REVISITING THE IMPLICATIONS OF THE SOUTH CHINA SEA ARBITRATION: AN ARCTIC PERSPECTIVE

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ABSTRACT

This article examines the implications of the South China Sea Arbitration ("the SCS Arbitration") for the governance of the Arctic Ocean. It argues that the SCS Arbitration award is more than a "piece of paper" and carries important implications for assessing and resolving maritime disputes and disagreements in the Arctic, especially regarding four maritime issues: (1) the historic claims in the Arctic Ocean, (2) the legal status of maritime features in the Arctic Ocean, (3) the application of straight baselines to outlying archipelagos in the Arctic Ocean, and (4) the adjudication of Arctic maritime disputes in international courts and tribunals.

In the Arctic Ocean, many claims and practices of several Arctic states are arguably inconsistent with the United Nations Convention on the Law of the Sea (UNCLOS) and the findings of the SCS Arbitration Tribunal. Several Arctic states have endorsed the SCS Arbitration award and called for China and the Philippines to abide by it. However, they have not altered their own practices in light of the SCS Arbitration ruling. This double-standard approach to international law is not new in many states' practices but constitutes a significant challenge for constraining maritime states' creeping claims in the sea all around the world. Taken together, by revisiting some key maritime disagreements in the Arctic Ocean in light of the SCS Arbitration award, this article offers critical insights into current opportunities and challenges for constraining powerful states' expansion in the sea.

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TABLE OF CONTENTS

I. INTRODUCTION

It is common for scholars and legal practitioners to discuss the rulings of international courts and tribunals years, even decades, after the decision. It is, however, uncommon for such decisions to be featured on a giant screen at New York's Time Square[2] and to continue receiving significant political, media, and scholarly attention worldwide. On 12 July 2016, the South China Sea Arbitration ("the SCS Arbitration") Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS)[3] delivered a unanimous decision, ruling that China's several claims and activities in the South China Sea (SCS) are contrary to UNCLOS.[4] Although the arbitral award was focused on the disputes in the SCS and only binding on the parties of the case, i.e., the Philippines and China, it was expected to have considerable legal implications for other maritime claims around the world, including those in the Arctic.[5]

To date, many countries, including several Arctic states,[6] have publicly declared their support for the ruling of the SCS Arbitration and called for

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[2] *See* Fang Bing & Zhang Zhen, *China Airs Propaganda Video over New York's Times Square*, VOA NEWS (Aug. 7, 2016, 3:00 PM), https://www.voanews.com/a/china-airs-propaganda-video-over-new-york-times-square/3454457.html.

[3] U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter *UNCLOS*].

[4] *See* discussion *infra* Part III.B.

[5] *See, e.g.*, CLIVE R. SYMMONS, HISTORIC WATERS AND HISTORIC RIGHTS IN THE LAW OF THE SEA: A MODERN REAPPRAISAL 160-61 (2d ed. 2019) (noting that the SCS Arbitration award constitutes a compelling precedent for other historic maritime claims in the world); Krittika Singh & Timo Koivurova, *The South China Sea Award: Promoting a Revived Interest in the Validity of Canada's Historic Internal Waters Claim?* 10 Y. B. POLAR L. 386 (2018) (discussing the implications of the SCS Arbitration ruling for Canada's historic title claims to the Northwest Passage); Brian Finneran, *U.S. Policy in the Arctic: The Implications of the South China Sea Arbitration Award on American Policy and UNCLOS*, 6 PENN. ST. J. L. & INT'L AFF. 290 (2018) (arguing that the SCS Arbitration award can shed light on how to deal with Arctic maritime issues, especially regarding the historic titles or rights, the status of maritime features, and dispute resolution); Clive Schofield, *A Landmark Decision in the South China Sea: The Scope and Implications of the Arbitral Tribunal's Award*, 38 (3) CONTEMP. SOUTHEAST ASIA 339, 346 (2016) (noting that the award is an authoritative and unanimous ruling by an international judicial body and has considerable implications both within and beyond the SCS); Justin D. Nankivell, *The Role of History and Law in the South China Sea and Arctic Ocean*, MARITIME AWARENESS PROJECT (Aug. 7, 2016), http://maritimeawarenessproject.org/2017/08/07/the-role-of-history-and-law-in-the-south-china-sea-and-arctic-ocean/ (arguing that Russia's and Canada's historic claims in the Arctic would be subject to greater scrutiny in the wake of the SCS Arbitration award).

[6] In the Arctic region, eight states have territory north of the Arctic Circle. They are Canada, Denmark (by virtue of Greenland), Finland, Iceland, Norway, Russia, Sweden, and the United States (by virtue of Alaska). Among them, five states have coastal frontage in the Arctic Ocean and therefore perceive themselves as "Central Arctic Ocean Coastal States" or "Arctic

China and the Philippines to abide by it.[7] For instance, in July 2021, the Canadian Government stated that:

> Canada reiterates the need for all involved parties to comply with [the SCS Arbitration decision]. This decision is a significant milestone and a useful basis for peacefully resolving disputes in the South China Sea…. Canada supports lawful commerce, navigation and overflight rights, as well as the sovereign rights and jurisdiction of coastal states in the South China Sea, exercised in accordance with international law, including the UNCLOS.[8]

However, Canada's own maritime claims and practices in the Arctic Ocean, especially with regard to the Northwest Passage (NWP), have long been controversial.[9] Moreover, many maritime features in the Arctic Ocean are not sustainable for human habitation or economic life of their own, just as some insular features in the SCS.[10] In other words, many maritime claims and practices of several Arctic states in the Arctic seem to be inconsistent with UNCLOS, especially in light of the ruling of the SCS Arbitration. As the sea ice in the Arctic Ocean continues to retreat, the Arctic has become more "globalized."[11] In this context, the Artic maritime disputes and their resolution would have great impact on non-Arctic actors' participation in the Arctic as well as the development of the law of the sea.

Coastal States." They are Canada, Denmark (by virtue of Greenland), Norway, Russia, and the United States (by virtue of Alaska).

[7] Specifically, Canada and the United States have publicly called for the ruling to be respected; several member states of the European Union (EU), including Denmark, Finland, and Sweden, have positively acknowledged the award. *Arbitration Support Tracker*, ASIA MARITIME TRANSPARENCY INITIATIVE (July 18, 2023), https://amti.csis.org/arbitration-support-tracker/.

For EU's position on the SCS Arbitration, *see* Council of the EU, *Declaration by the High Representative on Behalf of the EU on the Award Rendered in the Arbitration Between the Republic of the Philippines and the People's Republic of China*, (July 15, 2016), https://www.consilium.europa.eu/en/press/press-releases/2016/07/15/south-china-sea-arbitration/.

[8] *Statement by Global Affairs Canada on South China Sea Ruling* (July 11, 2021), https://www.canada.ca/en/global-affairs/news/2021/07/statement-by-global-affairs-canada-on-south-china-sea-ruling.html.

[9] Canadian maritime international disputes and disagreements in the Arctic include the Beaufort Sea maritime boundary dispute with the United States, the legal status of the Northwest Passage, controversies over Canadian coastal state's legislative and enforcement jurisdiction in the Arctic Ocean bestowed by Article 234 of UNCLOS, and Canada's extended continental shelf claim in the central Arctic Ocean. For a detailed overview of these disputes and disagreements, *see* David L. VanderZwaag, *Canada's Arctic Disputes: Cooperative Bridges, Foggy Futures*, in A BRIDGE OVER TROUBLED WATERS 445 (Hélène Ruiz Fabri et al. eds., 2021).

[10] *See* discussion *infra* Part IV.B.

[11] Donald R. Rothwell, *The Law of the Sea and Arctic Governance*, 107 AM. SOC'Y INT'L L. PROC. 271, 273 (2013).

While there is an extensive literature on the SCS Arbitration and the impact it has made in the field of the law of the sea,[12] little attention has been paid to the implications of the SCS Arbitration for the Arctic Ocean. To fill this research gap, this article revisits some key Arctic maritime disputes and disagreements in light of the SCS Arbitration award. This article argues that the SCS Arbitration decision is more than a "piece of paper"[13] and has significant implications for assessing and resolving maritime disputes in the Arctic. In particular, there are four issues that were considered by the SCS Arbitration Tribunal are of direct relevance to the governance of the Arctic Ocean: (1) the issue of historic titles and historic rights in the law of the sea, (2) the legal status of maritime features under UNCLOS, (3) the drawing of straight baselines around outlying archipelagos, and (4) the jurisdiction of the Tribunal over the dispute. Overall, the SCS Arbitration award offered authoritative articulations on many important aspects of the law of the sea. However, in the Arctic Ocean, some Arctic states have paid lip-service to the SCS Arbitration award and have not altered their maritime practices in accordance with the findings of the SCS Arbitration. This double-standard approach to international law, which is not new to many states,[14] undermines the legitimacy of the SCS Arbitration ruling and constitutes a significant challenge for constraining maritime states' creeping claims in the sea all around the world.

This article is structured as follows. Following the introduction, Part II first compares the Arctic Ocean and the SCS to provide a background for

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[12] For an excellent review of the existing literature on the SCS disputes and the SCS Arbitration, *see* Hong Kong Nguyen, *The South China Sea Dispute: A Systematic Review*, ICAS 2021 Presentation, https://osf.io/7h325/download/?format=pdf (last visited Mar. 30, 2023).

[13] At a Regular Press Conference in Beijing on July 12, 2021, Chinese Foreign Ministry Spokesperson Zhao Lijian stated that:

The award of the [SCS] arbitration is illegal, null, and void. It is nothing more than a piece of waste paper…. China's sovereignty and rights and interests over the South China Sea are not affected at all by the arbitration and China does not accept any claim or act based on it.

Ministry of Foreign Affairs of China, *Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on July 12, 2021* (2021), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202107/t20210712_9170783.html. *See also Speech by Dai Bingguo at China-US Dialogue on South China Sea Between Chinese and US Think Tanks*, CHINA DAILY (July 5, 2016), http://www.chinadaily.com.cn/a/201607/05/WS5a30ccbda3108bc8c672ee48.html (contending that "the final award of the arbitration …. amounts to nothing more than a piece of paper. China suffered enough from hegemonism, power politics and bullying by Western Powers since modern times").

[14] For example, in his 2003 article on American exceptionalism, Harold Hongju Koh noted that the most problematic aspect of American exceptionalism in international law is *double standards*, i.e., "when the United States proposes that a different rule should apply to itself than applies to the rest of the world." Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1485-86 (2003).

subsequent discussions. Part III offers an overview of China's assertiveness in the SCS and the SCS Arbitration, with a focus on China's historic claims in the SCS. Part IV examines the major implications of the SCS Arbitration award for addressing the maritime disputes and disagreements in the Arctic Ocean. Part V concludes by discussing existing opportunities and challenges for constraining powerful states' creeping claims in the sea.

II. COMPARING THE SOUTH CHINA SEA AND THE ARCTIC OCEAN

Centering on the North Pole, the Arctic Ocean (AO) is the smallest of the world's five oceans and is ringed by several seas, such as the East Siberian, Laptev, and Kara Seas of Russia, the Chukchi Sea between Alaska and Russia, the Beaufort Sea, which has a shared coastline by Alaska and Canada, and the Barents Sea that borders Russia and Norway.[15] Compared to the other oceans, a striking physical characteristic of the AO is the snow and sea ice[16] that covers much of its surface, especially in the central Arctic Ocean. Nevertheless, in recent years, the thickness and extent of sea ice on the AO have continued to decline due to climate change. According to recent research, the Arctic may have warmed nearly four times faster than the rest of the world from 1979 to 2021.[17]

As a marginal sea of the Pacific Ocean, the South China Sea (SCS) is located in the tropical and subtropical belts, encompassing an area of approximately 3.5 million square kilometers (1.4 million square miles) between the Malacca Straits and the Taiwan Strait.[18] It contains four main groups of islands, islets, cays, and reefs which are referred to collectively by China as *Nanhai Zhudao* (the "South China Sea Islands"). They are the Pratas

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[15] ANDREW HUND, ANTARCTICA AND THE ARCTIC CIRCLE: A GEOGRAPHIC ENCYCLOPEDIA OF THE EARTH'S POLAR REGIONS 87 (Andrew J. Hund, 1st ed., 2014).

[16] In contrast to icebergs, glaciers and ice shelves that originate on land, sea ice forms, grows, and melts in the ocean. Commonly called "pack ice," sea ice is only 1 to 2 years old. For most of the year, sea ice is covered with snow. For more information on Arctic sea ice, *see Arctic Sea Ice News & Analysis*, NATIONAL SNOW & ICE DATA CENTER, http://nsidc.org/arcticseaicenews/ (last visited Mar. 30, 2023).

