

CHINA'S ISLAND BUILDING IN THE SOUTH CHINA SEA: COLLATERAL EFFECT ON THE UNCLOS AND POTENTIAL SOLUTIONS

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I. INTRODUCTION

The South China Sea (SCS) is one of the most hotly contested areas in the world. Six nations—Brunei, China, Malaysia, the Philippines, Taiwan, and Vietnam—assert overlapping and ever-changing claims throughout the area that result in constant conflict. In 2009, Vietnam and Malaysia submitted a joint brief to the United Nations claiming a portion of the SCS continental shelf. Disputing the claim and supporting its own claims over the SCS continental shelf and various SCS features, China submitted the “nine-dash line map”¹ to the Commission on the Limits of the Continental Shelf (CLCS).² In July 2016, the Permanent Court of Arbitration (PCA) rejected the nine-dash line and China’s historical rights to the SCS.³ Ignoring the PCA, violating international law, and inflaming the global SCS conflict, China

¹ See *infra* Appendix A, Figure 1.

² GREGORY B. POLING, THE SOUTH CHINA SEA IN FOCUS: CLARIFYING THE LIMITS OF MARITIME DISPUTE 2 (CTR. FOR STRATEGIC & INT’L STUDIES [CSIS], July 2013), https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/130717_Poling_SouthChinaSea_Web.pdf. China

claims the nine-dash line is justified “based upon historic use of the sea and the natural prolongation of its continental shelf without consideration of the UNCLOS constraints.” ERNEST E. SMITH ET AL., INTERNATIONAL PETROLEUM TRANSACTIONS 150–51 (3d ed. 2010).

³ *In re South China Sea Arb.*, Case No. 2013-19, at 473 (Perm. Ct. Arb. 2016), <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>.

The PCA is an international tribunal in The Hague that is recognized by the United Nations and numerous treaties. See United Nations Commission on International Trade Law, *Dispute Settlement General Topics, 1.3 Permanent Court of Arbitration* 6–7, 9–10 (New York and Geneva: United Nations, 2003), http://unctad.org/en/docs/edmmisc232add26_en.pdf.

continued creating artificial islands and militarizing the SCS.⁴

China's forceful taking and militarization of the SCS has far-reaching implications for a wide variety of international laws, globalization, and energy security. However, this comment specifically focuses on the collateral effect of China's SCS actions on the United Nations Convention on the Law of the Sea (UNCLOS), the failure of the 2016 PCA Award, and potential solutions to the SCS dispute. Part II highlights the SCS's importance to the global economy, frames the SCS dispute, and establishes China's historical claims. Part III analyzes the collateral consequences of China's SCS actions on the UNCLOS. Part IV evaluates the key findings and failures of the recent 2016 PCA Award and offers alternative solutions to the SCS dispute. Part V is a brief conclusion urging politicians, military advisors, and governments to consider a peaceful resolution and the creation of an international organization that strengthens the UNCLOS, preserves international trade and energy security, and ultimately prevents war.

II. FRAMING THE SCS DISPUTE

A. *An Artery of Globalization: SCS's Vital Role in the Global Economy*

The SCS is one of the most important areas of the globe for three reasons: (1) trade; (2) energy security; and (3) resources.⁵

1. Trade

The SCS's critical trade route serves a vast majority of the global population and is an engine for global commerce. One estimate suggests that "more than half the world's maritime

⁴ See Katie Hunt, *South China Sea: What's at Stake*, CNN (Feb. 19, 2017), <http://www.cnn.com/2017/02/19/asia/south-china-sea-explainer/>.

⁵ Michael Schuman, *A South China Sea of Uncertainty*, U.S. NEWS (June 10, 2016), <http://www.usnews.com/news/best-countries/articles/2016-06-10/why-you-need-to-care-about-the-south-china-sea>; Hemant Sreeraman, *(South China) Sea of Problems: A Question of Energy Security*, FOREIGN POLY J. (Aug 22, 2012), <https://www.foreignpolicyjournal.com/2012/08/22/south-china-sea-of-problems-a-question-of-energy-security/>.

trade goes through [the SCS].”⁶ The SCS accounts for approximately \$5.3 trillion in trade a year, allowing essential energy and food resources to pass through the area free of impediment.⁷ Additionally, the *Wall Street Journal* estimates that U.S. imports and exports account for \$1.2 trillion of the \$5.3 trillion in annual trade.⁸ One journalist has described the SCS as “both the fulcrum of world trade and a crucible of conflict.”⁹ Ultimately, any destabilization of the SCS could impact global commerce.¹⁰

2. Energy Security

Controlling the SCS has major implications for energy security. The key factors driving energy security in the SCS are “high and volatile energy prices, China’s rapid emergence as a huge oil and gas importer, Japan and Northeast Asia’s total and continuing dependence on imported oil and gas, and Southeast Asia’s emergence as a net oil and gas importer.”¹¹ About one-third of the oil trade and more than one-half of the liquefied natural gas (LNG) traded throughout the world passes through the SCS.¹² China alone requires approximately 3.77 billion barrels of oil per year—2.46 billion of which are imported.¹³ Additionally, China consumes approximately 6.78 trillion cubic feet of gas a year and imports about 2.08 trillion cubic feet of that gas.¹⁴ The entire Asia-

⁶ BILL HAYTON, *THE SOUTH CHINA SEA: THE STRUGGLE FOR POWER IN ASIA* xvi (2014). Bill Hayton is a longtime journalist who is well-respected in the fields of journalism and research of Southeast Asia.

⁷ Schuman, *supra* note 5.

⁸ Sara Schonhardt & Saurabh Chaturvedi, *South China Sea Ruling Increases Uncertainty for Shipping, Trade*, WALL ST. J. (July 14, 2016), <http://www.wsj.com/articles/south-china-sea-ruling-increases-uncertainty-for-shipping-trade-1468487095>.

⁹ Hayton, *supra* note 6, at xvi.

¹⁰ Schonhardt & Chaturvedi, *supra* note 8.

¹¹ Mikal E. Herberg, *The Role of Energy in Disputes over the South China Sea*, MAR. AWARENESS PROJECT (June 28, 2016), <http://maritimeawarenessproject.org/2016/06/28/the-role-of-energy-in-disputes-over-the-south-china-sea/>.

¹² *Id.* (“According to the U.S. Department of Energy, the [SCS and Malacca] account for roughly 75% of China’s oil imports, 85%–90% of Japan’s and South Korea’s oil imports, and 33% of Japan’s and South Korea’s LNG imports.”).

¹³ Jeremy Maxie, *The South China Sea Dispute Isn’t About Oil, At Least Not How You Think*, FORBES (Apr. 25, 2016), <http://www.forbes.com/sites/jeremymaxie/2016/04/25/the-south-china-sea-dispute-isnt-about-oil-at-least-not-how-you-think/2/#23e562d360f5>.

¹⁴ *Id.*

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Pacific consumed 24 trillion cubic feet of natural gas.¹⁵ Furthermore, Australia is estimated to become one of the biggest providers of LNG in Southeast China by 2020.¹⁶ It is estimated that by 2035, 90% of Middle Eastern fossil fuel exports will be sent to Asia.¹⁷ Substantial conflict or war in the SCS could create a global energy crisis.

3. Resources

Resources may play a lesser role than global trade and energy security throughout the SCS, but it has still driven controversy throughout the area. It is estimated that there are approximately 11 billion barrels of oil and 190 trillion cubic feet of natural gas in the SCS.¹⁸ However, the SCS is relatively unexplored, and in November 2012, the Chinese National Offshore Oil Company estimated that undiscovered resources amount to 125 billion barrels of oil and 500 trillion cubic feet of natural gas.¹⁹ Another essential resource in the SCS is its fish supply. The fishing industry employs more than 3.7 million people and generates billions of dollars every year.²⁰ By 2030, China is expected to supply 37 percent of total fishery production and 38 percent of the fish supply for human consumption throughout the world.²¹ SCS trade and energy security drive the majority of disputes, but resources also play a role.

B. Legal Claims throughout the SCS

Gregory B. Poling asserts that the biggest issue surrounding

¹⁵ Herberg, *supra* note 11.

¹⁶ *Id.*

¹⁷ *China's Maritime Disputes*, COUNCIL ON FOREIGN REL. (last visited Feb. 5, 2018), <https://www.cfr.org/interactives/chinas-maritime-disputes#!/> (citing World Energy Outlook 2012, prepared by the International Energy Agency).

¹⁸ *South China Sea*, U.S. ENERGY INFO. ADMIN. (last updated Feb. 7, 2013), https://www.eia.gov/beta/international/analysis_includes/regions_of_interest/South_China_Sea/south_ [hereinafter *EIA Report*].

¹⁹ *Id.*

²⁰ Rachael Bale, *One of the World's Biggest Fisheries Is on the Verge of Collapse*, NAT'L GEOGRAPHIC (Aug. 29, 2016), <http://news.nationalgeographic.com/2016/08/wildlife-south-china-sea-overfishing-threatens-collapse/> (noting that 16.6 million tons of fish are caught per year in the SCS).

²¹ FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *THE STATE OF WORLD FISHERIES AND AQUACULTURE 2015* (Rome: 2014), <http://www.fao.org/3/a-i3720e.pdf>.

the SCS is the failure of the claimants to clearly codify their claims.²² Figure 1 in Appendix A is a visual representation of the various claims made throughout the SCS by Brunei, China, Indonesia, the Philippines, Malaysia, Taiwan, and Vietnam.²³

Brunei's claim to the continental shelf extends into the SCS and encompasses the Louisa Reef, which is considered a portion of the Spratly Islands archipelago.²⁴ Indonesia has claimed a portion of the SCS based on the Exclusive Economic Zone (EEZ), its continental shelf, and its treaties with Malaysia and Vietnam delimiting maritime boundaries.²⁵ The majority of the Philippines' claims are created based on "the EEZs generated from its territorial baselines," however, the Philippines has "not demarcated the majority of [its] EEZs and continental shelves in the SCS" with Malaysia or China.²⁶ Additionally, the Philippines claims the Scarborough Reef and occupies several of the Spratly Islands.²⁷ Malaysia signifies its maritime boundaries in the SCS based on its maritime boundary with Indonesia's Tudjuh Archipelago and with the Philippines.²⁸ Malaysia has agreed to joint development with Vietnam in the western SCS, but it has not resolved ambiguities pertaining to Brunei's continental shelf claims.²⁹ Taiwan claims that it has "sovereignty over all features

²² Poling, *supra* note 2, at 2–5. Gregory B. Poling is the Director of Asia Maritime Transparency Initiative and Southeast Asia Program Fellow. He oversees the research of U.S. foreign policy in the Asia Pacific and has a strong focus on the SCS. Poling also notes Beijing's position is the most ambiguous by far and urges resolution in compliance with international law under the UNCLOS. *Id.*

²³ See *infra* Appendix A, Figure 1; *EIA Report*, *supra* note 18 (featuring illustration of South China Sea maritime claims) (citing U.S. DEPT OF STATE).

