009.
- JIA, Bing Bing. *The Issue of Admissibility in Inter-State Arbitration*. In: TALMON, Stefan and JIA, Bing Bing. *The South China Sea Arbitration: A Chinese Perspective*. London, Hart Publishing, 2014. pp. 107-136.
- KAPLAN, Robert. *The Geography of Chinese Power: How Far Can Beijing Reach on Land at Sea?* *Foreign Affairs*, 89 (1): pp. 22-41. 2010.
- KIRSCHNER, Jonathan. *The tragedy of offensive realism: Classical realism and the rise of China*. *European Journal of International Relations*, 18 (1): pp. 53-75. 2010.
- KOSKENNIEMI, MARTTI. *Carl Schmitt and International Law*. In: MEIERHENRICH, Jens and SIMONS, Oliver. *The Oxford Handbook of Carl Schmitt*. Oxford, Oxford University Press, 2013. pp. 592-611.
- KRASNER, Stephen. *Realist Views of International Law*. *Proceedings at the Annual Meeting of the American Society of International Law*, 96 (1): pp. 265-268. 2002.

- KU, Julian. Assessing the South China Sea Arbitral Award after One Year: Why China Won and the U.S. is Losing. *Lawfare* [Online.] July 12, 2017. [Accessed: April 3, 2019.] Available at: <https://www.lawfareblog.com/assessing-south-china-sea-arbitral-award-after-one-year-why-china-won-and-us-losing>
- LEONARD, Mark. Why Convergence Breeds Conflict. *Foreign Affairs*, 92(5): pp. 125-135. 2013.
- LOBELL, Steven, RIPSAN, Norrin and TALIAFERRO, Jeffrey. Introduction: Neoclassical realism, the state and foreign policy. In: LOBELL, Steven et. al. *Neoclassical Realism, The State and Foreign Policy*. Cambridge, Cambridge University Press, 2009. pp. 1-15.
- MORGENTHAU, Hans. *Politics Among Nations*. 7th ed. New York, McGraw-Hill, 1993. 752p.
- NATHAN, Andrew. China's Rise and International Regimes: Does China Seek to Overthrow Global Norms? In: ROSS, Robert and BEKKEVOLD, Jo Inge (eds.) *China in the Era of Xi Jinping*. Washington D.C., Georgetown University Press, 2016.
- O'CONNOR, Tom. Which Countries Still Recognize Taiwan? Two More Nations Switch to China in Less Than a Week. *Newsweek*. [online]. September 9, 2019. [Accessed November 11, 2019.] Available at: <https://www.newsweek.com/who-recognizes-taiwan-two-change-china-1460559>
- O'ROURKE, Ronald. Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress. [Online.] Congressional Research Service, 2019. [Accessed on: April 7, 2019.] Available at: <https://fas.org/sqp/crs/row/R42784.pdf>
- PEDROZO, Raul. Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone. *Chinese Journal of International Law*, 9 (1): pp. 9-29. 2010.
- PEOPLE'S REPUBLIC OF CHINA. Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (December 7, 2014.) [Online.] December 7, 2014. [Accessed april 7, 2019.] Available at: http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml
- PEOPLE'S REPUBLIC OF CHINA. China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea (July 13, 2016). [Online.] Available at: http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1380615.htm
- PEOPLE'S REPUBLIC OF CHINA. Law on the Territorial Sea and the Contiguous Zone. Beijing, February 25, 1992. Available at: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf
- PERMANENT COURT OF ARBITRATION. *Barbados v. Trinidad and Tobago*. 2006. par. 205.