[17] Mika Rantanen et al., *The Arctic Has Warmed Nearly Four Times Faster than the Globe since 1979*, 3 COMMC'N EARTH & ENV'T 168 (2022).

[18] An illustrative map of the SCS is provided by the South China Sea Arbitration award. South China Sea Arbitration (Phil. v. China), 33 R.I.A.A. 153, 162 (Perm. Ct. Arb. 2016), https://pcacases.com/web/sendAttach/2086 [hereinafter *Award*].

Islands,[19] the Scarborough Shoal,[20] the Spratly Islands,[21] and the Paracel Islands.[22]

Over the past few years, both the Arctic Ocean and the SCS have gained significant attention from the international society. They both are important to international shipping,[23] fisheries,[24] natural resources exploration and exploitation,[25] ecological integrity, and marine environment protection.[26] Furthermore, both regions are fueled by various competing maritime claims,

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[19] The Pratas Islands are three atolls located 200 miles south of Hong Kong in the northern SCS. They are also known as *Dongsha Qundao* in Chinese.

[20] Scarborough Shoal includes five to seven rocks located between Macclesfield Bank and the Philippine Island of Luzou. It has been regarded as part of the *Zhongsha* Islands (*Zhongsha Qundao* in Chinese) and effectively controlled by China since 2012.

[21] The Spratly Islands (known as *Nansha Qundao* in Chinese) contain 150 named landforms and more than 600 submerged reefs, located in the southeast corner of the SCS. They have been claimed, wholly or in part, by the PRC, the Philippines, Brunei, Malaysia, Vietnam, and Taiwan.

[22] The Paracel Islands (known as *Xisha Qundao* in Chinese and the *Hoang Sa Archipelago* in Vietnam) are a group of insular features located east of Vietnam and south of China's island province of Hainan. They include about 130 small coral islands and reefs, and are claimed by the PRC, Vietnam, and Taiwan. The PRC has occupied the Paracel Islands since 1974.

[23] The SCS has served as a major international trade route for centuries. About half of the world commercial fleet tonnage passes through the SCS each year, which represents about $5.3 trillion of trade. *How Much Trade Transits the South China Sea?* CHINAPOWER https://chinapower.csis.org/much-trade-transits-south-china-sea/ (last visited Mar. 30, 2023).

As the sea ice melts in the summer months, the Arctic Ocean could offer three shipping routes for international trade: the Northeast Passage (also known as the "Northern Sea Route" (NSR)), the Northwest Passage (NWP), and the transpolar route (the "Central Route").

[24] The SCS has historically been a rich and important resource for seafood. The area is home to at least 3365 known species of marine fishes and provides an estimated 12% of the world's total fishing catch. Shui-Kai Chang et al., *A Step Forward to the Joint Management of the South China Sea Fisheries Resources: Joint Works on Catches, Management Measures and Conservation Issues*, 116 MARINE POL'Y 103716 (2020).

[25] The Arctic Ocean is rich in living and non-living natural resources, such as fish, oil and gas. For example, according to the U.S. Geological Survey (USGS), there are 90 billion barrels of oil, 1,669 trillion cubic feet of natural gas, and 44 billion barrels of natural gas liquids that may remain to be found in the Arctic, of which approximately 84 percent is expected to occur in offshore areas. U.S. DEPT. OF THE INTERIOR, U.S. Geological Survey, *Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle* (May 2008), http://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf.

Likewise, the SCS is a maritime area that is rich in hydrocarbons, gas, and other natural resources. For instance, according to the U.S. Energy Information Administration, there are about 11 billion barrels of oil and 190 trillion cubic feet of natural gas in deposits under the SCS. *South China Sea Analysis Brief*, U.S. ENERGY INFO. ADMIN. (Feb.7, 2013), https://www.eia.gov/international/content/analysis/regions_of_interest/South_China_Sea/south_china_sea.pdf.

[26] The SCS's marine ecosystem has changed dramatically from the past. In particular, overfishing and habitat destruction have directly contributed to the biodiversity loss in the SCS. *See* ALFREDO C. ROBLES JR., ENDANGERED SPECIES AND FRAGILE ECOSYSTEMS IN THE SOUTH CHINA SEA 5 (2020).

including the delineation of the outer limits of the extended continental shelves[27] and the assertion of historic maritime sovereignty.[28] On the other hand, the Arctic Ocean and the SCS are very different in many aspects.

A. Different Geographical and Human Features

As introduced above, a unique characteristic of the Arctic Ocean is the snow and sea ice that cover most of its water surface, especially in the central Arctic Ocean. Consequently, the exploitation of Arctic resources has largely been prevented by the challenges posed by sea ice coverage, harsh weather conditions, remoteness, and lack of infrastructure.[29] Unlike the Arctic Ocean, the SCS is tropical in nature. Some natural resources of the SCS, such as fisheries, have experienced over-exploitation over the last few decades.[30]

Furthermore, the human characteristics of the two maritime regions are different. Compared to the sparsely populated Arctic region,[31] the coastal subregions of the littoral states in the SCS are home to roughly 270 million people or five percent of the world's population.[32] However, with respect to the indigenous population, there are approximately 1.13 million indigenous peoples living in the Arctic,[33] whereas there is relatively a small indigenous

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[27] Among ten costal states and territories surrounding the SCS, Indonesia, Malaysia, Vietnam and the Philippines have made submissions to the UN Commission on the Limits of the Continental Shelf (CLCS) regarding their extended continental shelf beyond 200 nm. Brunei and China have submitted preliminary information indicative of the outer limits of their continental shelves. For a further discussion, *See* Nguyen Hong Thao & Ramses Amer, *Coastal States in the South China Sea and Submissions on the Outer Limits of the Continental Shelf,* 42 OCEAN DEV.& INT'L. 245 (2011).

In the Arctic Ocean, all the coastal UNCLOS member states have submitted their extended continental shelf claims to the CLCS. Although the United States is not a party to UNCLOS, it has been preparing data to claim an extended continental shelf in the Arctic Ocean. For a further discussion, *See* Øystein Jensen, *End of the Common Arctic Seabed: Recent State Practice in the Establishment of Continental Shelf Limits beyond 200 nm*, 12 (1) POLAR J. 108, 108 (2022).

[28] For further discussions on historic maritime claims in the SCS and the AO, *see infra* Part III.A.1 & Part IV.A.

[29] Council on Foreign Relations, *The Emerging Arctic*, YOUTUBE (Mar. 25, 2014), https://www.youtube.com/watch?v=2qcuAr5UyHc#!/emerging-arctic.

[30] Gregory B. Poling, *Illuminating the South China Sea's Dark Fishing Fleets*, CSIS: STEPHENSON OCEAN SECURITY PROJECT (Jan. 9, 2019), https://ocean.csis.org/spotlights/illuminating-the-south-china-seas-dark-fishing-fleets/.

[31] Nordic Council of Ministers, ARCTIC HUMAN DEVELOPMENT REPORT: REGIONAL PROCESSES AND GLOBAL LINKAGES (2014), 53, http://norden.diva-portal.org/smash/get/diva2:788965/FULLTEXT03.pdf (last visited Mar 30, 2023).

[32] David L. VanderZwaag & Hai Dang Vu, *Regional Cooperation in the South China Sea and the Arctic: Lessons to Be Learned? in* THE REGULATION OF INTERNATIONAL SHIPPING: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 171-172 (Aldo Chircop et al. eds., 2012) (Statistics as of 2000).

[33] T. Kue Young & Peter Bjeregaard, *Towards Estimating the Indigenous Populations in Circumpolar Regions*, 78 (1) INT'L J. CIRCUMPOLAR HEALTH 1,1 (2019).

population who is living near coastal areas or practically living on the sea in the SCS region.[34]

B. Different International Legal Statuses

Moreover, according to UNCLOS, the legal statuses of the AO and the SCS are very different. The Arctic Ocean is an "ocean." Although some scholars have attempted to argue that the Arctic Ocean can be regarded as a "semi-enclosed sea" under Article 122 of UNCLOS,[35] many other authors have found that this contention is unpersuasive.[36] By contrast, the SCS is indisputably a "semi-enclosed sea" within the Pacific Ocean.[37]

C. Different Regional Governance Dynamics

Lastly, although both the Arctic and the SCS have largely adopted a soft-law approach to regional cooperation without an overarching (regional) treaty framework,[38] the efficiency of the regional cooperation mechanisms of the two regions are very different, especially with respect to marine environmental protection. Whereas Russia's invasion of Ukraine currently presents a great obstacle to Arctic governance,[39] it is fair to say that regional cooperation in the Arctic has been quite successful. In particular, the Arctic Council (AC), a primary high-level intergovernmental forum for Arctic cooperation, has greatly promoted cooperation on the issues of maritime environmental protection and sustainable development among Arctic states,

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[34] For example, the Sama-Bajau people have been living across central maritime Southeast Asia, particularly in the seas bordering the Philippines, Indonesia, and Malaysia. *See generally* Matthew Constancio Maglana, *Understanding Identity and Diaspora: The Case of the Sama-Bajau of Maritime Southeast Asia*, 1 (2) JURNAL SEJARAH CITRA LEKHA 71 (2016).

[35] *See, e.g.*, Tavis Potts & Clive Schofield, *The Arctic: A Race for Resources or Sustainable Ocean Development*, 16 (3) OCEAN CHALLENGE 23, 23 (2009); Lewis M. Alexander, *Regionalism and the Law of the Sea: The Case of Semi-enclosed Seas*, 2 OCEAN DEV. & INT'L. 151, 157 (1974).

[36] For an excellent overview of the issue and debate, *see* Kristin Bartenstein, *The Arctic Regional Council Revisited: Inspiring Future Development of the Arctic Council*, *in* INTERNATIONAL LAW AND POLITICS OF THE ARCTIC OCEAN 55, 58-60 (Suzanne Lalonde & Ted L. McDorman eds., 2015).

[37] Award, *supra* note 18, ¶3.

[38] *See* VanderZwaag & Vu, *supra* note 32, at 173.

[39] *See generally,* Timo Koivurova & Akiho Shibata, *After Russia's Invasion of Ukraine in 2022: Can We Still Cooperate with Russia in the Arctic?* 59 POLAR REC. 1 (2023) (arguing that Arctic cooperation based on treaties seem to be more resilient to the consequences of the Ukraine war than that based on soft law mechanisms)

Arctic peoples, and non-Arctic actors.[40] In addition, there are increasingly new Arctic-specific treaties negotiated under the auspices of the AC,[41] the International Maritime Organization (IMO),[42] and other mechanisms,[43] which further promotes international cooperation in the Arctic.

Arguably, regional cooperation in the SCS has been limited.[44] In accordance with Article 123 of UNCLOS, states bordering an enclosed or semi-enclosed sea "*shall* endeavor, directly or through an appropriate regional organization" to cooperate with each other in the conservation and management of marine living resources, the protection and preservation of marine environments, and the conduct of marine scientific research.[45] Regrettably, the SCS coastal states have largely failed to do so through direct collaboration or an effective regional institution.[46] For example, the Association of Southeast Asian Nations ("ASEAN"), as Southeast Asia's primary multilateral organization, has been playing an important role in diplomacy in the SCS region since 1967.[47] However, ASEAN's and China's various efforts to implement the Declaration on the Conduct of Parties in the South China Sea (DOC)[48] and to adopt a Code of Conduct in the South China

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[40] *See generally* Timo Koivurova, Paula Kankaanpää & Adam Stępień, *Innovative Environmental Protection: Lessons from the Arctic*, 27 (2) J.E.L. 285 (2015) (arguing that the flexible organizational structure of the Arctic Council enables it to promote effective cooperation on Arctic environmental protection, which offers useful lessons for other regions).

[41] Under the auspices of the AC, three new pan-Arctic treaties have been negotiated and signed: Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic (2011), Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (2013), and Agreement on Enhancing International Arctic Scientific Cooperation (2017).

[42] For example, the IMO has adopted a legally binding instrument to govern shipping in the polar areas, namely the International Code for Ships Operating in Polar Waters ("Polar Code"), which entered into force on January 1, 2017. *International Code for Ships Operating in Polar Waters (Polar Code)*, MSC.385(94) (Nov. 21, 2014). [hereinafter *Polar Code*].

[43] For instance, in October 2018, the five Arctic Coastal States and five other fishing actors, namely China, EU, Iceland, Japan, and Republic of Korea, signed the Agreement to Prevent Unregulated High Sea Fisheries in the Central Arctic Ocean. The Agreement entered into force on June 25, 2021. The text is available at https://faolex.fao.org/docs/pdf/mul199323.pdf.

[44] Shih-Ming Kao, Nathaniel Sifford Pearre & Jeremy Firestone, *Regional Cooperation in the South China Sea: Analysis of Existing Practices and Prospects*, 43 (3) OCEAN DEV. & INT'L L. 283, 292 (2012).