²⁴ *EIA Report*, *supra* note 18 (noting "China (including Taiwan), Malaysia, Vietnam, and the Philippines have all rejected Brunei's claims to this area"). Brunei's legal basis for its claims are based on: (1) "its maritime boundaries with Malaysia as defined in two British Orders in Council in 1958; (2) the extension of that boundary as an EEZ out to 200 nautical miles, as declared in 1982 and accepted by Malaysia in 2009; and (3) the extension of those boundaries for an extended continental shelf, approximately 60 nautical miles farther according to an official 1988 map." Poling, *supra* note 2, at 7–8.

²⁵ Poling, *supra* note 2, at 6, 13.

²⁶ *Id.* at 10.

²⁷ *EIA Report*, *supra* note 18. The Philippines claims the Scarborough Reef and the Spratly Islands are "a special 'regime of islands' distinct from the rest of the Philippine archipelago." *Id.* China (including Taiwan), Malaysia, and Vietnam all dispute the Philippines' claims. *Id.*

²⁸ Poling, *supra* note 2, at 8.

²⁹ See *id.* at 8–9 (noting both countries agreed to Brunei's 200 nautical mile EEZ, but they have not agreed upon Brunei's claim to the continental shelf beyond the 200 nautical miles).

drawn within the dashes originally shown on a map published by the Kuomintang government in 1947—including the Spratly Islands, Paracel Islands, and Scarborough Reef.”³⁰ Taiwan also occupies some of the Spratly Islands and “administers Pratas Island.”³¹ Vietnam claims it has historical rights to the SCS and the Spratly and Paracel Islands similar to China’s.³²

Although Vietnam has attempted to negotiate maritime boundaries with several countries,³³ Gregory Poling notes that its claims throughout the SCS “provoked China into presenting the nine-dash line map as an official protest.”³⁴ China has set boundaries with Vietnam, Taiwan, and the Philippines,³⁵ yet the primary disputes throughout the SCS revolve around specific features such as the Spratly Islands. Claiming these features grants a country greater control over trade, energy security, and resources in the SCS. These disputes caused China to submit its nine-dash line map, reinforcing its historical rights to the SCS.³⁶

C. *The Nine-Dash Line: China’s Historical Legal Claims over the SCS*

1. Birth of the Nine-Dash Line

China’s historical claims date back to the Silk Road on the Sea during the Qin and Han dynasties from 221 BC to 220 AD.³⁷ By 1935, China had claimed 132 names for islands and other insular features throughout the SCS and published these claims in an atlas.³⁸ In 1947, China published the eleven-dash line “to reaffirm and reiterate [its] sovereignty over the island groups in the SCS at the beginning of a new, postwar era.”³⁹ In 1953, China

³⁰ *EIA Report*, *supra* note 18.

³¹ *Id.* (noting “Brunei, Malaysia, the Philippines, and Vietnam object to Taiwan’s coincident claims with China”).

³² *Id.* (“[Vietnam] claims that since France controlled both island groups beginning in the 1930s, [it] succeeded to those rights after independence.”).

³³ Poling, *supra* note 2, at 13. Vietnam has negotiated maritime boundaries with Malaysia, the Philippines, and China since the early 2000s. *Id.*

³⁴ *Id.*

³⁵ *Id.* at 14.

³⁶ See Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AM. J. INT’L L. 98, 105–06, 108 (2013).

³⁷ *Id.* at 101.

³⁸ *Id.* at 101–02.

³⁹ *Id.* at 102–03.

entertained Vietnam's concerns by removing two dashes "from the eleven-dash line, leaving nine segments . . ." ⁴⁰ Thus, the nine-dash line was born.

2. The Note

China's primary foundation for its nine-dash line stems from its Declaration on the Territorial Sea, which was promulgated on September 4, 1958.⁴¹ Eventually, China promulgated its Law on the Territorial Sea and the Contiguous Zone and its Law on the Exclusive Economic Zone and the Continental Shelf to codify its claims over several islands and features throughout the SCS.⁴² As resources and energy security became a major priority throughout the SCS, tensions began to rise, and China started enforcing its claims over islands and areas within the Sea and its nine-dash line.⁴³ Most notably, China's "note verbale of May 7" openly contested Malaysia's and Vietnam's joint submission to the Commission on the Limits of the Continental Shelf, stating,

China has indisputable sovereignty over the islands in the SCS and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. . . . The continental shelf beyond 200 nautical miles as contained in the Joint Submission . . . has seriously infringed China's sovereignty, sovereign rights and jurisdiction in the SCS.⁴⁴

China submitted the nine-dash line map with the Note.⁴⁵ In response to China's Note, Malaysia, Vietnam, the Philippines,

⁴⁰ *Id.* at 103 ("The first two lines lay within the Beibu Gulf, or Gulf of Tonkin, bordered by Vietnam and China, and they were taken as effective during the pre-1949 period.") (referencing Jia Yu, *Nan Hai "Duan Xu Xian" De Fa Lü Di Wei* [*Legal Status of the "Broken Line" in the SCS*], 15 *ZHONG GUO BIAN JIANG SHI YAN JIU* [CHINA'S BORDERLAND HISTORY AND GEOGRAPHY STUDIES] 112, 115, 120 (2005)).

⁴¹ *Id.* at 104.

⁴² *Id.* at 104–05. China promulgated these laws in anticipation of the UNCLOS, however, these provisions "[did] not prejudice 'historic rights' enjoyed by China." *Id.*

⁴³ *Id.* at 105–06 (referring to the tensions between China and Vietnam and Malaysia over the occupation of islands and disagreements over maritime boundaries during negotiations between the countries).

⁴⁴ *Id.* at 106.

⁴⁵ *Id.*

and Indonesia all contested the nine-dash line and have refused to acknowledge China's claims.⁴⁶ Thus, the simple demarcation of maritime boundaries ignited the SCS dispute.

3. International Legality of China's Claim within the Nine-Dash Line versus Island Building and Militarization

Zhiguo Gao and Bing Jia reasonably believe that "the nine-dash line, after sixty years of evolution, has become synonymous with a claim of sovereignty over the island groups that always belonged to China."⁴⁷ Additionally, China asserts that its nine-dash line reserves its historical rights of fishing, navigation, and other marine activities (including the exploration and exploitation of resources, mineral or otherwise) on the islands and in the adjacent waters. Ultimately, Gao and Jia believe the nine-dash line acts as a maritime delimiting boundary.⁴⁸

Gao and Jia posit the legality of China's claims. First, under the rule of discovery, China's discovery of the islands in the SCS

⁴⁶ *Id.* at 107–08 (Malaysia responded to the note by asserting that "the submission was made 'without prejudice to the delimitation of the continental shelf between States with opposite or adjacent coasts in consonance with Article 76(10) of UNCLOS 1982' and 'to the position of States which are parties to a land or maritime dispute in consonance with Paragraph 5(b) of Annex I to the Commission's Rules of Procedure.'" Vietnam "reaffirmed its position regarding the Nansha and Xisha Islands, and indicated a commitment to peaceful negotiations in accordance with international law," and Indonesia "concluded that 'the so called 'nine-dotted-lines map' . . . clearly lacks international legal basis and is tantamount to upset the UNCLOS 1982.'" In addition, the Philippines felt that the "sovereignty and jurisdiction or sovereign rights over those areas necessarily appertain or belong to . . . the Philippines.").

⁴⁷ *Id.* at 108.

⁴⁸ *Id.* Gao and Jia state five factors for why they think the nine-dash line acts as a boundary. First, China's legislation since 1958 exemplifies its claims over several SCS islands and its international rights to the adjacent waters. *Id.* (referring to the "Dongsha, Nansha, Xisha, and Zhongsha Islands, as well as . . . other islands in the SCS."). Second, the disputes have always been about ownership of islands and features, so China's recent proclamation to sovereignty over the seas within the nine-dash line have ignited fears throughout the region. *Id.* at 109. Third, China's claims to "adjacent waters" and "relevant waters as well as the seabed and subsoil thereof" have never been defined but are conditioned on its adoption of the UNCLOS and its relevant provisions. *Id.* Fourth, although not the case today, the nine-dash line embraced historic waters sometime in the past. *Id.* Fifth, "the dashed lines were drawn in [an] atlas as if they were median lines between the islands and the opposite coasts of the neighboring states, thus serving a potential delimitation purpose." *Id.*

precedes any other countries'.⁴⁹ Second, under the rule of occupation, Vietnam and the Philippines never legally occupied the islands in dispute, and therefore, China peacefully and continuously displayed sovereignty over the islands.⁵⁰ Gao and Jia assert that China's nine-dash line stems from its historical title over the island.⁵¹ Additionally, prescription by other countries fails because it is condoned by the UN Charter.⁵² Furthermore, China asserts the validity of the nine-dash line based on recognition, estoppel, and title by treaty.⁵³

China may have legitimate legal claims in the SCS, but its unilateral island building in the Spratly Islands has generated severe tension in the SCS and threatens longstanding and effective international laws. Figure 2 in Appendix A represents the contested area and the many Spratly features that exist in the SCS.⁵⁴ China is building on these features and using them to "project power throughout" the SCS by blocking waterways and establishing military outposts that house runways for jets and

⁴⁹ *Id.* at 110 ("[E]vidence of China's discovery of the islands in the South China Sea, which preceded the Philippines' and Vietnam's discovery of them by many years, is simply overwhelming.")

⁵⁰ *Id.* at 110–12 (explaining the legal effect of China's occupation of the islands prior to that of France and the Philippines). Gao and Jia analyzed Vietnam's claims to the Nansha Islands based on prior French Occupation, and the Philippines' claims on the Nansha Islands were null and void because China had already survived the French claims and did not cede any rights to the islands from that point on. *Id.* at 112–13.

⁵¹ *Id.* at 113 ("China's claim can also be based on a historic title that . . . can potentially be established through common knowledge of the possession of a territory."). Gao and Jia state that China maintained sovereignty over the islands for several centuries and there is a lack of evidence establishing any contrary rights from other countries. *See id.* (asserting that, based on the history surveyed in the article, China's title appears to be the only one that could boast of genuine timelessness or that could be described as in place "from time immemorial"; no other claim can be so characterized). Furthermore, China's historical rights are strengthened through the doctrine of historical consolidation because China discovered and occupied the islands, and the other countries acquiesced to China's sovereignty over the territory. *Id.* at 114.

⁵² *See id.* at 114–15 (noting that the "use of force to take possession of another state's territory . . . is no longer acceptable in the era of the UN Charter" and thus prescription is not "helpful as ground for a Philippine or Vietnamese title").