- PERMANENT COURT OF ARBITRATION. In the Matter of the South China Sea Arbitration, Award on Jurisdiction and Admissibility. 2015.
- PERMANENT COURT OF ARBITRATION. In the Matter of the South China Sea Arbitration, Award. 2016.
- QIN, Yaqing. Global Governance Failure and Ideational Reconstruction for a Sustainable World Order. In: SHAO Binhong (ed.) China under Xi Jinping: Its Economic Challenges and Foreign Policy Initiatives. Leiden, Netherlands. 2015.
- REICHLER, Paul. The Path to a Just and Lasting Peace in the South China Sea. U.S.-Asia Law Institute. [Online.] November 10, 2016. [Accessed: april 3, 2019]. Available at: <https://usali.org/publications/reichler-paul-s-the-path-to-a-just-and-lasting-peace-in-the-south-china-sea>
- REPUBLIC OF THE PHILIPPINES. Notification and Statement of Claim on West Philippine Sea. [Online.] January 22, 2013. [Accessed april 7, 2019.] Available at: <https://seasresearch.files.wordpress.com/2014/12/notification-and-statement-of-claim-on-west-philippine-sea.pdf>
- REPUBLIC OF THE PHILIPPINES. Response of the DFA Spokesperson to the Recent Statement of the Chinese Ministry of Foreign Affairs on the West Philippine Sea Issue (July 15, 2013.) [Online.] July 15, 2013. [Accessed april 7, 2019.] Available at: <https://www.dfa.gov.ph/dfa-releases/332-response-of-the-dfa-spokesperson-to-the-recent-statement-of-the-chinese-ministry-of-foreign-affairs-on-the-west-philippine-sea-issue>
- SHAW, Malcolm. International Law. 7th ed. Cambridge, Cambridge University Press, 2014. 1063p.
- SIPRI MILITARY EXPENDITURE DATABASE [online.] Stockholm, Sweden. [Accessed April 9, 2016.] Available at: <https://www.sipri.org/databases/milex>
- STENSLIE, Stig and CHEN, Gang. Xi Jinping's Grand Strategy: From Vision to Implementation. In: ROSS, Robert and BEKKEVOLD, Jo Inge (eds.) China in the Era of Xi Jinping. Washington D.C., Georgetown University Press, 2016
- TANAKA Yoshifumi. The International Law of the Sea. Cambridge, Cambridge University Press, 2012. 548p.
- THAO, Nguyen. The 2002 Declaration on the Conduct of Parties in the South China Sea: A Note. Ocean Development and International Law, 34 (3): pp. 279-285. 2003.
- THIRLWAY, Hugh. The Sources of International Law. Oxford, Oxford University Press, 2014. 262p.
- UNITED NATIONS. Declarations and Statements to UNCLOS. [Online.] New York, United States. [Accessed april 5, 2019.] Available at: https://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification

- UNITED NATIONS. Reservations to CEDAW. [Online.] New York, United States. [Accessed March 25, 2019.] Available at: <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>
- WALLACE, Dustin. An analysis of Chinese Maritime Claims in the South China Sea. *Naval Law Review*. 63 (1): pp. 128-159. 2014.
- WALTZ, Kenneth. Anarchic Order and Balances of Powers. In: KEOHANE, Robert. *Neorealism and its Critics*. New York, Columbia University Press, 1986. Pp. 98-132.
- WALTZ, Kenneth. Political Structures. In KEOHANE, Robert. *Neorealism and its Critics*. New York, Columbia University Press, 1986. pp. 70-97.
- WANG, Tiewa. International Law in Ancient China. *Collected Courses of the Hague Academy of International Law*, 221 (1): pp. 226-262. 1990.
- WATKINS, Derek. What China Has Been Building in the South China Sea. [Online.] *New York Times*, New York, July 30, 2015. [Accessed 4 april 2019.] Available at: <https://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea.html>
- WILLIAMS, Robert. Tribunal Issues Landmark Ruling in South China Sea Arbitration. *Lawfare* [Online.] July 12, 2016. [Accessed: april 5, 2019.] Available at: <https://www.lawfareblog.com/tribunal-issues-landmark-ruling-south-china-sea-arbitration>
- XIAOFENG, Ren and XIZHONG, Cheng. A Chinese Perspective. *Maritime Policy*, 29 (2): pp. 139-146. 2005.
- XINBO, Wu. Cooperation, Competition and Shaping the Outlook: The United States and China's Neighborhood Diplomacy. *International Affairs*, 92 (4): pp. 849-867. 2016.
- ZHANG, Haiwen. Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ. *Chinese Journal of International Law*, 9 (1): pp. 31-47. 2010.
- ZHANG, Yongjin. China and Liberal Hierarchies in Global International Society. *International Affairs*, 92 (4): pp. 795-816. 2016.
- ZHIHUA, Zheng. Why Does China's Maritime Claim Remain Ambiguous? *Asia Maritime Transparency Institute* [Online.] June 12, 2015. [Accessed april 4, 2019.] Available at: <https://amti.csis.org/why-does-chinas-maritime-claim-remain-ambiguous/>
- ZONGYOU, Wei. China's Maritime Trap. *Washington Quarterly*, 40 (1): pp. 167-184. 2017.
- ZOU, Keyuan. Innocent Passage for Warships: The Chinese Doctrine and Practice. *Ocean Development and International Law*, 29 (3): pp. 195-223. 2009.