[45] UNCLOS, art. 123 [emphasis added]

[46] Jon M Van Dyke, *Regional Cooperation in the South China Sea and the Arctic Ocean, in* MARITIME SECURITY ISSUES IN THE SOUTH CHINA SEA AND THE ARCTIC: SHARPENED COMPETITION OR COLLABORATION? 222 (Gordon Houlden & Hong Nong eds., 2012).

[47] Le Hu, *Examining ASEAN's Effectiveness in Managing South China Sea Disputes*, 36 (1) PACIFIC REV. 119 (2023).

[48] Four ASEAN countries (Brunei, Malaysia, the Philippines, and Vietnam) are direct claimants in the SCS disputes. In November 2002, China and ASEAN's members reached a nonbinding Declaration on the Conduct of Parties in the South China Sea (DOC). *Declaration*

Sea (CoC) [49] have produced few substantive results.[50] In addition to ASEAN, there are some other regional programs that aim to facilitate regional cooperation in the SCS.[51] However, they are relatively dysfunctional and inefficient.[52] Without efficient regional cooperation mechanisms, the SCS disputes have been increasingly escalated, involving both territorial and maritime disputes by several coastal states.[53]

III. THE SOUTH CHINA SEA ARBITRATION

In the SCS, facing numerous territorial and maritime disputes with China, the Philippines initiated the South China Sea Arbitration ("the SCS Arbitration") in 2013. The SCS Arbitration Tribunal took this opportunity to address several important, general issues of the law of the sea. Many of these issues concern maritime claims and disputes in the Arctic Ocean. Based on the above comparison, the remaining of this article provides a systematic analysis of the significance of the SCS Arbitration and its important implications for the Arctic Ocean governance.

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on the Conduct of Parties in the South China Sea, https://asean.org/declaration-on-the-conduct-of-parties-in-the-south-china-sea-2/.

[49] ASEAN's members and China have also been engaged in discussions on a potential Code of Conduct (CoC) to manage the SCS territorial and maritime disputes for over two decades. In 2018, ASEAN and China decided on a Single Draft South China Sea Code of Conduct Negotiating Text (SDNT). For a further discussion on the ongoing negotiations of CoC, *See* Viet Hoang, T*he Code of Conduct for the South China Sea: A Long and Bumpy Road,* THE DIPLOMAT (Sept. 28, 2020), https://thediplomat.com/2020/09/the-code-of-conduct-for-the-south-china-sea-a-long-and-bumpy-road/.

[50] C. J. Jenner & Tran Truong Thuy, *Introduction: A Crucible of Regional Cooperation or Conflict-making Sovereignty Claims? in* THE SOUTH CHINA SEA: A CRUCIBLE OF REGIONAL COOPERATION OR CONFLICT-MAKING SOVEREIGN CLAIMS 2 (C. J. Jenner & Tran Truong Thuy eds., 2016).

[51] These Programs and Initiatives include the Coordinating Body on the Seas of East Asia (COBSEA), the Partnerships in Environmental Management for the Seas of East Asia (PEMSEA), the Workshops to Manage Potential Conflicts in the South China Sea, and the Reversing Environmental Degradation Trend in the South China Sea and the Gulf of Thailand Project. *See* VanderZwaag & Vu, *supra* note 32.

[52] Van Dyke, *supra* note 46, at 222.

[53] For an excellent overview of the SCS maritime disputes, *see* Robert Beckman, *The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea*, 107 AM. J. INT'L L. 142 (2013).

A. China's Assertiveness in the South China Sea

1. China's Historic Maritime Claims in the SCS

At the heart of China's assertiveness in the South China Sea are its historic claims within the nine-dash line.[54] On May 7, 2009, China sent two *Notes Verbales* to the UN Secretary-General regarding Malaysia and Vietnam's joint submission to the Commission on the Limits of the Continental Shelf (CLCS) concerning the outer limits of the continental shelf beyond 200 nautical miles in the SCS.[55] In these *Notes*, the Chinese government attached a map of the SCS which showed nine dashes encompassing almost all of the SCS waters and claimed that:

> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese government, and is widely known by the international community.[56]

Since then, Beijing has expressly linked the nine-dash line to its historic claims in the SCS, arguing that China's sovereignty over the *Nansha* Islands and their adjacent waters "has been formed over a long course of history."[57]

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[54] The line is a cartographic denotation that was developed by the Republic of China and the PRC for their territorial and maritime claims in the SCS. It is also known as the "U-shaped line." For a further account of its development and promulgation, *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 (2013).

[55] Permanent Mission of China, *Note Verbale* dated May 7, 2009 from the Permanent Mission of China addressed to the U.N. Secretary-General, U.N. Doc. CML/17/2009 (May 7, 2009), https://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf; Permanent Mission of China, *Note Verbale* dated May 7, 2009 from the Permanent Mission of China addressed to the U.N. Secretary-General, U.N. Doc. CML/18/2009 (May 7, 2009), https://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf.

[56] Permanent Mission of China, *Note Verbale* dated May 7, 2009 from the Permanent Mission of China addressed to the U.N. Secretary-General, U.N. Doc. CML/17/2009 (May 7, 2009), https://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf; Permanent Mission of China, *Note Verbale* dated May 7, 2009 from the Permanent Mission of China addressed to the U.N. Secretary-General, U.N. Doc. CML/18/2009 (May 7, 2009), https://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf.

[57] *Foreign Ministry Spokesperson Hong Lei's Remarks on Vietnam's Statement on the Chinese Government's Position Paper on Rejecting the Jurisdiction of the Arbitral Tribunal Established at the Request of the Philippines for the South China Sea Arbitration*, Ministry of Foreign Affairs of China (Dec. 12, 2014), https://www.mfa.gov.cn/eng/xwfw_665399/s2510_665401/2535_665405/201412/t20141212_696477.html.

FIGURE 1: CHINA'S NINE-DASH LINE CLAIM

Sources: Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009); *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009).

i. A Conceptual Caveat: Historic Titles and Historic Rights in the Law of the Sea

The issue of historic titles and historic rights (HTHRs), thus, constitutes a core element for understanding and assessing China's assertiveness in the SCS. However, in international law, the issue of historic claims has long been complex and controversial. To date, there is no consistent terminology used for historic claims to land or maritime areas in states' practices. As space precludes a comprehensive analysis of HTHRs in international law and the law of the sea, the sketch here is of certain key concepts and issues, which, hopefully, helps better understand China's historic claims in the SCS, the SCS Arbitration award, and the historic maritime claims in the Arctic Ocean.

ii. "Historic Titles" and "Historic Rights" in the Law of the Sea

In international law, both "historic titles" and "historic rights" have been developed and used as general terminological categories to denote the source of a particular right or possession over land or maritime territory acquired by a state through a process of historic consolidation.58 In practice, international tribunals and many legal scholars have used the two terms interchangeably, especially before UNCLOS came into force in 1994.[59] However, a recent trend in international legal literature and jurisprudence is to link the concept

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[58] Seokwoo Lee & Lowell Bautista, *Historic Rights, in* THE DEV. OF THE LAW OF THE SEA CONVENTION: THE ROLE OF INT'L COURTS AND TRIBUNALS 244, 244 (Øystein Jensen ed., 2020); Andrea Gioia, *Historic Titles, in* MAX PLANCK ENCYC. OF PUBLIC INT'L LAW (2018), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e705; Y.Z. Blum, *Historic Rights, in* 7 ENCYC. OF PUBLIC INT'L LAW 120 (1984); Y.Z. BLUM, HISTORIC TITLES IN INT'L LAW (1965).

[59] *See, e.g.,* Y.Z. BLUM, HISTORIC TITLES IN INT'L LAW (1965) (discussing different types of historic rights); Continental Shelf (Tunis./Libyan Arab Jamahiriya), Judgement, 1982 I.C.J. 18 (Feb. 24), https://www.icj-cij.org/sites/default/files/case-related/63/063-19820224-JUD-01-00-EN.pdf (where ICJ used the terms "historic title" and "historic rights" interchangeably).

of "historic titles" closely to *full* territorial sovereignty[60] and to maintain a general category of "historic rights" that encompasses all rights acquired by virtue of a process of historic consolidation, including full sovereignty over land or maritime territory *and* historic rights falling *short of* full sovereignty, such as passage rights, fishing rights, and special rights related to the manner of delimiting boundaries.[61]

In the context of the law of the sea, "there [also] exists …. a cognizable usage among the various terms for rights deriving from historic processes."62 In general, the international law of the sea comprises a multitude of global, regional, and bilateral instruments, decisions of international organizations; and international rules from other sources, including customary international law (CIL), that govern the rights and duties of states in maritime areas.[63] UNCLOS, globally recognized as a "constitution for the oceans,"[64] was negotiated and adopted with the goal of codifying the rules of the law of the sea.[65] Although the Convention aimed to provide a comprehensive legal framework governing the uses of the oceans and seas, it is fair to say that there are numerous maritime issues which remain vague or unregulated by UNCLOS.[66]

Therefore, at least from China's perspective, the issue of HTHRs is exactly a case in point. Specifically, in the text of UNCLOS, there are only two direct usages of the term "*historic title(s)*," namely, Article 15[67] and Article 298 (1) (a) (i).[68] Moreover, Article 10 (6)[69] and Article 298 (1) (a) (i)

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60 *See, e.g.,* Y.Z. BLUM, HISTORIC TITLES IN INT'L LAW (1965) (discussing different types of historic rights); Continental Shelf (Tunis./Libyan Arab Jamahiriya), Judgement, 1982 I.C.J. 18 (Feb. 24), https://www.icj-cij.org/sites/default/files/case-related/63/063-19820224-JUD-01-00-EN.pdf (where ICJ used the terms "historic title" and "historic rights" interchangeably).

61 *See* Gioia, *supra* note 58*,* para.1; Award, *supra* note 18, ¶ 225.

62 Award, *supra* note 18, ¶ 225.

63 E.J. Molenaar, *Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea*, 27 INT'L J. MAR. & COASTAL L. 553, 555-56 (2012).

64 Tommy Koh (President of the Third United Nations Conference on the Law of the Sea), *A Constitution for the Oceans*, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH INDEX AND FINAL ACT OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA xxxvii (1983), https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf.

65 L.F.E. Goldie, *Historic Bays in International Law – An Impressionistic Overview*, 11 (2) SYRACUSE J. INT'L L. & COMM. 211, 218 (1984).

66 *See also* Yubing Shi (施余兵), Lianheguo haiyang fa gongyue de haiyang xianzhang diwei: fazhan yu jiexian (《联合国海洋法公约》的"海洋宪章"地位：发展与界限) [The UNCLOS as the "Constitution for the Oceans:" Developments and Limits], Jiaoda Faxue (交大法学) [SJTU L. REV.], Vol.1, 2023, at 20.

67 UNCLOS, art. 15 (concerning the delimitation of the territorial sea between States with opposite or adjacent coasts).

68 *Id.* art. 298.

69 *Id.* art. 10 (6) ("the foregoing provisions [on bays] do not apply to so-called 'historic' bays, or in any case where the system of straight baselines provided for in article 7 is applied").

of UNCLOS refer to "*historic bays.*" Nevertheless, UNCLOS provides no further annotations on the concepts of "historic titles" and "historic bay" and contains no provision mentioning "*historic waters*" or "*historic rights.*"[70] As L. Frederick E. Goldie noted, even informed by two excellent UN studies[71] and two codification conferences,[72] the Third United Nations Conference on the Law of the Seas (UNCLOS III) still failed to strike a satisfactory balance between the interests of different states regarding historic bays and other historic rights in maritime areas.[73] Given that the preamble of UNCLOS provides that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law,"[74] some commentators, particularly Chinese scholars, have contended that under the broad framework of the law of the sea, the issues of historic maritime claims are governed by general international law (GIL) and customary international law (CIL).[75]

The task of distinguishing the terms "historic rights" and "historic titles" was particularly taken up by the South China Sea Arbitration Tribunal in

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[70] In addition, Article 51 mentions "traditional fishing rights" (TFRs) concerning the archipelagic rules. However, UNCLOS provides no further annotations on the concept of TFRs.

[71] They were: (1) United Nations Conference on the Law of the Sea, *Historic Bays: Memorandum by the Secretariat of the United Nations*, U.N. Doc. A/CONF. 13/1(1957), https://legal.un.org/diplomaticconferences/1958_los/docs/english/vol_1/a_conf13_1.pdf, and (2) Juridical Regimes of Historic Waters including Historic Bays – Study prepared by the Secretariat, 1962 Y.B. Int'l Comm'n, U.N. Doc. A/CN.4/143, https://legal.un.org/ilc/documentation/english/a_cn4_143.pdf [hereinafter *UN Study on Historic Waters*].