⁵³ *Id.* at 115–17. The title by treaty refers to the 1887 Sino-French boundary treaty that "recognized China's sovereignty over the islands east of the demarcation line" and "conferred a title by that recognition" *Id.* at 117.

⁵⁴ Derek Watkins, *Territorial Disputes in the Waters Near China*, N.Y. TIMES (May 8, 2014), https://www.nytimes.com/interactive/2014/02/25/world/asia/claims-south-china-sea.html?_r=1.

docks for ships.⁵⁵ Figure 3 in Appendix A represents the extent of China's island building and depicts the runways necessary to establish dominance throughout the SCS. China's actions have major implications for the stability of the SCS and international laws and should be classified as acts of war.⁵⁶ China may have substantial legal claims in the SCS, but its unilateral island building and militarization should be constituted as acts of war that encourage super powers to circumvent international laws, such as the UNCLOS, and to control international trade routes through military force.

4. Acts of War: China's Forceful Taking and Military Control of the South China Sea

The United Nations Charter states, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."⁵⁷ Furthermore, the Charter states, "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."⁵⁸ China violated the United Nations Charter when it began building islands in the SCS, thus threatening the territorial integrity and freedom of navigation of the volatile area. As a member of the United Nations, China should be seeking diplomatic solutions to the disputed areas in the SCS. Instead, China is challenging international law,

⁵⁵ Gregory Poling, *Prepare for a Stormy 2017 in the SCS*, Asia Maritime Transparency Initiative (Jan. 12, 2017), <https://amti.csis.org/prepare-stormy-2017-south-china-sea/>. "Satellite imagery ahead of the ruling revealed ongoing construction of hangar space for 24 fighter jets (a full regiment) and 3–4 larger planes at each of the three largest Chinese artificial islands, at Fiery Cross, Mischief, and Subi Reefs. . . . The region will soon see Chinese military aircraft deployed in significant numbers, at least on a rotational basis, to the Spratlys." *Id.* "The number of Chinese naval, coast guard, and paramilitary vessels in the area will continue to grow as facilities at the three large artificial islands allow Chinese assets to consistently patrol the southern reaches of the nine-dash line as never before. China also continues to construct sophisticated radar and signals intelligence capabilities, bolstering its ability to monitor and intercept vessels anywhere in the area, and advanced anti-aircraft and anti-missile point defenses to protect these new power projection capabilities." *Id.*

⁵⁶ *See id.* *See also infra* Appendix A, Figure 3 (illustrating one of China's Islands and China's New Spratly Island Defenses).

⁵⁷ United Nations Charter art. 2, ¶ 4.

⁵⁸ *Id.* at ¶ 3.

neglecting its duty to resolve matters peacefully, infringing on the sovereignty of other United Nations Members, and choking freedom of navigation in the SCS.⁵⁹ China's direct challenge to the United Nations and its blatant disregard of its duty as a Member pose major threats to the sovereignty of the SCS nations and should be seen as acts of war.

The United Nations defines an act of war in terms of aggression and defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."⁶⁰ Additionally, the United Nations holds that the "[f]irst use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression."⁶¹ Acts that constitute an act of aggression include the following: (a) "any military occupation . . . or any annexation by the use of force of the territory of another State or part thereof" . . . (c) the blockade of the ports or coasts of a State by the armed forces of another State."⁶² Furthermore, the list of acts that qualify as aggression is not exhaustive,⁶³ and aggressive territorial acquisition is not lawful.⁶⁴

China's building of artificial islands with the intention of militarizing them constitutes an act of aggression, severely undermining the UNCLOS and hindering freedom of navigation throughout the area.⁶⁵ Several SCS nations claim ownership over the Spratly Islands, but China has forcefully taken the islands. Furthermore, in 2011, China's marine patrol vessels cut the cables of a Vietnamese oil survey ship in the SCS and continue to

⁵⁹ See *id.* at ¶ 1. Vietnam, the Philippines, Brunei, and Malaysia are all members of the United Nations; UNITED NATIONS, MEMBER STATES, <http://www.un.org/en/member-states/>.

⁶⁰ G.A. Res. 3314 (XXIX), at 1 (Dec. 14, 1974).

⁶¹ *Id.* at 2.

⁶² *Id.* at 3 (a), (c).

⁶³ *Id.* at 4.

⁶⁴ *Id.* at 5 (3).

⁶⁵ See Frederick Kuo, *Why China Won't Stop Island Building in the SCS*, THE DIPLOMAT, Jul. 2, 2016, <http://thediplomat.com/2016/07/why-china-wont-stop-island-building-in-the-south-china-sea/> (noting that China has "pushed forward with its ambitious plans of power projection, causing many to fear the terrible fallout that may occur due in an atmosphere fraught with heightened tensions").

threaten other vessels in the SCS.⁶⁶ An attack on the Vietnamese constitutes an act of war, threatens freedom of navigation in the SCS, and undermines the peaceful application of the UNCLOS. Therefore, this falls under the definition of aggression because China has impeded on the territorial integrity and sovereignty of other nations.

The United Nations should classify China's actions as an annexation of territory by the use of force. Although an armed conflict has not broken out, any encroachment on the islands has resulted in strict and threatening responses from the Chinese military.⁶⁷ Additionally, island building has been used to establish China's military outposts and could be used to administer blockades to ports and coasts of a sovereign State.⁶⁸ These acts are clearly aggressive and should be classified as acts of war against the several nations in the SCS and the entire world that relies on the safe and free passage through the SCS. More specifically, China's acts of war could have substantial collateral effects on the UNCLOS's Commission on the Limits of the Continental Shelf (CLCS) and freedom of navigation.

III. COLLATERAL EFFECTS ON THE UNCLOS'S CLCS AND FREEDOM OF NAVIGATION: ARE SUPERPOWERS EXEMPT?

A. *China's Undermining of the UNCLOS*

The UNCLOS governs maritime claims over the continental

⁶⁶ WU SHICUN, SOLVING DISPUTES FOR REGIONAL COOPERATION AND DEVELOPMENT IN THE SOUTH CHINA SEA: A CHINESE PERSPECTIVE 155 (2013). According to Shicun, China's Hainan province established regulations that gave it the power to implement and act on security concerns in the SCS. *Id.* at 154. The regulations and the attack on the Vietnamese escalated tensions in the SCS and encouraged Vietnam and other states to take precautionary efforts. *Id.*

⁶⁷ See Katie Hunt, *Showdown in the South China Sea: How Did We Get Here?*, CNN, Aug. 2, 2016, <http://www.cnn.com/2015/10/28/asia/china-south-china-sea-disputes-explainer/> (explaining that tensions have been rising since China began reclaiming land and that "Beijing has also warned U.S. warships and military aircraft to stay away from these islands").

⁶⁸ See Ben Westcott, *South China Sea: Aircraft Hangars, Radar Installed on Artificial Islands*, CNN, Mar. 29, 2017, <https://www.cnn.com/2017/03/28/asia/south-china-sea-islands-aircraft-hangars/index.html> ("[I]f China bases its military aircraft (in the South China Sea), they could fly up and challenge anyone's military aircraft or civilian aircraft if they wanted to.").

shelf, exclusive economic zone, islands, and features in the sea.⁶⁹ The UNCLOS has almost universally been accepted by the world, and the nations discussed in this comment have all signed the Convention.⁷⁰ Under UNCLOS, islands above water at high tide and features that can “sustain human habitation or economic life” are sufficient to establish an exclusive economic zone or continental shelf.⁷¹ The exclusive economic zone can extend 200-nautical miles from the territorial sea and grants a country the right to explore and exploit the natural resources of the seabed and subsoil.⁷² The outer continental shelf (OCS) extends 200–350 nm from the territorial sea of a nation's territory and grants the right to explore and exploit natural resources on the continental shelf.⁷³ Furthermore, if a feature in the sea is qualified as an island or one that can sustain habitation, then its sovereign has the right to exclude others from its territorial sea.⁷⁴ This comment focuses on two important aspects of China's collateral impact on the UNCLOS: (1) the CLCS; and (2) freedom of navigation.

1. The Commission on the Limits of the Continental Shelf

The UNCLOS established the Commission on the Limits of the Continental Shelf (CLCS) to “facilitate the implementation of the UNCLOS in respect of the establishment of the outer limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”⁷⁵ Coastal states send formal reports to the CLCS requesting the extension of their outer limits of their continental

⁶⁹ See United Nations Convention on the Law of the Sea (Dec. 10, 1982), 1833 U.N.T.S. 397 [hereinafter UNCLOS].

⁷⁰ See Sean Mirski, *Dispute in the SCS: A Legal Primer*, LAWFARE, Jun. 9, 2015, <https://www.lawfareblog.com/dispute-south-china-sea-legal-primer> (“Maritime law has largely been codified in the U.N. Convention on the Law of the Sea (UNCLOS)” and the “vast majority of nations have ratified UNCLOS, including all the primary claimants in the South China Sea dispute.”).

⁷¹ UNCLOS, *supra* note 69, art. 121 (1), (3).

⁷² *Id.* art. 56 (1)(a).

⁷³ *Id.* arts. 76–77.

⁷⁴ *Id.* art. 2.

⁷⁵ United Nations, Oceans & Law of the Sea, Division for Ocean Affairs and the Law of the Sea, *Commission on the Limits of the Continental Shelf Purpose, Functions, and Sessions*, http://www.un.org/depts/los/clcs_new/commission_purpose.htm.

shelf.⁷⁶ The CLCS has adopted 29 recommendations from different countries regarding the extension of their OCS.⁷⁷ The recommendations detail the scientific justifications to extend the OCS and can take several years for the CLCS to approve.⁷⁸ Overall, the system has been effective, and countries have abided by the requirements established in the UNCLOS.⁷⁹ Over the past decade, countries such as Australia, Germany, England, the United States, Canada, Denmark, and Norway have utilized the UNCLOS and the CLCS to establish rights over resources on the OCS.⁸⁰ Unfortunately, China's island building in the SCS is undermining the CLCS system, and other countries have begun to question the UNCLOS power to control a country's claim to islands and CSC.⁸¹ China's challenge to the UNCLOS and CLCS process could encourage other super powers like Russia or the United States to claim territory at sea and resources on the OCS through island building. More specifically, China's SCS actions and its rise as a super power raise major concerns about the security of resource rich areas such as the Arctic and the Gulf of Mexico.

2. Freedom of Navigation under the UNCLOS

The rights to explore and exploit the seabed and to exclude others from entering the territorial sea are crucial to a countries sovereignty and respecting customary international law. However, the UNCLOS preserves freedom of navigation through

⁷⁶ UNLCOS, *supra* note 69, Annex II, art. 4.