[72] In 1956, the UN held the first Conference on the Law of the Sea (UNCLOS I) in Geneva, Switzerland which resulted in four treaties of the law of the sea. In 1960, the UN held the second Conference on the Law of the Sea (UNCLOS) in Geneva which ended with no new agreements.

[73] Goldie, *supra* note 65, at 214-20.

[74] UNCLOS, pmbl.

[75] *See, e.g.,* Xinmin Ma*, Merits Relating to Historic Rights in the South China Sea Arbitration: An Appraisal*, 8 ASIAN J. INT'L L. 12 (2018) (criticizing that the SCS Arbitration Tribunal erroneously treated UNCLOS as the sole legal source of maritime rights, which denied China's historic rights under general international law, including customary international law); Yoshifumi Tanaka, *Reflections on Historic Rights in the South China Sea Arbitration (Merits)*, 32 INT'L J. MAR. & COASTAL L 458, 464 (2017) (arguing that the issues of temporal concepts, such as historic title, historic rights, and historic waters, are governed by customary international law); Sophia Kopela, *Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration*, 48 (2) OCEAN DEV. & INT'L L. 181, 186 (2017) ("[UNCLOS] intended to create a comprehensive regime for the regulation of ocean affairs, but this does not presuppose that any previously established regimes were eliminated, especially since no explicit provision was included to this effect"); Gao & Jia, *supra* note 54, at 119 ("Neither historic title nor the law of discovery and occupation can be fundamentally understood in terms of treaty law; they are matters of customary international law").

2013.[76] In the case, the Philippines requested the Tribunal to find that China's "*historic rights*" claim in the SCS is without effect if it exceeds China's maritime entitlements under UNCLOS.77 The SCS Arbitration Tribunal distinguished "historic titles" from "historic rights" in light of UNCLOS negotiations,78 holding that "'historic title' was clearly intended to have the same meaning as its usage in Anglo-Norwegian Fisheries, namely as an area of sea claimed exceptionally as internal waters (or, possibly, as territorial sea)."[79] In other words, in the context of law of the sea, "historic title" is used specifically to refer to "historic sovereignty to land or maritime areas."[80] "Historic water" is simply a term for "historic title over maritime areas," typically exercised either as a claim to internal waters or as a claim to the territorial sea.[81] By contrast, the term "historic rights" is broader than that of "historic titles" or "historic waters." As summarized by the Tribunal,

> The term "historic rights" is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more *limited* rights, such as fishing rights or rights of access, that fall well *short of* a claim of sovereignty.[82]

All in all, under the above interpretations of terms, historic maritime claims under the law of the sea include: (1) historic title to maritime features ("historic title" in the narrow sense),[83] (2) historic title to *waters* (i.e., "historic waters") ("historic title" in the narrow sense), and (3) historic rights to *utilization* ("historic rights" in the narrow sense).

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[76] For a further discussion of the SCS Arbitration Tribunal's ruling on the issue of HTHRs, *see infra* Part III.B.1.

[77] *See* Annex I: Notification and Statement of Claim of the Republic of the Philippines, (Jan. 22, 2013), in Memorials of the Philippines (volume III: Annexes) (Mar. 30, 2014), https://files.pca-cpa.org/pcadocs/The%20Philippines%27%20Memorial%20-%20Volume%20III%20%28Annexes%201-60%29.pdf.

[78] Award, *supra* note 18, ¶¶217-24.

[79] *Id.* ¶221.

[80] *Id.* ¶225.

[81] *Id.*

[82] *Id.* [emphasis added].

[83] In this regard, it is worth noting that UNCLOS does *not* address the sovereignty of states over land territory, including islands and other maritime features. Nevertheless, the issue of historic title over maritime features has been adjudicated by several other international courts and tribunals, especially regarding maritime boundary delimitation. *See generally* Xuechan Ma, *Historic Title Over Land and Maritime Territory*, 4 (1) J. TERR. & MAR. STUD. 31, 37 (2017) (offering a good overview of international judicial decisions on the issue).

iii. Three-factor Test for the Existence of HTHRs

Whichever term a state uses, under the conventional wisdom of international law, a successful claim of a historic title or historic right requires the effective and continuing exercise of governmental authority and the acquiescence of the other states.84 Specifically, according to the UN Secretariat's 1962 study titled Juridical Regime of Historic Waters Including *Historic Bays,*[85] numerous scholarly studies[86] and international adjudicatory decisions,[87] the requirements for establishing a historic title or a historic right under international law and the law of the sea include: (1) the effective exercise of authority over the area by the state claiming the historic right, (2) the continuity of this exercise of authority, and (3) the attitude of foreign states.[88] In other words, even historic rights short of sovereignty must satisfy similar requirements to those for establishing historic waters claims.[89] These requirements were reaffirmed by the SCS Arbitration award.[90] In addition, geographical and other "vital interests" factors[91] can also be taken into account when assessing a state's claim of historic rights over certain land or maritime areas,[92] although they cannot, in themselves, justify such claims.[93]

However, this normative consensus does not necessarily translate to an interpretive consensus. In practice, the application of the constituent factors for formulating HTHRs in the law of the sea has faced great difficulty in

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84 SYMMONS, *supra* note 5, at 185; Blum, *supra* note 58, at 245; Gioia, *supra* note 58*,* at §2; Lee & Bautista, *supra* note 58, at 249-53.

85 UN Study on Historic Waters, *supra* note 70, ¶80.

86 *See, e.g.,* BLUM, *supra* note 58, ch.IV; Gioia, *supra* note 58*,* at §2; SYMMONS, *supra* note 5, ch.13.

87 The issue of HTHRs has been addressed in the following main international cases: North Atlantic Coast Fisheries Case (G.B. v. U.S.) P.C.A. (Sept. 7, 1910) (especially in the dissenting opinion by Judge Drago); Anglo-Norwegian Fisheries Case (U.K. v Nor.), 1951 ICJ Rep. 116 (Dec. 18) [hereinafter *Fisheries Case*]; Award on Territorial Sovereignty and Scope of the Dispute (Eri. v. Yemen) 1998 XXII RIAA 209 (Oct. 9); Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening), 2002 Judgement, ICJ Rep. 303 (Oct. 10).

88 UN Study on Historic Waters, *supra* note 71, ¶80; Award, *supra* note 18, ¶265.

89 SYMMONS, *supra* note 5, at 5.

90 Award, *supra* note 18, ¶265.

91 According to Leo J. Bouchez, vital interests are "interests to which such a great value is attached by a State that their realization is seen a necessity for the existence of a national community." LEO J. BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW, 297 (1964).

92 For example, the "vital interests" factor was given consideration and weight by the International Court of Justice (ICJ) in *Fisheries Case*, particularly regarding the geographic and economic aspects. *See Fisheries Case*, *supra* note 87, at 133 & 139.

93 *See generally* BLUM, *supra* note 58, at 186; DONAT PHARAND, CANADA'S ARCTIC WATERS IN INTERNATIONAL LAW, 103 (1988).

almost all instances. [94] In particular, as emphasized by Yehuda Z. Blum, maritime historic titles and rights are acquired at the expense of the whole international community.[95] An attitude of general acquiescence is required in principle.[96] However, how to infer or acquire "general toleration of the international community"[97] as a form of tacit consent is complicated and contentious. The passage of time is also essential for the formation of historic rights.[98] In other words, the claimant state must have kept up its exercise of sovereignty over the area for a considerable amount of time.[99] However, how long the exercise of authority must continue and when opposition must occur to prevent the creation of a historic title or right remain unclear.[100]

vi. Understanding China's Sovereign Claims in the Nine-dash Line

In this context, China has never sufficiently clarified and distinguished the type, nature, and scope of its historic maritime claims, even in the wake of the SCS Arbitration.[101] For example, following the SCS Arbitration Tribunal's issuance of its final award in 2016, Beijing released another statement on its territorial sovereignty and maritime rights in the SCS which asserts that:

> Based on the practice of the Chinese people and the Chinese government *in the long course of history* and the position consistently upheld by successive Chinese governments, and in accordance with national law and international law, including [UNCLOS], China has territorial sovereignty and maritime rights and interests in the South China Sea, including, inter alia:
>
> i. China has *sovereignty* over Nansha Zhudao, consisting of Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao;
> ii. China has *internal waters, territorial sea* and [a] contiguous zone, based on Nanhai Zhudao;
> iii. China has [an] exclusive economic zone and continental shelf, based on Nanhai Zhudao;
> iv. China has *historic rights* in the South China Sea.[102]

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94 *See* BLUM, *supra* note 58, at 245.

95 *Id.* at 241.

96 *Id.*

97 *Fisheries Case*, *supra* note 87, at 139.

98 UN Study on Historic Waters, *supra* note 71, ¶103.

99 *Id.*

100 Tanaka, *supra* note 75, at 474-75.

101 This was also noted by the SCS Arbitration Tribunal. Award, *supra* note 18, ¶180.

102 China's Ministry of Foreign Affairs, *Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea*, §III, (July 12, 2016),

Based on the previous discussion about HTHRs, China's official statements,103 and the extensive existing literature on the SCS disputes, China's sovereign claims within the nine-dash line in the SCS can be understood in the following three layers or bases: First, China *implies* that,[104] based on its long-standing historical presence and display of authority in the SCS, it has historic titles (i.e. claiming full, historic sovereignty) over all the maritime features of Nanhai Zhudao[105] and some of their adjacent waters within the nine-dash line.[106] Second, as a party to UNCLOS,[107] China claims that it enjoys sovereign rights and jurisdiction over various maritime zones generated by China's historic land territory in the SCS, including the disputed islands and archipelagos.[108] Third, and *in addition*, China enjoys certain *historic rights* within the nine-dash line in the SCS.[109] This package of sovereign claims has been long advocated by several influential Chinese

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https://www.mfa.gov.cn/eng/wjdt_665385/2649_665393/201607/t20160712_679472.html#:~:text=China%20is%20the%20first%20to,in%20the%20South%20China%20Sea [hereinafter *China's Statement*] [emphasis added].

103 Many of China's statements and remarks on the SCS disputes are available at the webpage of China's Ministry of Foreign Affairs, *The South China Sea Issue*, https://www.fmprc.gov.cn/nanhai/eng/ (last visited Mar. 30, 2023).

104 *See* CSIL, *The South China Sea Arbitration Awards: A Critical Study,* 17 CHINESE J. INT'L L., ¶¶ 187, 204 &207 (2018) (arguing that the SCS Arbitration Tribunal made improper findings regarding historic rights by "ignoring the possibility that China's historic rights *may* involve historic title") [emphasis added] [hereinafter *A Critical Study*].

105 China's Statement*, supra* note 102; Li Guoqiang, *Claim over Islands Legitimate*, CHINA DAILY (July 22, 2011), http://usa.chinadaily.com.cn/opinion/2011-07/22/content_12957473.htm; Gao & Jia*, supra* note 54, at 114 & 123.

106 In this regard, it is noteworthy that Taiwan has clearly claimed the entire water area within the nine-dash line as its *historic waters*. *See* The Republic of China, *South China Sea Policy Guidelines*, reproduced in Kuan-Ming Sun, *Policy of the Republic of China towards the South China Sea: Recent Developments*, 19 (5) MARINE POL'Y 401, 408 (1995).

107 China signed UNCLOS on 10 December 1982 and ratified it on 7 June 1996. The instrument of ratification was deposed at the UN headquarters on 7 June 1996. United Nations Treaty Collection, Depositary Notifications by the Secretary-General, https://treaties.un.org/doc/Publication/CN/1996/CN.197.1996-Eng.pdf.

108 China's Statement*, supra* note 102; Gao & Jia, *supra* note 54, at 123.

109 China's Statement, *id.*

According to Zhiguo Gao, Bing Bing Jia, and other influential Chinese scholars, these "historic rights" include fishing rights, navigation rights, and other marine activities such as oil and gas development. However, it seems unclear whether these "historic rights" short of sovereignty have a quasi-territorial or zonal impact beyond the territorial sea or are non-exclusive historic rights. Gao & Jia, *supra* note 54, at 124; Kopela, *supra* note 75, at 188-89.

scholars[110] who describe it as a model of "sovereignty + UNCLOS + historic rights."[111] In their words,

> China enjoys sovereignty over all the features within [the nine-dash line], and enjoys sovereign rights and jurisdictions, defined by [UNCLOS], for instance, EEZ and continental shelf when the certain features fulfill the legal definition of Island Regime under Article 121 of [UNCLOS]. In addition to that, China enjoys certain historic rights within this line, such as fishing rights, navigation rights and priority rights of resource development.[112]

2. China's Other Assertive Claims and Activities in the SCS

i. Strengthening the Control of the Disputed Maritime Features

Over the past decades, China has continued to strengthen its control over the disputed maritime features in the SCS. Beijing and many Chinese scholars have particularly argued that archipelagic rules should be applied to *Nansha Qundao*.[113] For example, they have contended that China may enclose its outlying archipelagos[114] in the SCS with straight baselines and there is an emerging customary international law rule regarding this practice.[115] In practice, China has declared straight baselines around the Paracel Islands (*Xisha Qundao*).[116] In this way, all the space within these baselines is claimed as China's *internal waters*.[117] However, China is clearly not an archipelagic

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110 *See, e. g.,* Gao & Jia, *supra* note 54*,* at 123; Keyuan Zou, *The South China Sea, in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 635 (2015); Wu Shicun & Hong Nong, *Extended Continental Shelf Claims in East Asia: Intention for Legal Clarity, Political Dilemma in Reality*, 3 (2) J. DEFENCE & SEC.151, 157 (2013).

111 Zou, *supra* note 110, at 635.

112 *Id.*

113 *See, e.g.,* Declaration of the Government of the People's Republic of China on the Baseline of the Territorial Sea of the People's Republic of China, (May 15, 1996), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf; For scholarly discussions, *see, e. g.,* A Critical Study, *supra* note 104, Ch. 5.II (arguing that *Nansha Qundao* is an outlying archipelago); Nong Hong, *The Applicability of the Archipelagic Regime in the South China Sea: A Debate on the Rights of Continental States' Outlying Archipelagos*, 32 OCEAN Y.B. 80 (2018) (arguing that the archipelagic regime can be applied to *Nansha Qundao* as a whole).

114 For a further discussion on the rules concerning outlying archipelagos, *see infra* Part III.B.1.

115 National Institute for South China Sea Studies, *A Legal Critique of the Award of the Arbitral Tribunal in the Matter of the South China Sea Arbitration*, 24 ASIAN Y.B. INTL L. 151, 208-10 (2018) [hereinafter *A Legal Critique*].

116 *Supra* note 113.

117 Xinmin Ma, *China and the UNCLOS: Practices and Policies*, 5 CHINESE J. GLOB. GOV. 1, 11 (2019).

state under Article 46 of UNCLOS.[118] In addition, according to Article 47 (1) of UNCLOS, an archipelagic state *may* draw straight archipelagic baselines if "within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1."[119] However, in the Paracel Islands, the water to land ratio is 1,891 to 1.[120] China also views the Spratly Islands as a single archipelago unit and claims that the archipelagic regime should apply to it; yet to date, China has not declared straight baselines around the Spratly Islands.[121] The United States and other countries[122] have long objected to China's straight baselines claims and practice in the SCS.[123]

Moreover, China has accelerated its "island-building" activities in the SCS. According to the US Department of Defense, China has reclaimed more than 3,200 acres of land since late 2015 and has completed the construction of shore-based infrastructure on four smaller outposts in the Spratly Islands.[124] Many studies have found that China's land reclamation and artificial island construction in the SCS has caused serious damage to the marine environment and living resources of the region.[125]

ii. Controversial Regulations on Freedom of Navigation in the SCS

In addition, freedom of navigation (FON) in the SCS is of key concern for the international community. States disagree significantly on the FON issues, especially regarding military vessels. For example, China requires

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[118] UNCLOS, art. 46 (providing that "archipelagic State" means a state constituted wholly by one or more archipelagos and may include other islands).

[119] *Id.* art. 47.

[120] Asia Maritime Transparency Initiative, *Reading Between the Lines: The Next Spratly Legal Dispute*, CSIS (Mar. 21, 2019), https://amti.csis.org/reading-between-lines-next-spratly-dispute/ [hereinafter *Reading Between the Lines*].

[121] U.S. DEP'T OF STATE, *Limits in the Seas No. 150 People's Republic of China: Maritime Claims in the South China Sea* (Jan., 2022), at 20, https://www.state.gov/wp-content/uploads/2022/01/LIS150-SCS.pdf.

[122] For instance, in August 2018, Britain's Royal Navy vessel *the HMS Albion* sailed through the Paracel Islands to assert freedom of navigation and challenged China's straight baselines around the Islands. *British Navy's HMS Albion Warned over South China Sea "Provocation,"* BBC (Sept. 6, 2018), https://www.bbc.com/news/uk-45433153.

[123] U.S. DEP'T OF STATE, *supra* note 121, at 14; J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS 98 (3d ed., 2012).

[124] U.S. DEP'T OF DEF., *Assessment on U.S. Defense Implications of China's Expanding Global Access*, (Dec. 2018), at 3, https://media.defense.gov/2019/Jan/14/2002079292/-1/-1/1/EXPANDING-GLOBAL-ACCESS-REPORT-FINAL.P

[125] Leland Smith et al., *Evidence of Environmental Changes Caused by Chinese Island-Building*, 9 (5295) SCI. REP. 1 (2019).

foreign military ships to obtain permission to enter its territorial seas.[126] China also imposes restrictions on certain foreign military activities in its exclusive economic zones (EEZs), including surveillance and reconnaissance operations and military marine data collection activities.[127] For instance, China classifies several US military measurement activities (including hydrographic surveys) in its border seas as marine scientific research (MSR) falling under the jurisdiction of its EEZ law.[128] By contrast, the US holds that navigation and military exercises in EEZs need not be conducted with the consent of the coastal state.[129] In sum, just as it has done with its historic maritime claims in the SCS, China has failed to clarify its commitment to the FON and overflight in the SCS in the legal parlance of UNCLOS. The US has been routinely conducting naval patrols and aerial surveillance through its Freedom of Navigation (FON) Program in the SCS, challenging China's various claims in the region.[130]

B. The South China Sea Arbitration (2013-2016)

1. The Procedure and Ruling of the South China Sea Arbitration

On January 22nd 2013, the Philippines initiated an arbitration proceeding again China under Annex VII of UNCLOS in an effort to challenge China's multiple claims and activities in the SCS.[131] On February 19th 2013, China presented a Note Verbale to the Philippines in which it described the "position

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[126] Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, adopted at the 24th Meeting of the Standing Committee of the Seven National People's Congress (Feb. 25, 1992), art. 6, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf; In April 2021, China further revised its Maritime Traffic Safety Law which restricts the right of innocent passage in its territorial waters. Unofficial English version of the Law is available at https://www.piclub.or.jp/wp-content/uploads/2021/08/Maritime-Traffic-Safety-Law-of-the-Peoples-Republic-of-China_Revised-in-2021-1.pdf.

In April 2021, China further revised its Maritime Traffic Safety Law which restricts the right of innocent passage in its territorial waters. Unofficial English version of the Law is available at https://www.piclub.or.jp/wp-content/uploads/2021/08/Maritime-Traffic-Safety-Law-of-the-Peoples-Republic-of-China_Revised-in-2021-1.pdf.

[127] Silvia Menegazzi, *Military Exercises in the Exclusive Economic Zones: The Chinese Perspective*, 1 MAR. SAFETY & SEC. L. J. 1, 56 (2015).

[128] U.S. DEP'T OF STATE, *see supra* note 121, at 26.

[129] James W. Houck & Nicole M. Anderson, *The United States, China, and Freedom of Navigation in the South China Sea*, 13 WASH. U. GLOBAL STUD. L. REV. 441, 443-47 (2014).

[130] For an excellent illustration of the US' FON operations in the SCS, *see* Eleanor Freund, *Freedom of Navigation in the South China Sea: A Practical Guide*, BELFER CENTER (June 2017), https://www.belfercenter.org/publication/freedom-navigation-south-china-sea-practical-guide.

[131] The South China Sea Arbitration (Phil. v. China), Perm. Ct. Arb. Case No. 2013-19, https://pca-cpa.org/en/cases/7/.

of China on the South China Sea issues" and rejected and returned the Philippines' Notification.[132] On July 11th 2013, a five-judge tribunal constituted with the appointment of the Permanent Court of Arbitration (PCA) in the Hague as Registry for the proceedings.[133] Throughout the proceedings, China had returned all communications and maintained that the SCS Arbitration Tribunal did not have jurisdiction and "[China] will neither accept nor participate in the arbitration unilaterally initiated by the Philippines."[134] On the other hand, the Chinese government had issued numerous documents to defend its positions.[135] In the China's absence, the Tribunal issued two awards: On October 29th 2015, it issued an initial award on the jurisdiction and admissibility of the case, finding that China's absence was not a bar to the proceedings, the Philippines had not abused the process, and the Tribunal had jurisdiction over seven claims[136] that the Philippines had brought forward against China, including the one regarding China's historic rights claim in the SCS.[137] A Hearing on the Merits and Remaining Issues of Admissibility was held at the Hague in November 2015. On July 12th 2016, the Tribunal delivered its final award, which largely favored the Philippines' claims and ruled that China's numerous claims and activities in the SCS are contrary to UNCLOS.[138]

The issues raised in the SCS Arbitration went beyond the key question concerning the legal status of the nine-dash line under UNCLOS.Chapter 6 shows that China has also breached its obligations under UNCLOS by operating its law enforcement vessels in a highly dangerous and provocative

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[132] Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (13) PG-039 (Feb.19, 2013), *available at* https://s3.amazonaws.com/s3.documentcloud.org/documents/2165478/phl-prc-china-note-verbale.pdf (last visited Mar.30, 2023).

[133] The South China Sea Arbitration (Phil. v. China), Perm. Ct. Arb. Case No. 2013-19, Award on Jurisdiction and Admissibility (Oct. 29, 2015), ¶34, https://pcacases.com/web/sendAttach/2579 [hereinafter *Award on Jurisdiction*].

[134] This position had been articulated in many diplomatic and governmental statements. *See, e.g.,* The Embassy of the People's Republic of China, *supra* note 132*;* China's Ministry of Foreign Affairs, *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, (Dec. 7, 2014), https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm.

[135] *See* Jiangyu Wang, *China and International Dispute Settlement: Implications of the South China Sea Arbitration, in* CHINA AND INTERNATIONAL DISPUTE RESOLUTION IN THE CONTEXT OF THE 'BELT AND ROAD INITIATIVE' 285 (Wenhua Shan et al. eds., 2021) for a further discussion on these documents and China's practice.

[136] *See* Paul Gewirtz, *Limits of the Law in the South China Sea*, Washington, DC: Brookings, East Asia Policy Paper (May 2016), at 4, https://www.brookings.edu/wp-content/uploads/2016/07/Limits-of-Law-in-the-South-China-Sea-2.pdf. (The Philippines originally brought 15 claims against China. For a detailed summary of the submissions.)

[137] Award on Jurisdiction, *supra* note 133, ¶413.

[138] Award, *supra* note 18, ¶1203(B).

manner that has posed a direct threat to Philippine navigation. They also included the legal statuses of disputed maritime features and their relevant maritime entitlements under UNCLOS, and the legality of China's multiple activities within the disputed area, such as fishing, marine pollution, and law enforcement in a dangerous manner.[139] Although the final award is only binding on the parties and there is no doctrine of precedence in international law, the ruling of the SCS Arbitration Tribunal is likely to have a significant jurisprudential legacy in the law of the sea.[140]

First, the SCS Arbitration award is a landmark decision on the issue of historic titles and historic rights (HTHRs) in the law of the sea. The issue is critical for the SCS Arbitration in terms of both jurisdiction and merits. Specifically, the Philippines strategically argued that China's historic claims within the nine-dash line has involved "historic rights" (历史性权利, *li shi xing quan li*) rather than "historic titles" (历史性所有权, *li shi xing suo you quan*).[141] This argument is critical because, first, with respect to the jurisdiction of the Tribunal, UNCLOS contains comprehensive provisions on compulsory dispute settlement, subject only to limited exceptions. Article 298 (1) (a) (i) of UNCLOS clearly provides for an exception for disputes involving "*historic titles,*" which reads as follows:

> 1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
> (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 *relating to sea boundary delimitations*, *or* those involving *historic bays or titles* …[142]

On 25 August 2006, China issued a declaration pursuant to Article 298 of UNCLOS, activating all the optional exceptions to UNCLOS' compulsory jurisdiction.[143] Therefore, one of the arguments for Beijing to reject the SCS

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[139] *See generally* Memorial of the Philippines, filed on 30 March 2014, ch. 4, https://files.pca-cpa.org/pcadocs/Memorial%20of%20the%20Philippines%20Volume%20I.pdf.

[140] Warwick Gullett, *The South China Sea Arbitration's Contribution to the Concept of Juridical Islands*, 6 (47) Questions for Int'l L. 5, 36-37 (2018).

[141] Memorial of the Philippines, *supra* note 139, ¶ 4.28.

[142] UNCLOS, art. 298 (1) [emphasis added].

[143] China: Declaration Under Article 298, in depository notification dated Aug. 25, 2006 from U.N. Secretary-General addressed to United Nations Convention on the Law of the Sea, 2834 U.N.T.S. 32 (Aug. 25, 2006).