⁷⁷ See United Nations, Oceans & Law of the Sea, Division for Ocean Affairs and the Law of the Sea, *Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982*, http://www.un.org/depts/los/clcs_new/commission_submissions.htm (listing the countries that have submitted recommendations, the dates on which the recommendations were submitted, and whether the recommendations were adopted by the Commission).

⁷⁸ See Suzette V. Suarez, *Commission on the Limits of the Continental Shelf*, 14 YEARBOOK OF UNITED NATIONS LAW 131, 148 (stating that the Agency can take two to four years to consider a submission before a recommendation is adopted).

⁷⁹ See *id.* at 166 (noting that "many of the Coastal States which have received the recommendation from the CLCS found the interaction with the CLCS very productive.").

⁸⁰ See *id.*, at 132, 159.

⁸¹ See Nguyen Ba Son, *A New Legal Landscape in the SCS*, THE DIPLOMAT (Aug. 26, 2016), <http://thediplomat.com/2016/08/a-new-legal-landscape-in-the-south-china-sea/> (emphasizing that China's defiance to the ruling has "given rise to concern not only about peace and stability in the region, but also about the rule of law in international relations").

maritime zones without interference.⁸² For example, the UNCLOS protects the “right of innocent passage” through the territorial sea, the “right of transit passage” through straits, and restricts the interference of passage by coastal states.⁸³ Freedom of navigation is an essential aspect of the UNCLOS, a major proponent to globalization, and a substantial protection to the energy security and trade throughout the SCS. Although the UNCLOS is designed to regulate international disputes at sea and resolve them according to its Annex VII, recent attempts to enforce the UNCLOS have been futile.⁸⁴

China’s island building and military control in the SCS directly undermine the UNCLOS’s intent to preserve and protect freedom of navigation throughout the world, putting energy security and international trade at risk. Recently, China’s *Global Times* stated that China would attack any Australian vessel that entered the SCS.⁸⁵ China’s Supreme Court ruled that anyone caught fishing in Chinese waters would be jailed for up to a year and “the defense minister warned that China should prepare for a ‘people’s war at sea’ to protect national sovereignty.”⁸⁶ The defense minister’s words were supported by China’s installation

⁸² See Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT’L L.J. 131, 171 (“UNCLOS provisions relating to ‘innocent passage’ and ‘transit passage’ are reminders that the expansion of maritime zones . . . has not eliminated the freedom of navigation.”).

⁸³ UNCLOS arts. 17, 24, 38. “Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.” *Id.*, art. 19(1).

⁸⁴ See UNCLOS, Annex VII, art. 1. See also Paul S. Giarra, *The Folly of UNCLOS*, THE DIPLOMAT (May 28, 2012) (“[The] Chinese . . . are trying to redefine UNCLOS according to their own purposes, without re-negotiating the contract, and in so doing undermining customary law.”).

⁸⁵ Colin Clark, *Chinese Threaten Japan, Australia, over SCS; Time for US FON Ops?*, BREAKING DEFENSE (Aug. 23, 2016), <http://breakingdefense.com/2016/08/chinese-threaten-japan-australia-over-south-china-sea-time-for-us-fon-ops/>. See also Simon Osborne, *‘We Must Take Revenge’: Chinese Call for War with Australia over South China Sea Dispute*, EXPRESS (Aug. 3, 2016), <http://www.express.co.uk/news/world/695967/South-China-Sea-dispute-Australia> (“The hardline nationalist newspaper warned ‘Australia Will Learn its Lesson’ for supporting a ruling by the international arbitration tribunal at The Hague opposing Beijing’s historical claims to the SCS.”).

⁸⁶ Editorial Board, *China’s Defiance in the South China Sea*, N.Y. TIMES (Aug. 13, 2016), https://www.nytimes.com/2016/08/14/opinion/sunday/chinas-defiance-in-the-south-china-sea.html?_r=0.

of weapons on the Spratly Islands.⁸⁷ China's actions are a signal to super powers that they are exempt from the UNCLOS's preservation of freedom of navigation. A perfect example of this is the United States involvement in the Strait of Hormuz.

B. Collateral Effects of the CLCS: The Arctic and the Gulf of Mexico

1. The Arctic

The United States Geological Survey estimates that its Arctic territory has approximately 90 billion barrels of oil that is actually recoverable.⁸⁸ Russia estimates that its Arctic territory contains 594 oil fields, 159 gas fields, two major nickel fields, and 350 gold deposits.⁸⁹ Substantial investments have been made by oil companies to tap into the resources of the Arctic.⁹⁰ Furthermore, the ice in the Arctic sea is receding and eventually will allow ships to travel through the Northwest Passage.⁹¹ The vast resources and the potential trade route have caused countries to reassert territorial claims or submit recommendations to the UN that they have rights over the territory.⁹² The area is quickly becoming a magnet for investment and resembles the early stages of the SCS disputes.

The Arctic is jointly owned by the United States, Canada,

⁸⁷ See Chris Buckley, *China Suggests It Has Placed Weapons on Disputed Spratly Islands in SCS*, N.Y. TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/world/asia/china-spratly-islands.html>.

⁸⁸ Stephanie Showalter Otts, *A Review of Who Owns the Arctic?*, 16 OCEAN AND COASTAL L.J. 239, 240.

⁸⁹ Trude Pettersen, *UN to Consider Russia's Arctic Continental Shelf Claim This Summer*, EYE ON THE ARCTIC (Apr. 28, 2016), <http://www.rcinet.ca/eye-on-the-arctic/2016/04/28/un-to-consider-russias-arctic-continental-shelf-claim-this-summer/>.

⁹⁰ Otts, *supra* note 88, at 240 (noting that Shell, ConocoPhillips, and BP have all acquired leases from the United States for billions of dollars).

⁹¹ *Id.*

⁹² See United Nations, Oceans & Law of the Sea, Division for Ocean Affairs and the Law of the Sea, Submissions to the CLCS, Oct. 28, 2016, http://www.un.org/depts/los/clcs_new/commission_submissions.htm; Carol J. Williams, *Russia Claims Vast Arctic Territory, Seeks U.N. Recognition*, L.A. TIMES (Aug. 4, 2015), <http://www.latimes.com/world/europe/la-fg-russia-arctic-claim-un-20150804-story.html>; Associated Press in Toronto, *Canada To Claim North Pole As Its Own*, THE GUARDIAN (Dec. 23, 2013); Pettersen, *supra* note 89 (referencing IBRU: Centre for Borders Research, Department of Geography, Durham University, <https://www.dur.ac.uk/ibru/publications/>). Russia, Norway, Denmark, and Canada have all made submissions to the CLCS on the extension of their respective OCS in the Arctic. See Pettersen, *supra* note 89.

Iceland, Russia, Denmark, and Norway.⁹³ However, Russia recently “descended 14,000 feet to plant a one-meter-high titanium Russian flag on the 1,100 mile-long Lomonosov ridge” to establish its sovereignty over the area.⁹⁴ Russia’s unilateral actions are reminiscent of China’s Note that asserted historical territorial rights over the SCS. The UNCLOS and CLCS process seems to be working in the Arctic, but with China’s ignorance of the Award, countries may begin militarizing the area in hopes of deterring others. Canada’s annual Operation NANOOK simulates real-life situations for Canadian Forces to protect its interests in the Arctic.⁹⁵ “The U.S. government recently released the National Strategy for the Arctic Region listing advancing national security interests as its number one policy objective in the region.”⁹⁶ Vladimir Putin has also stated that Russia plans to make concerted efforts to control and protect its territory in the Arctic.⁹⁷ Mirroring the SCS disputes, the Arctic showcases the start of a potential dispute due to resources and control of a future trade route. Furthermore, China’s recent denial of the Award may cause countries like Russia and the United States to claim territory without UNCLOS recognition. Without peaceful resolution in the Arctic through the recognition of the UNCLOS, a budding area of economic growth and resource development is at risk of destabilization and confrontation similar to the SCS.

2. The Gulf of Mexico

The Gulf of Mexico accounts for 17% of the United States total production of crude oil per year.⁹⁸ The United States has extracted 19.03 billion barrels of oil from the Gulf of Mexico and there is an estimated reserve of 3.34 billion barrels of oil in the area.⁹⁹ The

⁹³ IBRU: Centre for Borders Research, Department of Geography, Durham University, <https://www.dur.ac.uk/ibru/publications/>.

⁹⁴ Otts, *supra* note 88, at 239.

⁹⁵ Dylan Ciccarelli, *Warming Up to Arctic Prospects*, WASH. POST (June 5, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/06/05/warming-up-to-arctic-prospects/?utm_term=.508950b20f7b.

⁹⁶ *Id.*

⁹⁷ *See id.*

⁹⁸ U.S. Energy Information Administration, *Gulf of Mexico Fact Sheet*, https://www.eia.gov/special/gulf_of_mexico/.

⁹⁹ U.S. Department of the Interior Bureau of Ocean Energy Management Gulf of Mexico OCS Region, *Estimated Oil and Gas Reserves: Gulf of Mexico OCS Region*, OCS Report BOEM 2016-024, Dec. 31, 2014, <https://www.boem.gov/BOEM-2016-024/>.

oil industry estimates that Mexico might have 60 billion to 120 billion barrels of undeveloped oil in the deep-water gulf.¹⁰⁰ The Gulf of Mexico has two areas that extend beyond the 200-nautical mile EEZ where Mexico's and the United States' EEZ overlapped; they are called the western gap and the eastern gap, *see* Figure 4 in Appendix A.¹⁰¹ In 2000, the United States and Mexico signed a treaty delineating the continental shelf in the western gap.¹⁰² The United States received 38% and Mexico received 62% of the western gap,¹⁰³ and followed up the 2000 Treaty with a 2012 Transboundary Agreement that established terms to exploit minerals at the boundary.¹⁰⁴ The agreements between the United States and Mexico have been relatively successful and demonstrate how nations can negotiate territorial claims at sea.

Although the western gap has been successfully delaminated, the eastern gap poses greater hurdles. First, the United States, Mexico, and Cuba have claims within the eastern gap.¹⁰⁵ This poses substantial uncertainty because of the tense relationship between the United States and Cuba and the United States' recent lift of its embargo on Cuba.¹⁰⁶ The United States would likely require certain guarantees from Cuba to protect the

¹⁰⁰ Patrice Hill, *Mexico Could Make North America the World Leader in Oil Production*, WASH. TIMES (Sept. 12, 2013), <http://www.washingtontimes.com/news/2013/sep/12/mexico-could-make-north-america-the-world-leader-i/>.

¹⁰¹ The Heritage Foundation, *U.S. Extended Continental Shelf* (May 15, 2012), <http://www.heritage.org/multimedia/infographic/2012/05/us-extended-continental-shelf-gulf-mexico>.

¹⁰² Treaty Between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles [Western Gap Treaty], U.S.-Mex., June 9, 2000, S. Treaty Doc. No. 106-39.