Tribunal's jurisdiction was that China's historic claims in the SCS include a claim of *historic titles*.[144]

As discussed previously, the Tribunal first distinguished "historic titles" from "historic rights" in the context of law of the sea, holding that "historic title" is used specifically to refer to "historic *sovereignty* to land or maritime areas." "Historic water" is simply a term for "historic title over maritime areas," typically exercised either as a claim to internal waters or as a claim to the territorial sea. By contrast, the term "historic rights" is broader than that of "historic titles" or "historic waters." "Historic rights may include sovereignty, but may equally include more *limited* rights, such as fishing rights or rights of access, that fall well *short of* a claim of sovereignty." [145] In this way, the Tribunal reached a restrictive interpretation of "historic titles" in the context of UNCLOS, namely that the term refers only to claims of *full* sovereignty over the *waters*. Thus, as far as the application of article 298 (1) (a) (i) of UNCLOS is concerned, the SCS Arbitration Tribunal ruled that the provision was not intended to "exclude jurisdiction over a broad and unspecified category of possible claims to historic rights falling short of sovereignty."[146]

Therefore, the SCS Arbitration Tribunal favored the argument of the Philippines and ruled that the nature of China's historic rights claim within the nine-dash line is "a constellation of historic rights *short of* title" (*i.e.*, historic rights in the narrow sense), rather than historic titles.[147] This particularly arises from the fact that China has consistently committed itself to respecting freedom of both navigation and overflight in the disputed water area.[148] This commitment indicates that China does not consider the (entire) area within the nine-dash line to be equivalent to its territorial sea or internal waters (by virtue of a claim to historic waters).[149] Thus, for the Tribunal, it is unnecessary to further examine each element of establishing a *historic title* regarding China's historic claims in the SCS.

Moreover, the Tribunal found that China appeared to claim *exclusive historic rights* to both living and non-living resources within the nine-dash line, which is incompatible with UNCLOS.[150] First, the Tribunal confirmed

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144 A Critical Study, *supra* note 104, paras. 187 & 204; A Legal Critique, *supra* note 115, at 152.

145 *See supra* Part III.A.1.

146 Award, *supra* note 18, ¶226.

147 *Id.* ¶229.

148 *Id.* ¶213.

149 *Id.*

150 Specifically, the Tribunal found that there are at least three activity examples when China appears to assert such rights: (1) opening blocks for petroleum exploration to the western edge of the nine-dash line; (2) objecting to the Philippines' award of petroleum blocks within the

that even historic rights *short of* sovereignty must satisfy similar requirements to those for establishing historic titles/waters claims.[151] In this regard, the Tribunal particularly emphasized that "historic rights are, in most instances, *exceptional* rights. They accord a right that a State would not otherwise hold, were it not for the operation of the historical process giving rise to the right and the acquiescence of other States in the process."[152] Nevertheless, rather than taking the orthodox three-elements approach to examine each factor for establishing a historic right, the SCS Arbitration Tribunal adopted a "*high seas freedom"* approach to the issue of historic maritime rights and China's historical activities in the SCS, ruling out that China enjoys exclusive historic rights within the nine-dash line.[153] Specifically, the Tribunal noted that China recognized that the SCS formed part of the high seas prior to the adoption of UNCLOS.[154] Thereafter, the Tribunal highlighted that "the exercise of freedoms permitted under international law cannot give rise to a historic right [because] it involves nothing that would call for the acquiescence of other States and can only represent the use of what international law already freely permits."[155] For much of history, China's navigation and trade in the SCS, as well as fishing beyond the territorial sea, merely represented the exercise of high seas freedoms.[156] Thus, "in order to establish historic rights in the waters of the South China Sea, it would be necessary to show that China has engaged in activities that deviated from what was permitted under the freedom of the high seas and that other States acquiesced in such a right."[157] Accordingly, China should show that it had historically sought to prohibit or restrict the exploitation of the living and non-living resources within the nine-dash line by the nationals of other states and that those states had acquiesced in such restrictions.[158] However, there is no such supportive evidence.[159] Therefore, China's historical navigation and fishing activities in the SCS cannot generate any historic rights.[160]

A final important finding of the SCS Arbitration Tribunal regarding the issue of HTHRs is that, even if the historic rights claimed by China were established before UNCLOS came into force to China, they were extinguished

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nine-dash line; and (3) issuing an announcement of the summer ban on maritime fishing in the South China Sea Maritime Space in May 2012. *Id.* ¶¶208–11.

151 *Id.* ¶265.

152 *Id.* ¶268 [emphasis added].

153 *See also* Tanaka, *supra* note 75, at 471–72.

154 Award, *supra* note 18, ¶269.

155 *Id.*

156 *Id.*

157 *Id.* ¶270.

158 *Id.*

159 *Id.*

160 *Id.*

to the extent they were incompatible with UNCLOS.[161] In the view of the Tribunal, "[t]his is apparent in the text of the Convention which *comprehensively* addresses the rights of *other* States within the areas of the *exclusive economic zone* and *continental shelf* and leaves no space for assertion of historic rights."[162] Interestingly, with respect to "traditional fishing rights" (TFRs),[163] which were advanced by the Philippines in the interest of its fisherman in the Arbitration, the Tribunal held that they can be preserved even in the *territorial seas* of other states.[164]

Taken together, on the one hand, the SCS Arbitration Tribunal reconfirmed the criteria for the establishment of HTHRs, i.e., the exercise of authority, the continuity of the exercise of authority, and the acquiescence of other states. On the other hand, without further discussing and applying these three classic elements of HTHRs in the case, the Tribunal ruled that,

> [A]s between the Philippines and China, China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the 'nine-dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention; …. the Convention superseded any historic rights, or other sovereign rights or jurisdiction, in excess of the limits imposed therein.[165]

Furthermore, the SCS Arbitration Tribunal provided the first judicial interpretation of Article 121 of UNCLOS.[166] In the SCS Arbitration, the Philippines also skillfully asked the Tribunal to *categorize* certain maritime features in the disputed Spratly Island chain, even though the Tribunal does not have jurisdiction over the issues of "sovereignty" and "sea boundary delimitation."[167] According to UNCLOS, there are three types of maritime features: "low-tide elevations," "rocks," and "islands."[168] With respect to maritime entitlements, a low-tide elevation generates nothing, unless it is

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161 Award, *supra* note 18, ¶¶261, 278.

162 *Id.* ¶261 [emphasis added].

163 These rights can also be referred to as "artisanal fishing rights." In the SCS Arbitration, the Tribunal distinguished TFRs from historic fishing rights by finding that TFRs are historic *private* rights belonging to individuals and their communities but not the state. *Id.* ¶798.

164 *Id.* ¶ 804 (c).

165 *Id*. ¶ 203 B (2).

166 CLIVE SCHOFIELD, THE REGIME OF ISLANDS REFRAMED: DEVELOPMENTS IN THE DEFINITION OF ISLANDS UNDER THE INTERNATIONAL LAW OF THE SEA 89 (Brill 2021).

167 *See* Memorial of the Philippine*, supra* note 139, Ch. 5.

168 For a detailed overview of maritime features and associated jurisdictional rights, *see* Freund, *supra* note 130.

within 12 nautical miles of land or an island, in which case it can be used as a starting point from which the territorial sea can be measured.[169] An island enjoys a territorial sea, a contiguous zone, an exclusive economic zone (EEZ), and a continental shelf.[170] By contrast, a rock generates a contiguous zone but no EEZ or continental shelf. As provided by Article 121 (3) of UNCLOS, "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." [171] With respect to "human habitation," the SCS Tribunal ruled that it should be understood to involve the inhabitation of the feature "by a stable community of people for whom the feature constitutes a home and on which they can remain."[172] With respect to the term of "economic life of their own," the Tribunal emphasized that:

> [e]conomic life …. must be oriented around the feature itself and not focused solely on the waters or seabed of the surrounding territorial sea. Economic activity that is entirely dependent on external resources or devoted to using a feature as an object for extractive activities without the involvement of a local population would also fall inherently short with respect to [the] necessary link to the feature itself.[173]

In this way, the Tribunal ruled that the high-tide features in the Spratly Islands are all "rocks," as they can sustain neither human habitation nor economic life in their naturally formed state.174 Thus, these features are not entitled to EEZs and continental shelves in accordance with Article 121 of UNCLOS.[175]

It is worth noting that, in doing so, the SCS Arbitration Tribunal also treated all component features of the Spratly Islands and Zhongsha Islands (especially regarding Scarborough Reef) *separately* and ruled that China cannot treat the Spratly Islands as an archipelagic unit and apply straight baselines around it.[176] First, the Tribunal made it clear that the archipelagic regime provided by UNCLOS only applies to "archipelagic states," specifically regarding the use of straight archipelagic baselines.[177] Second, with respect to outlying archipelagos,[178] the Tribunal held that continental

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169 UNCLOS, art.13.

170 *Id.* art. 121 (2).

171 *Id.* art. 121 (3).

172 Award, *supra* note 18, ¶ 542.

173 *Id.* ¶ 543.

174 *Id.* ¶ 646.

175 *Id.*

176 *Id.* ¶573.

177 *Id.*

178 There are different terms to refer to an archipelago situated far from the mainland territory of a state. For example, Sophia Kopela uses the term "dependent archipelago." The SCS Arbitration Tribunal and the International Law Association Committee on Baselines under the

states cannot draw straight baselines around their outlying archipelagos. [179] According to Article 46 of UNCLOS, "archipelago" means "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."[180] In general, there are two different types of archipelagos: (1) continental or coastal archipelagos and (2) outlying or mid-ocean archipelagos. Outlying archipelagos are further divided on the basis of the political status into archipelagos forming the whole territory of states, namely, archipelagic states, and outlying archipelagos belonging to continental states.[181] To date, there are different views and approaches with respect to the drawing of straight baselines around an outlying archipelago located at a considerable distance from the continental state.[182] In the SCS Arbitration, the Tribunal affirmed that Article 7 of UNCLOS allows the application of straight baselines *only* "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity," and "[t]hese conditions do not include the situation of an offshore archipelago."[183] Lastly, the Tribunal highlighted that the practice of some states in employing straight baselines with respect to their outlying archipelagos has not "amounted to the formation of a new rule of customary international law."[184]

International Law of the Sea use "offshore archipelago" when discussing the issue of drawing straight archipelagic baselines. *See* SOPHIA KOPELA, DEPENDENT ARCHIPELAGOS IN THE LAW OF THE SEA (Brill 2013); COALTER G. LATHROP, J. ASHLEY ROACH & DONALD R. ROTHWELLS, BASELINES UNDER THE INTERNATIONAL LAW OF THE SEA 109-110 (Brill 2019).This article adopts the term "outlying archipelago" to highlight remoteness of such archipelagos.

[179] Award, *supra* note 18, ¶¶ 573-76.

[180] UNCLOS*, supra* note 2, art. 46 (b).

[181] J Evensen, *Certain Legal Aspect Concerning the Delimitation of Territorial Waters of Archipelagos*, United Nations Conference on the Law of the Sea, A/COF.13/18 (1958), at 290, *available at* https://legal.un.org/diplomaticconferences/1958_los/docs/english/vol_1/a_conf13_18.pdf; Tara Davenport, *The Archipelagic Regime, in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 135 (Donald R. Rothwell et al. eds., 2015).

[182] *See generally* U.S. DEP'T OF STATE, *Limits in the Seas No. 150 People's Republic of China: Maritime Claims in the South China Sea: State Practice Supplement*, (Jan. 2022), https://www.state.gov/wp-content/uploads/2022/01/LIS150-SCS-Supplement.pdf (offering a theoretical analysis and country-by-country review of state practice regarding the use of straight baselines around outlying archipelagos); J. Ashley Roach, *Offshore Archipelagos Enclosed by Straight Baselines: An Excessive Claim?* 49 (2) OCEAN DEV. & INT'L L. 176 (2018) (providing an overview of scholar writings and state practices supporting drawing straight baselines enclosing outlying archipelagos).

[183] Award, *supra* note 18, ¶ 575; UNCLOS, art.7.

[184] Award, *supra* note 18, ¶ 576.

Finally, the SCS Arbitration is also a landmark case on the issue of marine environmental protection.185 The major consideration of the issue in the case concerns China's two activities in the SCS: China's tolerance of harmful fishing practices by its nationals, and its construction of artificial islands in the disputed area.[186] By examining the obligation of due diligence, the obligation to conduct an Environmental Impact Assessment (EIA), and the obligation to cooperate, the Tribunal made significant contributions to the international environmental law jurisprudence.[187] Particularly, the SCS Arbitration Tribunal interpreted the "obligation to protect and preserve the marine environment" under Article 192 of UNCLOS, confirming that the obligation "entails the *positive* obligation to take active measures to protect and preserve the marine environment, …. and entails the *negative* obligation not to degrade the marine environment."[188]

2. The Mixed Reactions to the Ruling of the SCS Arbitration

According to Article 296 (1) of UNCLOS and Article 11 of Annex VII of UNCLOS, the SCS Arbitration award shall be "final" and shall be complied with by all the parties to the dispute.[189] Nevertheless, China has refused to acknowledge and enforce it. At the same time, the SCS Arbitration has received mixed reactions from other countries. 8 states have publicly called for the award to be respected; 35 states have issued generally positive statements noting the verdict but have stopped short of calling for the parties to abide by it; 8 states have publicly rejected it.[190]

The final decision has also received some scholarly criticism, which the Chinese government has been enthusiastically recruiting to support its positions and claims.[191] For example, some scholars have argued that the

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185 Stuart Leavenworth, *In South China Sea Case, Ruling on Environment Hailed as Precedent*, THE CHRISTIAN SCIENCE MONITOR (July 20, 2016), https://www.csmonitor.com/World/Asia-Pacific/2016/0720/In-South-China-Sea-case-ruling-on-environment-hailed-as-precedent (quoting Paul S. Reichler, who was a lead counsel of the Philippines legal team, stating that "this is really the first case to go to judgement over environmental provisions of the Law of the Sea").

186 Award, *supra* note 18, VII.D.

187 *See generally* Yoshifumi Tanaka, *The South China Sea Arbitration: Environmental Obligations under the Law of the Sea Convention*, 27 EUR. COMP. & INT'L ENVTL. L 90 (2018).

188 Award, *supra* note 18, ¶941 [emphasis added].

189 UNCLOS, art. 296; Annex VII, art.11.

190 Arbitration Support Tracker, *supra* note 7.

191 *See generally* Isaac B. Kardon, *China Can Say "No": Analyzing China's rejection of the South China Sea Arbitration: Toward A New Era of International Law with Chinese Characteristics*, 13 U PA. ASIAN L. REV. 1, 27 (2018) (describing how China has recruited support among both Chinese and foreign legal experts).

Tribunal failed to take into account the region's own historical systems and circumstances in approaching the non-European territorial disputes.[192] Another strong critique on the award concerns the interpretation and application of Article 121 (3) of UNCLOS.[193] In addition, some scholars have noted that Tribunal's reasoning and analysis on the issue of traditional fishing rights (TFRs) was problematic.[194]

Despite these limitations, the SCS Arbitration Tribunal is a properly constituted international arbitral body empowered by a multilateral treaty with close to universal acceptance by 168 states.[195] Its final award is a unanimous ruling on numerous general, important issues of the contemporary law of the sea. It is well known that the decisions of international courts and tribunals are a legitimate source of international law.[196] Although there is no stare decisis in international law, many international courts have extensively cited earlier international decisions in their judgements.[197] The SCS Arbitration award would be influential for future international courts or tribunals.[198] In

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[192] *See, e.g.,* Yeon Kim, *Making International Law Truly "International"? Reflecting on Colonial Approach to the China-Vietnam Dispute in the South China Sea and the Tribute System*, 24 J. HIST. INT'L L. 227 (2022) (but also making clear that this argument does not necessarily support China's historic claim in the nine-dash line); Atsuko Kanehara, *Validity of International Law over Historic Rights: The Arbitral Award (Merits) on the South China Sea Dispute*, 2 (3) JAPAN REV. 8 (2018) (arguing that the Tribunal failed to assess China's historic rights based on concrete and individual circumstances).

[193] For example, the Tribunal found that Itu Aba, the largest naturally formed feature in the Spratly Islands, is a "rock" under UNCLOS. For further discussions and critiques, *see, e.g.,* Gilbert Guillaume, *Rocks in the Law of the Sea: Some Comments on the South China Sea Arbitration Award*, EJIL: Talk! (Feb. 25, 2021), https://www.ejiltalk.org/ricks-in-the-law-of-the-sea-some-comments-on-the-south-china-sea-arbitration-award/ (criticizing that the award provided a very fragile interpretation of Article 121(3)); Michael Sheng-ti Gau, *The Interpretation of Article 121 (3) of UNCLOS by the Tribunal for the South China Sea Arbitration: A Critique*, 50 (1) OCEAN DEV. & INT'L 49 (2019); Yann-huei Song, *The July 2016 Arbitration Award, Interpretation of Article 121 (3) of the UNCLOS, AND Selecting Examples of Inconsistent State Practices*, 49 (3) OCEAN DEV. & INT'L L 247 (2018) (noting that the award run counter to the general practice of many states); Wang, *supra* note 135 (identifying two major weaknesses of the award regarding the jurisdiction and merit of the case: the sovereignty nature of the disputes and the Tribunal's restrictive interpretation of Article 121 (3) of UNCLOS).

[194] *See, e.g.,* Kopela, *supra* note 75, at 195 (critiquing that the SCS Tribunal went too far in arguing that the TFRs have been preserved only in the territorial sea and not in the EEZ); Ryan North, *Traditional Fishing Rights in International Law: The South China Sea Arbitration*, 36 U. TAS. L. REV. 101, 106 (2017).

[195] Gullett, *supra* note 140, at 37.

[196] *See* Statue of the International Court of Justice, art. 38 (1)(d) ("subject to the provisions of Article 39, judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law").

[197] Stuart Kaye, *Assessing the Impact of the South China Sea Arbitration on Small Island States: A Case Study of Kiribati*, 34 INT'L J. MARINE & COASTAL L. 778, 785 (2019).

[198] Gullett, *supra* note 140, at 37.

short, although the SCS Arbitration award was focused on the disputes in the SCS and only binding on China and the Philippines, it would be naïve to assume that the Arbitration will not have other effects beyond the two states and the region.[199]

IV. THE IMPLICATIONS OF THE SCS ARBITRATION FOR THE ARCTIC OCEAN

As discussed below, the SCS Arbitration award carries considerable legal implications for addressing maritime disputes and disagreements in the Arctic Ocean. In the Arctic, UNCLOS is recognized as the principle international legal framework governing the Arctic Ocean.200 Like all constitutive instruments, however, many definitions and provisions of UNCLOS have significant ambiguity and gaps that lead to different interpretations and practices by countries. [201] In the Arctic Ocean, several Arctic states have made excessive claims and adopted controversial domestic regulations which are arguably inconsistent with UNCLOS. On the one hand, it is true that most maritime boundaries in the Arctic have been settled peacefully.[202] On the other hand, there still exist several important maritime disputes and disagreements in the Arctic Ocean requiring legal-based solutions, including the delimitation of the Beaufort Sea boundary between Canada and the United States,[203] the

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[199] Kaye, *supra* note 197, at 785.

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In May 2008, the five Arctic Coastal States held the Arctic Ocean Conference in Ilulissat, Greenland, declaring that the law of the sea, namely UNCLOS, offers a solid legal framework for the management of the Arctic Ocean. Arctic Ocean Conference, *Ilulissat Declaration* (May 28, 2008), https://www.regjeringen.no/globalassets/upload/ud/080525_arctic_ocean_conference-_outcome.pdf.

As many scholars have explained, the five states used the term "the law of the sea" rather than "UNCLOS" in the Ilulissat Declaration simply because the United States is not a party to UNCLOS. *See, e.g.,* Timo Koivurova et al., *Emergence of a New Ocean, in* THE PALGRAVE HANDBOOK OF ARCTIC POLICY AND POLITICS 412 (note 5); E. J. Molenaar, *Arctic Marine Shipping: Overview of the International Legal Framework, Gaps, and Options*, 18 J. TRANSNAT'L L. & POL'Y 289, 297-98 (2009).

[201] Shicun Wu et al., *Introduction: The South China Sea: UNCLOS and State Practice, in* UN CONVENTION ON THE LAW OF THE SEA AND THE SOUTH CHINA SEA 1 (Shicun Wu et al., eds., 2015).

[202] A recent example is that, in June 2022, Canada and Denmark agreed to divide Hans Island peacefully. Per their agreement, a border will be drawn across the half-square-mile Hans Island in the water way between the northwestern coast of the semi-autonomous Danish territory of Greenland and Canada's Ellesmere Island. Elin Hofverberg, *The Hans Island "Peace" Agreement between Canada, Denmark, and Greenland*, BLOGS OF THE LIBRARY OF CONGRESS (June 22, 2022), https://blogs.loc.gov/law/2022/06/the-hans-island-peace-agreement-between-canada-denmark-and-greenland/.

[203] *See generally* James S. Baker & Michael Byers, *Crossed Lines: The Curious Case of the Beaufort Sea Maritime Boundary Dispute*, 43 OCEAN DEV. & INT'L. 373 (2012).

legal statuses of the Northwest Passage (NWP) and the Northern Sea Route (NSR), the interpretation and application of Article 234 of UNCLOS concerning "ice-covered areas,"[204] the delimitation of the outer limits of the extended continental shelves in the Central Arctic Ocean,[205] and the disagreement between Norway and other parties regarding the application of the Svalbard Treaty.[206] The SCS Arbitration award offers valuable insights into assessing and resolving many of these disputes, especially regarding the following four issues: (1) the historic claims concerning the NWP and the NSR, (2) the legal status of maritime features in the Arctic Ocean, (3) the drawing of straight baselines around outlying archipelagos in the Arctic Ocean, and (4) the adjudication of some Arctic maritime disputes in international courts and tribunals.

A. Historic Maritime Claims in the Arctic Ocean

First, in the Arctic, Canada and Russia have claimed strict sovereign control over the Northwest Passage (NWP) waters and the Northern Sea Route (NSR) waters, respectively, especially based on *historic grounds*.[207] As the most recent consideration of the issue of historic titles and historic rights in the law of the sea, the SCS Arbitration award can be highly influential on the historic claims in the Arctic Ocean.

1. Canada's Historic Title Claim in the Arctic Ocean

In the Arctic, the Canadian government claims that waters within the Arctic Archipelago208 are "historic internal waters" of Canada.209 The Arctic Archipelago, also known as the "Canadian Arctic Archipelago," is

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[204] Article 234 was negotiated directly between Canada, the Soviet Union, and the United States. It allows coastal states to take unilateral action including enacting laws and regulations to protect the "ice-covered areas" from pollution from vessels within their EEZs. UNCLOS, art. 234.

This provision has been descripted as "probably the most ambiguous, if not controversial, clause" in UNCLOS. Cynthia Lamson, *Arctic shipping, Marine Safety and Environmental Protectio*n, 11 MARINE POL'Y 4 (1987).

[205] *See supra* note 27 and accompanying text.

[206] *See* discussion *infra* Part IV.D.

[207] Another key legal basis used by Russia and Canada to control the NSR and the NWP waters is Article 234 of UNCLOS.

[208] Canada's sovereignty over the Arctic Archipelago bases on Britain's 1880 transfer of its northern possessions. *See* Imperial Order-in-Council (July 31,1880), reproduced in Gordon W. Smith, *The Transfer of Arctic Territories from Great Britain to Canada in 1880, and Some Related Matters, As Seen in Official Correspondence*, 14 (1) ARCTIC 53, 62-63 (1961).

[209] Joe Clark, Secretary of State for External Affairs, "Statement on Sovereignty" (Sept. 10, 1985), reproduced in POLITICS OF THE NORTHWEST PASSAGE 271 (Franklyn Griffiths ed., 1987) [hereinafter *Statement on Sovereignty*].

almost entirely ice-covered, located north of the Canada mainland in the Arctic Ocean. It covers an area of about 1,500,000 square kilometers and consists of 94 major "islands" and more than 36,000 minor features. Within the archipelago, various maritime features are separated from each other and the Canadian mainland by a series of Arctic waterways, collectively known as the Northwestern Passage (NWP).[210] Canada considers the Arctic Archipelago as a whole and treats both the land of the islands and inter-insular waters as part of its territory.[211]

This maritime claim has long been made on the basis of "historic title." Specifically, after the voyages of the Manhattan in 1969 and 1970, the Canadian government made the first official claim of historic internal waters in a letter in 1973, which stated that, "Canada also claims that the waters of the Canadian Arctic Archipelago are *internal waters* of Canada, *on a historical basis*, although they have not been declared as such in any treaty or by any legislation."[212] To support this claim, Canada has emphasized the unique circumstances of the related maritime areas.[213] In particular, Canada has argued that the sea ice in the Arctic Archipelago has been used from time immemorial by Canadian Inuit People in their everyday activities the same way as they had been using the land.[214]

Nevertheless, it was not until more recently that Canada delineated the *scope* of its historic waters. In September 1985, the Canadian government adopted an Order-in-Council to establish straight baselines around the outer perimeter of the Arctic Archipelago.[215] As Joe Clark, the then Secretary of State for External Affairs, stated, "[t]hese baselines define the outer limits of Canada's historic internal waters. Canada's territorial waters extend 12 miles seaward off the baselines."[216] Such a status for the waters would give Canada

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[210] *Supra* note 15, at 163.