¹⁰³ S. Warren Heaton, Jr., *Mexico's Attempt to Extend Its Continental Shelf Beyond 200 Nautical Miles Serves as a Model for the International Community*, 5 MEX. L. REV. 433, 450 (2012).

¹⁰⁴ Agreement between the United States of America and the United Mexican States Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico, <https://www.boem.gov/US-Mexico-Transboundary-Reservoirs-Agreement/>.

¹⁰⁵ *See* Paul Guzzo, *Advocates of Gulf Oil-Drilling Ban Worried by Talks with Cuba*, TAMPA BAY TIMES (Aug. 15, 2016), <http://www.tampabay.com/news/environment/water/advocates-of-gulf-oil-drilling-ban-worried-by-talks-with-cuba/2289585>.

¹⁰⁶ Julie Hirschfeld Davis, *Obama, Cementing New Ties with Cuba, Lifts Limits on Cigars and Rum*, N.Y. TIMES (Oct. 14, 2016), <https://www.nytimes.com/2016/10/15/world/americas/obama-cuba-trade-embargo.html?ref=todayspaper>.

interests of its licensees. Second, the United States and Florida have expressed major concerns about drilling in the eastern gap with the current drilling moratorium in place.¹⁰⁷ Any agreement would have to establish strong environmental protection standards and stringent regulations to curtail any accidents. Third, Mexico's recent oil and gas reform necessitates the negotiation of an agreement different from the western gap agreement. Fourth, and most importantly, President Trump's brash and confrontational nationalistic policies pose major threats to any agreement in the eastern gap.¹⁰⁸ Nowhere is this more evident than Trump's attack on Mexico; he has proposed building a wall between the United States and Mexico, tightening trade restrictions between the two countries, and stopping companies from building factories in Mexico.¹⁰⁹ Furthermore, Trump's comments regarding armed conflict and unpredictable military actions, including nuclear weapons, raises questions about his international treaty policies.¹¹⁰

Trump's policy is concerning because of its parallel to China's nationalistic point of view and its potential to destabilize international norms. China's actions in the SCS signal to super powers and world leaders such as Trump that military posturing is acceptable to protect illegitimate claims at sea. Trump may see this as an opportunity to dispute Mexico's and Cuba's claims in the eastern gap of the Gulf of Mexico and he might use the United States' military to strong arm both countries into an unfavorable agreement. Although these events have not materialized, the

¹⁰⁷ See Guzzo, *supra* note 105.

¹⁰⁸ See Robert J. Samuelson, Opinion, *Trump's Risky Nationalism*, WASH. POST (Dec. 4, 2016), https://www.washingtonpost.com/opinions/trumps-risky-nationalism/2016/12/04/dabc8f66-b8bd-11e6-a677-b608fbb3aaf6_story.html?utm_term=.7426871373e7.

¹⁰⁹ Uri Friedman, *What If Mexico Really Does Pay for Trump's Wall?*, ATLANTIC (Apr. 5, 2016), <http://www.theatlantic.com/international/archive/2016/04/trump-wall-mexico-foreign-policy/475581/>.

¹¹⁰ See Editorial Board, *Trump's Distressing Chest-Thumping On Nuclear Weapons*, WASH. POST (Dec. 23, 2016), https://www.washingtonpost.com/opinions/trumps-distressing-chest-thumping-on-nuclear-weapons/2016/12/23/6a528540-c88b-11e6-bf4b-2c064d32a4bf_story.html?utm_term=.aa4357df1220; Charles M. Blow, *Are You Not Alarmed?*, N.Y. TIMES (Jan. 19, 2017), <https://www.nytimes.com/2017/01/19/opinion/are-you-not-alarmed.html?mtrref=www.google.com&gwh=4DD3F89210FB713098BC4F101665807E&gwt=pay&assetType=opinion>.

impact China's actions in the SCS have on international agreements over boundary disputes could have drastic effects on peace and the UNCLOS. The Gulf of Mexico is a perfect example of where peaceful negotiations have worked, but China's actions offer countries such as the United States a justification to unilaterally claim disputed territory at sea and circumvent the UNCLOS.

C. Collateral Effects on the Freedom of Navigation: The Strait of Hormuz

The Strait of Hormuz represents the "world's most important oil choke point" because it fosters the passage of approximately thirty percent of the world's seaborne-traded oil.¹¹¹ "The shipping lane in either direction is only two miles wide, separated by a two-mile buffer zone."¹¹² The economic importance of the Strait and the conflicting interests amongst the many interested countries has caused constant friction in the area similar to the SCS. The United States is constantly at odds with Iran and it seeks to protect its interests in the western Persian Gulf states such as Saudi Arabia, Kuwait, and Oman.¹¹³ Recently, Iran and the United States have experienced close encounters, including warning shots from a United States vessel at an Iranian vessel.¹¹⁴ Additionally, wars throughout the years have caused strife over the control of the Strait.¹¹⁵ The UNCLOS discusses the safe passage of vessels through crucial straits in Article 39:

Ships and aircraft, while exercising the right of transit passage [through a straight], shall: . . . refrain from any threat or use of force against the sovereignty, territorial integrity or political

¹¹¹ EIA, World Oil Transit Chokepoints (Nov. 10, 2014), <https://www.eia.gov/beta/international/regions-topics.cfm?RegionTopicID=WOTC>.

¹¹² *Id.*

¹¹³ See Shibley Telhami, *The Persian Gulf: Understanding the American Oil Strategy*, BROOKINGS (Mar. 1, 2002), <https://www.brookings.edu/articles/the-persian-gulf-understanding-the-american-oil-strategy/>.

¹¹⁴ Rick Gladstone, *Tensions Rise Between Iran and U.S. in Persian Gulf*, N.Y. TIMES (Aug. 25, 2016), <https://www.nytimes.com/2016/08/26/world/middleeast/persian-gulf-us-iran.html>.

¹¹⁵ HISTORY WORLD, *THE GRECO-PERSIAN WARS*, <http://www.historyworld.net/wrldhis/PlainTextHistories.asp?ParagraphID=cee>.

independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations¹¹⁶

The Strait of Hormuz is similar to the SCS; they both foster substantial trade that is essential to the global economy and encompass a variety of countries that have diverging interests and political goals. Similar to China's militarization of the SCS, the United States has a strong military presence in the Persian Gulf region to defend its allies and allow safe passage through the Strait of Hormuz. The United States' actions encourage super powers to control territory at sea to protect their interests and trade routes. Analogously, China is seeking to establish dominance over the SCS to protect its interests and control the passage of ships.

The militarization of these zones is in direct conflict with the UNCLOS, and China's stance in the SCS is creating precedent that teaches nations to ignore the UNCLOS and choke freedom of navigation through vital trade routes. Furthermore, conflicts such as the United States firing warning shots at Iran near the Strait of Hormuz or China's aggression towards other vessels in the SCS is threatening the UNCLOS' credibility and the freedom of navigation. Both countries are signaling to the world that super powers are above the law and can ignore the UNCLOS. China's actions in the SCS not only undermine the UNCLOS, but they also encourage and justify the United States' stance in places like the Strait of Hormuz.

The Arctic, the Gulf of Mexico, and the Strait of Hormuz are all examples of world powers bending the rules to undermine international laws and facilitate control over strategic and resource rich areas of the world. These actions directly challenge a thriving, effective, and accepted UNCLOS system that regulates claims to resource rich areas and preserves energy security and international trade through freedom of navigation. The PCA attempted to resolve the SCS dispute, but China's ignorance of the award was a signal to all super powers that they are exempt from these types of sanctions. Ultimately, alternative

¹¹⁶ UNCLOS, art. 39(1)(b).

resolution techniques are required to quell tensions in the SCS and reaffirm the importance and vital role of the UNCLOS.

IV. GLOBAL CONFLICT: POTENTIAL FOR DISPUTE RESOLUTION OR A FALSE DREAM?

A. *Failure of the July 2016 Philippines v. China Arbitration*

In light of China's militaristic actions, the Philippines filed an international arbitration claim against China. A unanimous five-judge tribunal resulted in a resounding win for the Philippines and lambasted China for its unlawful creation of artificial islands and other actions in the SCS.¹¹⁷ The tribunal's 501-page Award issued four main holdings.¹¹⁸ First, the tribunal held that China's nine-dash line was invalid and a violation of the UNCLOS.¹¹⁹ Second, the tribunal concluded that the Spratly Islands could not generate an EEZ and therefore, do not support China's claims over the Philippines' EEZ.¹²⁰ Third, the tribunal held that China violated the Philippines' sovereign rights in its EEZ through the following infringements:

interfering with Philippine fishing and hydrocarbon exploration; constructing artificial islands; and failing to prevent Chinese fishermen from fishing in the Philippines' EEZ. China also interfered with Philippine fishermen's traditional fishing rights near Scarborough Shoal (without prejudice to the question of sovereignty over Scarborough Shoal). China's construction of artificial islands at seven features in the Spratly Islands, as well as illegal fishing and harvesting

¹¹⁷ Robert D. Williams, *Tribunal Issues Landmark Ruling in SCS Arbitration*, LAWFARE (July 12, 2016), <https://www.lawfareblog.com/tribunal-issues-landmark-ruling-south-china-sea-arbitration>.

¹¹⁸ *Id.*

¹¹⁹ *Id.* China claimed the nine-dash line was supported by historic rights, but the tribunal determined that China's SCS claims were governed by UNCLOS and therefore, its historic rights were extinguished when China adopted UNCLOS. *Id.*

¹²⁰ *Id.* The tribunal determined that the features had to be judged based on their natural condition and artificial islands could not alter the status of those features. *Id.* Furthermore, the Spratly Islands could not "sustain either a stable community of people or economic activity that is not dependent on outside resources or purely extractive in nature." *Id.*

by Chinese nationals, violate UNCLOS obligations to protect the marine environment. Finally, Chinese law enforcement vessels unlawfully created a serious risk of collision by physically obstructing Philippine vessels at Scarborough Shoal in 2012.¹²¹

Finally, the tribunal found that the disputes were aggravated and extended due to China's persistent island-building.¹²² Nguyen Ba Son praised the PCA Award for establishing a precedent under the UNCLOS that denied the legitimacy of China's nine-dash line and dubbed the Spratly Islands uninhabitable features that did not qualify as islands.¹²³ Son touted the PCA Award as groundbreaking international law and believed it would result in China's compliance.¹²⁴ Unfortunately, China was not present during proceedings and declared that "the award [was] null and void and [had] no binding force."¹²⁵ Son's comments ignore China's refusal to acknowledge the Award, China's persistent island building, and its militarization of its artificial islands. Contrary to Son's comments, China's actions represent an attack on the UNCLOS' credibility, global cooperation with the CLCS and freedom of navigation, and the stability of the region. The arbitration was an attempt to resolve the disputes between the two countries, but without Chinese participation or acceptance of the award, the tribunal's unanimous decision likely intensified controversy and further fueled China's island building and militarization in the SCS.

The United Nations Secretary-General has refused to intervene, instead advising peaceful resolution between the

¹²¹ *Id.* The tribunal noted specific instances of infringement, but the majority of them related to hostile acts by China, the violation of the Philippines' sovereign rights to its EEZ. *Id.* Additionally, the tribunal noted the impact on fisheries and the Philippine oil and gas exploration operations. *Id.*

¹²² *Id.* (The tribunal found evidence that China continued building the islands during proceedings, "caused irreparable harm to the marine ecosystem, and permanently altered the island features required for evidentiary analysis.>").

¹²³ Nguyen Ba Son, *A New Legal Landscape in the SCS*, THE DIPLOMAT (Aug. 26, 2016), <http://thediplomat.com/2016/08/a-new-legal-landscape-in-the-south-china-sea/>.

¹²⁴ *Id.*

¹²⁵ *Id.* (quoting China's Foreign Ministry's press release regarding the tribunal's award).

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parties.¹²⁶ At the 2016 G20 meeting, President Obama stated, “Where we see them violating international rules and norms, as we have seen in some cases in the SCS or in some of their behavior when it comes to economic policy, we’ve been very firm ... And we’ve indicated to them that there will be consequences.”¹²⁷ However, the only action the United States has taken is to strengthen its military presence throughout Southeast Asia.¹²⁸ President Obama’s attempted mediation likely intensified the dispute.¹²⁹ Likely fearing the United States’ presence and firm stance, China has continued to militarize its artificial islands in the SCS despite promises from its President Xi Jinping that it would not militarize the islands.¹³⁰

Without stronger actions to resolve the dire situation, China and other world powers will continue to circumvent the UNCLOS and hinder freedom of navigation through vital waterways. Ultimately, the arbitration was never going to solve the SCS dispute because the tribunal lacked jurisdiction.¹³¹ The tribunal’s failure is a signal to the world that alternative methods of resolution are required and peaceful negotiation is necessary to settle tensions in the area, protect trade, preserve energy security, and restore the UNCLOS’ credibility. Two plausible solutions exist: (1) economic sanctions and (2) international treaties and strong political pressure from the UN Security

¹²⁶ See United Nations, *Daily Press Briefing by the Office of the Spokesperson for the Secretary-General*, July 12, 2016, <http://www.un.org/press/en/2016/db160712.doc.htm>.

¹²⁷ Tom Phillips, *G20: Obama Warns Beijing Against SCS Aggression*, THE GUARDIAN (Sept. 2, 2016), <https://www.theguardian.com/world/2016/sep/03/g20-obama-warns-beijing-against-south-china-sea-aggression>

¹²⁸ Nicholas Borroz & Hunter Martson, *Washington Should Stop Militarizing the Pacific*, N.Y. TIMES (Oct. 9, 2016), <https://www.nytimes.com/2016/10/10/opinion/washington-should-stop-militarizing-the-pacific.html> (The U.S. Senate proposed a bill for punitive sanctions against China over its island building and militarization in the SCS, but it has not been passed yet); Ankit Panda, *U.S. Sanctions Against China Over the East and SCSs: A Serious Proposal?*, THE DIPLOMAT (Dec. 08, 2016), <http://thediplomat.com/2016/12/us-sanctions-against-china-over-the-east-and-south-china-seas-a-serious-proposal/>.

¹²⁹ See Phillips, *supra* note 128.

¹³⁰ Jeremy Page et al., *China’s President Pledges No Militarization in Disputed Islands*, WALL ST. J. (Sept. 25, 2015), <http://www.wsj.com/articles/china-completes-runway-on-artificial-island-in-south-china-sea-1443184818>; Chris Buckley, *China Suggests It Has Placed Weapons on Disputed Spratly Islands in SCS*, N.Y. TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/world/asia/china-spratly-islands.html>.

¹³¹ Williams, *supra* note 118, at 7.

Council.

B. Economic Sanctions: Quelling the Flames or Feeding the Fire?

Economic sanctions are a valuable tool that countries and world organizations can use to avoid conflict and military action. The President and the Congress of the United States have broad authority to apply economic sanctions in the following areas: “Government programs, such as foreign assistance and landing rights; Export control; Import control; Private financial transactions; and International financial institutions.”¹³² In 2014, after Russia annexed Ukraine, the United States enacted sanctions against Russia, including freezing assets, banning the travel of Russian individuals, and restricting trade with Russia’s financial, energy, technology, and defense sectors.¹³³ The United States specifically targeted three major Russian oil companies: Rosneft, Transneft, and Gazprom Neft.¹³⁴ It is estimated that, in combination with falling oil prices, Russia is losing approximately \$140 billion a year from European Union and United States sanctions.¹³⁵ After Iran violated non-proliferation agreements, the United States sanctioned the country by prohibiting “27 members of the European Union from purchasing oil or insuring oil tankers that carr[ie]d [Iranian Oil].”¹³⁶ The sanctions resulted in radical inflation, drastic increases on food prices, and massive unemployment.¹³⁷ North Korea has repeatedly violated nuclear testing and nuclear weapons development bans and the United

¹³² Siamack Shojai & Patricia S. Root, *Effectiveness of Economic Sanctions: Empirical Research Revisited*, 12 INT’L BUS. & ECON. RESEARCH J. 1479, 1481 (2013).

¹³³ Holly Ellyatt, *These Are the Only Sanctions that Russia Cares About*, CNBC (Aug. 16, 2016), <http://www.cnbc.com/2016/08/16/these-are-the-only-sanctions-that-russia-cares-about.html>.

¹³⁴ Tim Daiss, *Prolonged Sanctions Rip Into Russian Economy, Causing Angst For Putin*, FORBES (Aug. 19, 2016), <http://www.forbes.com/sites/timdaiss/2016/08/19/prolonged-sanctions-rip-into-russia-causing-angst-for-putin/#7d5b8f54c2f6>.

¹³⁵ Alanna Petroff, *Russia Losing \$140 Billion From Sanctions and Low Oil Prices*, CNN MONEY (Nov. 24, 2014), <http://money.cnn.com/2014/11/24/news/economy/russia-losing-140-billion-oil-sanctions/>.

¹³⁶ Sabrina M. Peterson, *Iran’s Deteriorating Economy: An Analysis of the Economic Impact of Western Sanctions*, Elliot School of International Affairs at George Washington University, <http://www.iar-gwu.org/node/428>.

¹³⁷ See *id.* (noting that after a year inflation was at 22.2 percent, the price of vegetables almost rose to 100 percent, and unemployment was at 35 percent).

States has responded with major bans on the export and import of North Korea coal and frozen North Korean company and individuals' assets.¹³⁸ All of these sanctions have been effective, and each country has suffered significant financial losses due to the sanctions.

China's island building in the Spratly Islands is extremely similar to Russia's annexation of Crimea. The only difference is that China is annexing sovereign territory at sea. China's actions constitute actions of war, as proven in Part III.A of this comment, and are more egregious than the Iranian nonproliferation violations. To an extent, China's annexation and forceful taking of territory at sea is almost more harmful to global stability than North Korea's attempt to obtain a nuclear weapon; yet, the United States has refused to enact sanctions against China.

The United States could sanction individuals and companies and restrict exports and imports to and from China. Chinese firms have invested billions in the U.S. real estate market.¹³⁹ Furthermore, the United States represents 17.1 percent of China's exports.¹⁴⁰ The top exports from the United States consist of refined petroleum, cars, planes, helicopters, spacecraft, vehicle parts, and packaged medicaments.¹⁴¹ The sanctions would severely impact China's export economy and its reliance on high-tech imports such as electronics and patented devices. Additionally, individuals and companies that made major investments in the United States would not be able to reap the benefits. This would put pressure on China to reduce island building in the SCS and begin to work towards a cooperative

¹³⁸ Charles Clover, *U.S. Hits North Korea with New Sanctions*, FINANCIAL TIMES (Mar. 17, 2016), <https://www.ft.com/content/53577052-ec05-11e5-bb79-2303682345c8>.

¹³⁹ See Iacob Koch-Weser & Garland Ditz, *Chinese Investment in the United States: Recent Trends in Real Estate, Industry, and Investment Promotion*, U.S.-China Economic and Security Review Commission 8 (Feb. 26, 2015), https://www.uscc.gov/sites/default/files/Research/Ch%20invt%20paper_2%2026%2015.pdf ("Of the roughly \$40 billion China has invested in the United States since the start of the century, more than half has entered in the last two years").

¹⁴⁰ Oliver B. Barron, *China's Reliance on the US at All-Time High*, FORBES (Oct. 21, 2014), <http://www.forbes.com/sites/oliverbarron/2014/10/21/chinas-reliance-on-the-us-at-all-time-high/#68aa4dfa4c72>. According to the Central Intelligence Agency, China exported \$1.99 trillion in 2016. *The World Fact Book: China*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html>.

¹⁴¹ *United States*, Observatory of Economic Complexity, <http://atlas.media.mit.edu/en/profile/country/usa/>.

resolution with the other nations in the SCS.

Sanctions, however, breed resentment and do not always work. Although Russia has suffered significant losses, it continues to occupy Crimea.¹⁴² North Korea continues to advance its nuclear weapons program.¹⁴³ In 2014, President Obama even stated that there was “no ‘magic bullet’ to influence an already isolated nation whose advancing weapons program poses a ‘direct threat’ to the United States.”¹⁴⁴ In January 2017, Iran conducted a missile test in spite of potential economic sanctions.¹⁴⁵ Thus, sanctions are unlikely to deter China from continuing its island building in the SCS. Additionally, President Trump has reiterated his hard stance on China and is more likely to take aggressive steps towards resolving the issue. Recent developments and lack of action have led to tensions that are now at a breaking point and could lead to war. Therefore, the most plausible solution is the formation of an international SCS body that protects the freedom of navigation in the SCS and preserves and enforces the UNCLOS.

C. Diplomatic Solutions: International Treaties and the USCSN

China’s aggressive stance on sovereignty over the SCS is a factor contributing to tensions, but China is not the only culprit in the equation. The United States’ political posture regarding the SCS has significantly intensified China’s urgency and angst over the area. For example, in 2010, during the ASEAN Regional Forum in Hanoi, U.S. Secretary of State Hillary Clinton “referred to the SCS as ‘international waters’ and claimed that the United States has a national interest in the freedom of navigation in the

¹⁴² See Neil MacFarquhar, *Under Russia, Life in Crimea Grows Chaotic*, N.Y. TIMES (Apr. 21, 2014), <https://www.nytimes.com/2014/04/22/world/europe/under-russia-life-in-crimea-grows-chaotic.html>.

¹⁴³ Chico Harlan, *Obama Sees No ‘Magic Bullet’ to Influence North Korea as Nuclear Program Continues*, WASH. POST (Apr. 25, 2014), https://www.washingtonpost.com/world/asia_pacific/obama-sees-no-magic-bullet-to-influence-north-korea-as-nuclear-program-continues/2014/04/25/96f533ca-cc73-11e3-93eb-6c0037dde2ad_story.html?utm_term=.28150f9a7852.

¹⁴⁴ *Id.*

¹⁴⁵ Reena Flores, *Trump Says Iran Is “Playing With Fire” After Missile Test*, CBSNEWS (Feb. 3, 2017), <http://www.cbsnews.com/news/trump-says-iran-is-playing-with-fire-after-missile-test/>.

area.”¹⁴⁶ China responded by claiming that the UNCLOS has declared an EEZ in the SCS and established a policy to allow freedom of navigation and overflights in the area.¹⁴⁷

Concurrently, conflict between the other countries in the SCS and China has also escalated. Despite this longstanding and volatile dispute, interested parties refuse to negotiate and implement international treaties or even create an effective international convention to discuss de-escalation of the area. Shicun suggests that these negotiations should consider the following principles:

- 1) that the ocean should be used for peaceful purposes;
- 2) cooperation should start from less sensitive areas such as marine environmental protection before expanding to more controversial issues;
- 3) the benefits should be equally shared by all involved parties;
- 4) exploitation and exploration of living and non-living resources should not be at the cost of the marine environment.¹⁴⁸

Shicun makes a valid point that peaceful considerations should be considered during the negotiations between SCS-interested parties. However, these goals all include an assumption that these parties are willing to forgo economic growth and control over the area for environmental considerations. Furthermore, Shicun assumes these parties have

¹⁴⁶ Wu Shicun, *Solving Disputes for Regional Cooperation and Development in the SCS: A Chinese Perspective* 156, 156 (2013).

¹⁴⁷ *Id.* Conflict between the United States and China arises from issues regarding freedom of navigation. Bonnie S. Glaser, *Contingency Planning Memorandum No. 14: Armed Clash in the SCS*, Council on Foreign Relations (2012), <http://www.cfr.org/asia-and-pacific/armed-clash-south-china-sea/p27883>. However, the United States is provoking China into armed conflict by claiming that, “nothing in the United Nations Convention on the Law of the Sea (UNCLOS) or state practice negates the right of military forces of all nations to conduct military activities in EEZs without coastal state notice or consent.” *Id.* Furthermore, the United States continues to conduct military exercises in the region. Simon Denyer, *China Slams U.S.-South Korea Military Drills Even as it Stages Naval War Games of its Own*, *Washington Post* (Aug. 22, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/08/22/east-asia-war-games-a-tour-of-the-hotspots-as-temperatures-rise-between-china-and-the-u-s/?utm_term=.b7fa9ec220d0.

¹⁴⁸ Shicun, *supra* note 147, at 163–64.

a preexisting relationship that will foster cooperation.¹⁴⁹ Shicun posits great ideas, but these resolutions rely on peaceful international relationships and negotiations like the United States-Mexico agreement in the Gulf of Mexico.¹⁵⁰ The ASEAN countries and China by no means have a working relationship in place that would foster the resolutions that Shicun suggests. Additionally, the United States has distinctly different interests in the SCS than the majority of the ASEAN as seen in other areas of this comment. Ultimately, the ASEAN, the United States, and China must resolve boundary disputes and should form an international SCS entity similar to the UN to create special maritime and military rules, manage disputes over the area, and establish joint development areas. First, it is important to leverage the preexisting agreements that might help start a conversation and spur the creation of the United SCS Nations (USCSN).

1. Prior ASEAN Agreements with China

The Association of Southeast Asian Nations (ASEAN) seeks “[t]o promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter.”¹⁵¹ The ASEAN believes in settling matters in the region peacefully and “renunciat[es] [. . .] the threat or use of force.”¹⁵² The ASEAN consists of 10 nations: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.¹⁵³ The biggest issue is that China is not a part of the ASEAN. However, treaties between the ASEAN and China do exist.

The ASEAN and China entered into a free trade agreement that encourages a Declaration on the Conduct of Parties in the

¹⁴⁹ See *id.* at 164 (suggesting that the SCS countries can work together to jointly develop oil resources and create a joint fisheries management and conservation management group).

¹⁵⁰ See discussion *supra* Section III.B.2.

¹⁵¹ *About ASEAN*, Association of Southeast Asian Nations (last visited Feb. 15, 2017), <http://asean.org/asean/about-asean/>.

¹⁵² *Id.*

¹⁵³ *Member States*, Association of Southeast Asian Nations (last visited Feb. 15, 2017), <http://asean.org/asean/asean-member-states/>.

SCS (DOC) and Guidelines on the Implementation of the DOC (GDOC).¹⁵⁴ The trade agreement has been relatively successful,¹⁵⁵ but, unfortunately, it lacks any substantial dispute resolution mechanism.¹⁵⁶ The DOC states, “[t]he Parties reaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea . . . other universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations.”¹⁵⁷ Furthermore, the DOC postulates that members of the agreement shall “undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 [UNLCOS].”¹⁵⁸ The GDOC reaffirmed the ASEAN’s and China’s commitment to “promoting peace, stability and mutual trust and to ensuring the peaceful resolution of disputes in the SCS.”¹⁵⁹ Unfortunately, China and the ASEAN nations have not adhered to the agreement, as illustrated in Part III.A of this comment. However, these act as starting points to bring China and the ASEAN nations to the table to negotiate boundary disputes and begin discussions about a new world organization that can provide stability to the SCS.

¹⁵⁴ *External Relations: China*, Association of Southeast Asian Nations (last visited Feb. 15, 2017), <http://asean.org/asean/external-relations/china/>.

¹⁵⁵ Nargiza Salidjanova, *China’s Trade Ambitions: Strategy and Objectives Behind China’s Pursuit of Free Trade Agreements*, U.S.-China Economic and Security Review Commission (May 28, 2015), <http://origin.www.uscc.gov/sites/default/files/Research/China's%20Trade%20Ambitions%20-%2005.28%2015.pdf> (citing Nargiza Salidjanova, Iacob Koch-Weser, and Jason Klanderman, *China’s Economic Ties with ASEAN: A Country-by-Country Analysis*, U.S.-China Economic and Security Review Commission (March 17, 2015)) (“Total trade between China and ASEAN was \$480.5 billion in 2014, while the total stock of China’s foreign direct investment (FDI) in ASEAN in 2013, the latest available, was \$35.7 billion.”).

¹⁵⁶ Alyssa Greenwald, *The ASEAN-China Free Trade Area (ACFTA): A Legal Response To China’s Economic Rise?*, 16 *Duke J. Comp. & Int’l L.* 193, 194 (2006).

¹⁵⁷ *Declaration on the Conduct of Parties in the SCS*, Association of Southeast Asian Nations (last visited Feb. 15, 2017), http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2.

¹⁵⁸ *Id.*

¹⁵⁹ *Guidelines for the Implementation of the DOC*, Association of Southeast Asian Nations (Jul. 20, 2011), <http://www.asean.org/wp-content/uploads/images/archive/documents/20185-DOC.pdf>.

2. Prior Agreements Between the U.S. and China

The United States and China have several treaties covering finances, trade, and fisheries.¹⁶⁰ However, the most significant treaties relating to the SCS dispute are The Agreement Establishing a Consultation Mechanism To Strengthen Military Maritime Safety (the Agreement)¹⁶¹ and a potential U.S.-China Bilateral Investment Treaty.¹⁶²

The Agreement establishes annual meetings to discuss maritime and air force issues from the perspective of international laws and the UNCLOS.¹⁶³ These meetings offer the United States an opportunity to discuss the tensions in the SCS, boundary disputes, and the possibility of establishing a USCSN. The Agreement might not include necessary members to begin discussions about the boundary disputes or the formation of the USCSN, but it presents an opportunity to de-escalate the SCS tensions and offer the solutions proposed in this comment.

A bilateral treaty between the United States and China would prevent Chinese expropriation or unfair treatment of investments made by U.S. companies in the SCS.¹⁶⁴ A U.S. company could bring an investor-state arbitration for violation of the bilateral investment treaty in front of “a neutral international arbitral tribunal under the rules of the International Centre for

¹⁶⁰ See generally *Finance: Investment Guaranties*, China-U.S., Oct. 7, 1980, 32 U.S.T. 4010; *Trade in Textiles: Visa System*, China-U.S., Feb. 16, 1984, 35 U.S.T. 4417; *Memorandum of understanding on effective cooperation and implementation of United Nations General Assembly Resolution 46/215 of December 20, 1991* (Dec. 3, 1993), http://www.nmfs.noaa.gov/ia/agreements/LMR%20report/us_china_46_215_agreement.pdf.

¹⁶¹ See *Maritime Matters: Military Safety*, China-U.S., Jan. 19, 1998, TIAS 12924.

¹⁶² Lauren Gloudeman & Nargiza Salidanova, *Policy Considerations for Negotiating a U.S.-China Bilateral Investment Treaty*, U.S.-China Economic and Security Review Commission (Aug. 1, 2016), https://www.uscc.gov/sites/default/files/Research/Staff%20Report_Policy%20Considerations%20for%20Negotiating%20a%20U.S.-China%20Bilateral%20Investment%20Treaty080116.pdf. Gloudeman and Salidanova discuss the implications on the United States of entering a bilateral investment treaty with China, however, this comment will focus only on the opportunities it grants the United States to initiate a convention to discuss the opportunity to establish the USCSN. See *id.*

¹⁶³ *Maritime Matters: Military Safety*, *supra* note 162.

¹⁶⁴ See Julie Bedard et. al., *The ‘Law 42’ Arbitrations Against Ecuador and the Importance of BIT Language*, Skadden Insights (2015), https://www.skadden.com/sites/default/files/publications/The_Law_42_Arbitrations_Against_Ecuador_and_the_Importance_of_BIT_Language.pdf.

Settlement of Investment Disputes (ICSID).”¹⁶⁵ Recently, companies in investor-state arbitrations have been winning disputes in the millions, and even billions, of dollars.¹⁶⁶ The United States and its companies could use these arbitrations and violations of investor rights to bargain for multilateral agreements in the SCS that could cool tensions and lead to a multinational body such as the USCSN. Furthermore, a U.S. company could raise disputes against Chinese laws that treat the company unfairly and violate the bilateral investment treaty. Pharmaceutical companies have been successful against countries when laws pertaining to intellectual property violated an investment treaty.¹⁶⁷ Companies could leverage these disputes against Chinese laws that seek to administer sovereignty over the SCS. Additionally, unlike the international court that wrote the Award for the Philippines, the ICSID has teeth through the World Bank.¹⁶⁸ Thus, a bilateral investment treaty with China would give the United States, through its companies, the opportunity to challenge Chinese policies in the SCS. This would give the United States the chance to address the tensions in the SCS and propose international regulation of the area.

3. Resolving Boundary Disputes & Creation of the USCSN

The UNCLOS, through the CLCS, has the power to resolve maritime boundary disputes.¹⁶⁹ However, as proven in Part II of this comment, the CLCS and the PCA have not resolved the issue and have ultimately inflamed tensions in the SCS. The ASEAN

¹⁶⁵ See *id.*

¹⁶⁶ *Id.* (awarding Occidental Petroleum \$1.7 billion in damages). The ICSID ordered Venezuela to pay \$1.6 billion to Exxon for its expropriation of Exxon oil projects. Manuel Perez-Rocha, *When Corporations Sue Governments*, N.Y. Times (Dec. 3, 2014), <https://www.nytimes.com/2014/12/04/opinion/when-corporations-sue-governments.html>.

¹⁶⁷ See Valentina S. Vadi, *Towards a New Dialectics: Pharmaceutical Patents, Public Health, and Foreign Direct Investments*, 5 NYU J. Int'l Prop. & Ent. L. 113, 117 (“Recent examples illustrate that investor-state arbitration can affect state autonomy in making important public policy decisions in the pharmaceutical sector, including making cheap generic medicines widely available and ensuring their safety.”); *Id.* (“In parallel, Eli Lilly, a major U.S. pharmaceutical company, filed an investor-state arbitration against Canada after Canadian Federal Courts invalidated a pharmaceutical patent on the ground of inutility.”)

¹⁶⁸ Bedard, *supra* note 165.

¹⁶⁹ See Suarez, *supra* note 78, at 136, 147.

countries and the United States could use their existing agreements and potential agreements to force China into a hearing with the ICJ.¹⁷⁰ However, this method is somewhat similar to the PCA method and would likely fail. Instead, the ASEAN countries and the United States could leverage their existing agreements, and a bilateral investment treaty, if it comes to be, to negotiate with China to convene a United SCS Nations Conference on International Organization similar to the United Nations Conference.¹⁷¹ The conference could be tailored around the boundary disputes in the SCS and the global necessity to create a body that would regulate the maritime disputes; create rules for the presence and appropriate actions of military; establish a permanent, multinational coast guard to protect vessels from oppression; and establish a fishing committee to regulate the consumption and protection of wildlife and a committee to manage resources in joint development areas. This group would ultimately be called the USCSN and could potentially be an independent entity from the UN or reside under the UN with only certain parties involved. Overall, the USCSN is the most plausible option to resolve the SCS dispute, protect freedom of navigation through the SCS, and preserve and promote the vitality of the UNCLOS and CLCS.

V. CONCLUSION

The UNCLOS and CLCS have been greatly undermined by China's actions in the SCS. China's forceful taking and control of the SCS has jeopardized freedom of navigation in the area and the global economy. Countries have refused to take further action beyond the CLCS and the PSA. Currently, tensions are at an all-time high, yet China continues to defy international laws, the PSA Award, and political pressure from global powers. Without quick, diplomatic resolution, China will have dominant control over one of the most important waterways in the world. Its control over the SCS has increased every year with its creation and

¹⁷⁰ See Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, 53 Duke L.R. 1779, 1781 (2004).

¹⁷¹ See United Nations, *History of the United Nations: The United Nations Officially Comes into Existence* (Oct. 24, 1945), <http://www.un.org/en/sections/history/history-United-nations/>.

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militarization of artificial islands and unyielding, confrontational posture. Military action against China would likely result in mutually assured destruction, and sanctions are more likely to intensify the SCS disputes.

Ultimately, the best solution is to encourage and, if necessary, pressure China to meet with the SCS countries and the United States in an international conference similar to the United Nations 1949 international conference. The goal of the conference should be to create an international SCS body consisting of the United States, China, and the rest of the SCS countries that regulates and enforces the UNCLOS and other international laws. Pending an international SCS conference and governing body, China will continue to threaten the freedom of navigation and the global economy, encourage super powers to forcefully control international waterways, and undermine the credibility of international law.

APPENDIX A

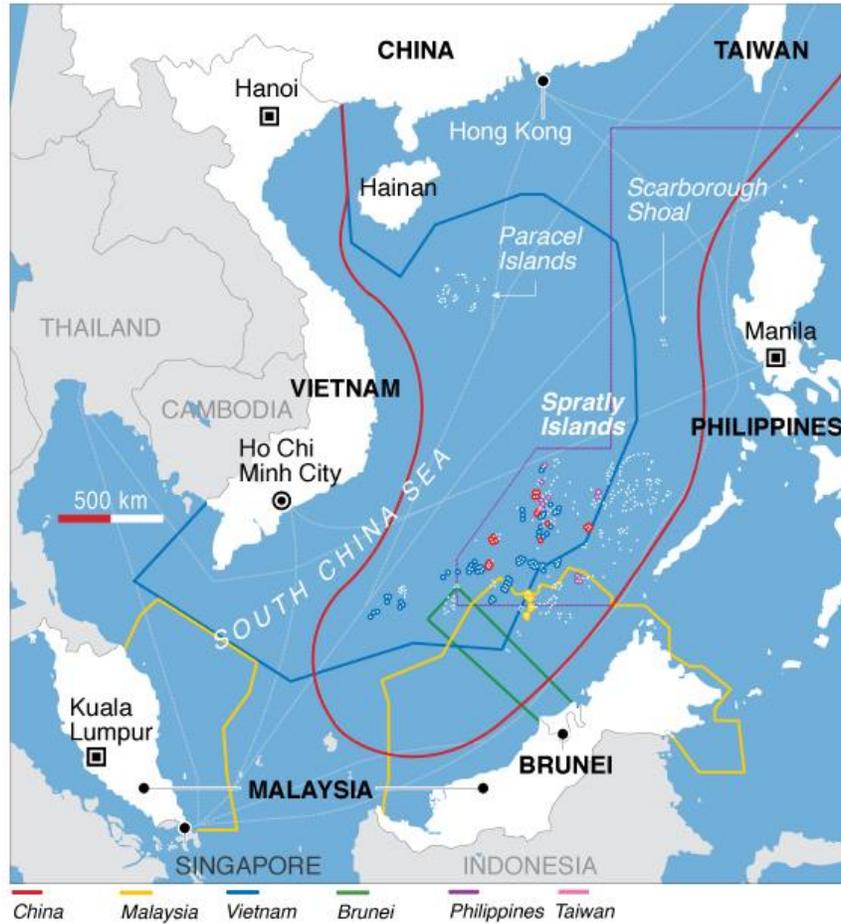


Figure 1: Nine-Dash Line & SCS Claims (<https://www.lawfareblog.com/dispute-south-china-sea-legal-primer>).

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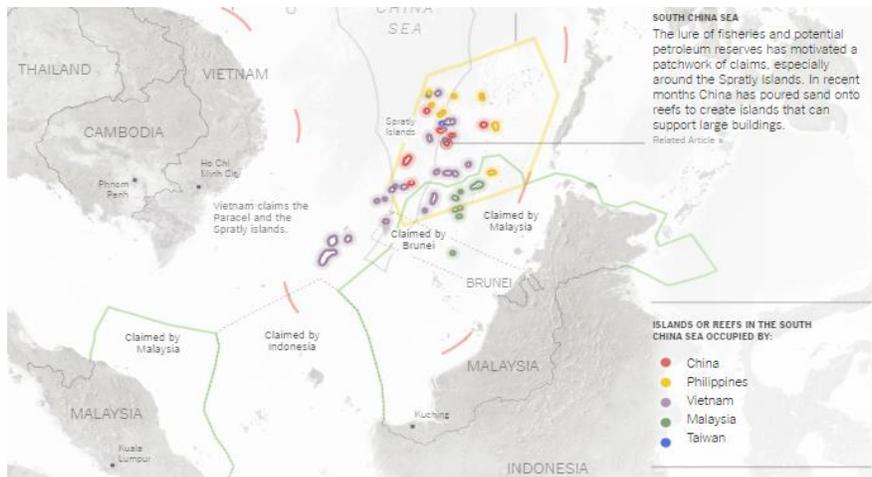


Figure 2: Spratly Islands and Features in SCS (Derek Watkins, *Territorial Disputes in the Waters Near China*, N.Y. TIMES (May 8, 2014),

<https://www.nytimes.com/interactive/2014/02/25/world/asia/claims-south-china-sea.html>



Figure 3: Example of one of China's Islands (China's New Spratly Island Defenses, *Asia Maritime Transparency Initiative*, Dec. 13, 2016, <https://amti.csis.org/chinas-new-spratly-island-defenses/>).

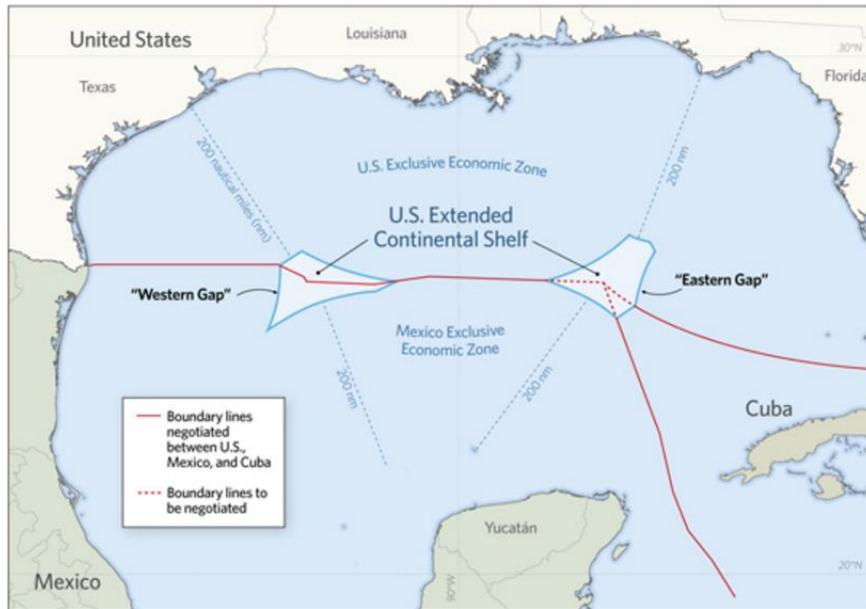


Figure 4: Western Gap and Eastern Gap, Boundaries of the U.S. Extended Continental Shelf. The Heritage Foundation, *U.S. Extended Continental Shelf* (May 15, 2012), <http://www.heritage.org/multimedia/infographic/2012/05/us-extended-continental-shelf-gulf-mexico>