[211] Statement on Sovereignty, *supra* note 209, at 270 ("Canada's sovereignty in the Arctic is indivisible. It embraces land, sea and ice").

[212] Letter dated Dec. 17, 1973, quoted in Donat Pharand, *The Arctic Waters and the Northwest Passage: A Final Revisit*, 38 OCEAN DEV. & INT'L L. 3, 11 (2007).

[213] For example, in a briefing on May 21, 1987, a representative of the Bureau of Legal Affairs of Canadian Department of Foreign Affairs and International Trade stated that,

[Canada's claim] establishes no precedent that might be cited to justify interference with international navigation in other parts of the world because it is based on unique circumstances: the Canadian Arctic archipelago is unlike any other archipelago in the world in geographical terms; these waters are covered with ice for all or most of the year; they have been used and occupied like the land itself by Canadian Inuit people from time immemorial; they have not been customarily used for international navigation and the Northwest Passage does not constitute an international strait.

Reproduced in Edward G. Lee, *Canadian Practice in International Law,* 25 CAN. Y.B. INT'L L. 391, 406 (1987).

[214] *Id.*

[215] Statement on Sovereignty, *supra* note 209, at 271.

[216] *Id.*

complete and exclusive control over the entire maritime area (*see Figure 2*). However, Canada is not an archipelagic state. Interestingly, Canada has also attempted to justify this straight baselines practice on historic grounds.[217] Based on these straight baselines, Canada claims extensive maritime zones, including EEZ and continental shelf, in the Arctic Ocean.[218] As sea pathways through the Arctic Archipelago, Canada has claimed that the NWP waters as its internal waters, and they therefore fall under the full sovereignty of Canada.[219]

Before the SCS Arbitration, the majority of legal scholars had already noted that Canada's historic title claim in the Arctic appears weak, especially due to its hesitancies and inconsistencies before the adoption of straight baselines in 1985.[220] The United States has long challenged Canada's sovereignty over the NWP waters and the related historic claims.[221]

FIGURE 2: CANADIAN STRAIGHT BASELINES AND THE NORTHWEST PASSAGE

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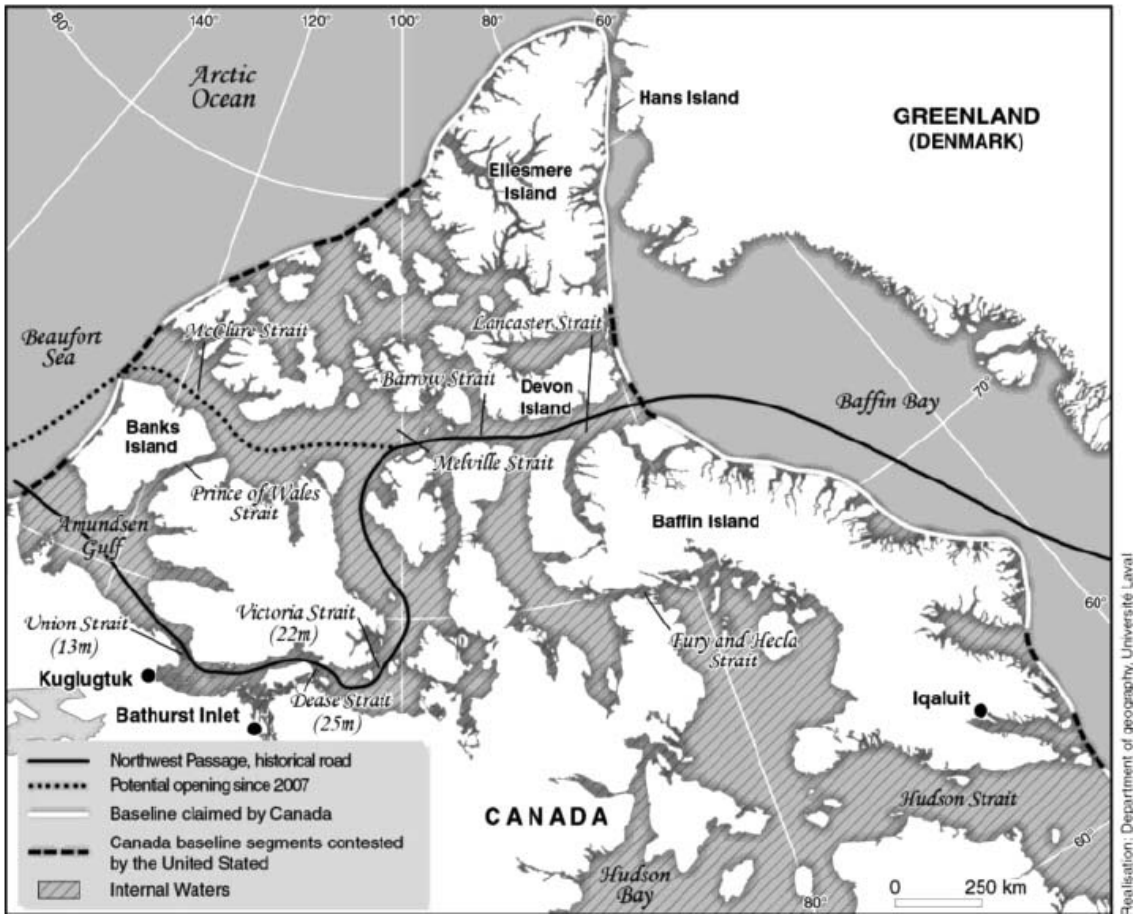
[217] For more detailed discussions on Canada's use of straight baselines around the Archipelago on the basis of the long use and occupation of the sea-ice by the Canadian Inuit, *see* Michael Byers & Suzanne Lalonde, *Who Controls the Northwest Passage?* 42 VAND. J. TRANSNAT'L L. 1134, 1153-56 (2009); DONAT PHARAND, CANADA'S ARCTIC WATERS IN INTERNATIONAL LAW 162-67 (1988).

[218] Mark Killas, *The Legality of Canada's Claims to the Waters of Its Arctic Archipelago*, 19 (1) OTTAWA L. R. 95, 98 (1987).

[219] *See* Canada Dep't of External Aff., *Briefing* (May 21, 1987), *as reprinted in* 25 CANADIAN Y.B. INT'L L. 406 (1987) ("Canada is determined to exercise full sovereignty over the *historic international waters* of the Arctic archipelago and is prepared to uphold its position before the International Court of Justice if necessary.") [emphasis original].

[220] KOPELA, *supra* note 178, at 207-08 (listing the leading Arctic experts who find the claim is weak. They include Donat Pharand, Erik Franckx, Ted L. McDorman, Donald R. Rothwell, and Michael Byers).

[221] *See generally* Suzanne Lalonde & Frederic Lasserre*, The Position of the United States on the Northwest Passage: Is the Fear of Creating a Precedent Warranted?* 44 OCEAN DEV. & INT'L L. 28 (2013); Andrea Charron, *Canada, The United States, and the Northwest Passage: Sovereignty to the Side*, 29 (2) POLAR GEOGRAPHY 139 (2005).



Source: Suzanne Lalonde & Frederic Lasserre, *The Position of the United States on the Northwest Passage: Is the Fear of Creating a Precedent Warranted?* 44 OCEAN DEV. & INT'L L. 28, 29 (2013).

2. Russia's Historic Claim in the Arctic Ocean

On the Russian side, although its treatment of the Northern Sea Route (NSR) waters under the law of the sea is a bit murky,[222] Russia claims that the

[222] Roughly speaking, Soviet and Russian academics have advocated for four groups of arguments in support of the USSR/Russia's control of the NSR: (1) the sector theory; (2) historic claims; (3) Article 234 of UNCLOS; and (4) the integrity of the NSR. Viatcheslav V. Gavrilov, *Legal Status of the Northern Sea Route and Legislation of the Russian Federation: A Note*, 46 OCEAN DEV. & INT'L. 256, 256 (2015).

area of the NSR is "a *historically* developed national transport communication of the Russian Federation."[223]

Unlike Canada (and China), neither the former Soviet Union nor Russia have ever explicitly or officially used the terms "historic waters," "historic titles," or "historic rights" to make this claim.224 Instead, they have used unique terminology, such as "historically belonging to the U.S.S.R." and "historic national transport line," to claim that at least certain waters of the NSR are "historic" or "national."[225] For example, in 1960, the Soviet Union adopted a new law entitled "Statute on the Protection of the State Border of the U.S.S.R." which provided that "internal sea waters of the U.S.S.R. shall include …. waters of bays, inlets, coves, and estuaries, seas and straits, *historically belonging to the U.S.S.R.*."[226] The current Russian government has adopted several laws that confirm the status of the NSR as Russia's "historic national transport line."[227] From the perspective of international law, such language is highly ambiguous and calls for clarification.

Furthermore, except for a few bays[228] and straits,[229] Russia has not specified the *scope* of its historic waters in the Arctic Ocean. Many Soviet and

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[223] Federal Law on Amendments to Certain Legislative Acts of the Russian Federation concerning State Regulation of Merchant Shipping on the Water Area of the Northern Sea Route, No. 132-FZ, FEDERAL STATE BUDGETARY INSTITUTION (July 28, 2012), http://www.nsra.ru/en/ofitsialnaya_informatsiya/zakon_o_smp.html [emphasis added].

[224] Sean Fahey, *Access Control: Freedom of the Seas in the Arctic and the Russian Northern Sea Route Regime*, 9 HARV. NAT'L SEC. J. 154, 171 (2018).

[225] *Id.*

[226] U.S.S.R., Statute on the Protection of the State Boundary of the U.S.S.R. (adopted Aug. 5, 1960), art.4, reprinted in NEW S. HOUSTON LAY ET AL., NEW DIRECTIONS IN THE LAW OF THE SEA 30 (S. Houston Lay et al.eds., Vol. I, 1973).

[227] *See, e.g.* Gavrilov*, supra* note 222; *Information about the Comprehensive Project for the Development of the Northern Sea Route*, RUSSIAN GOVERNMENT (June 8, 2015), http://government.ru/orders/selection/405/18405/.

[228] In 1957, the Soviet Union claimed the Bay of Peter the Great in the Sea of Japan as an historic bay. The 1985 Decree declared that:

the waters of the White Sea, south of the line connecting Cape Svyatoy Nos with Cape Kanin Nos, the waters of Cheshskaya/Bay south of the line connecting Cape Mikulkin with Cape Svyatoy/Nos (Timansky), and the waters of Baidaratskaya Bay south-east of the line connecting Cape Yuribeisalya with Cape Belushy Nos are, *as waters historically belonging to the USSR*, internal waters. "List of Geographic Coordinates of Points that Determine the Position of the Straight Baselines from Which the Breath of the Territorial Sea, Economic Zone and Continental shelf of the U.S.S.R. Off the Continental Coast and Islands of the Arctic Ocean, the Baltic and Black Seas," approved by the Resolution of the Council of Ministers of the U.S.S.R., UNITED NATIONS, (Jan. 15, 1985), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1985_Declaration.pdf. [hereinafter *1985 Decree*] [emphasis added].

[229] In 1966, the Soviet naval international law manual claimed the Dmitrii Laptev and Sannikov straits as "historic straits." The statement was reproduced in PHARAND, *supra* note 216, at 109-10.

Russian scholars have claimed that various waters are historic waters of the U.S.S.R. and Russia.230 These maritime areas include the Siberian seas (Kara, Laptev, East Siberian and Chukchi Seas) and the straits connecting these seas (Vilkitski, Sannikov, Dimitri Laptev, and De Long Straits). Nevertheless, as noted by Donald R. Rothwell, "while the position of the previous USSR and Russia over 'historic waters' in the Arctic has been reserved, there [had] been no official attempt to assert such a claim over the various seas which make up the [NSR]"[231] for a long time. However, Russia has very recently amended its Federal Law on Internal Sea Waters, Territorial Sea and Contiguous Zone of the Russian Federation which officially codified Russia's claim that four major straits (Kara Gate, the Vilkitski Strait, Sannikov strait, and Dimitri Laptev Strait) of the Northeast Passage are *internal waters* (*see Figure 3).*[232]

In addition, Russia claims that it has obtained the acquiescence of other countries concerning its Arctic strait regime.[233] In contrast, in the view of the United States, the NSR is an international strait connecting two high seas, making transit open and free to all ships with the right of transit passage.[234] Thus, the US has strongly disagreed with the declarations by the Soviet Union and Russia of internal water status for certain Arctic straits encompassed within the NSR.[235] However, the US has never conducted a Freedom of Navigation operation (FONOP), at least not openly and on the surface, in the NSR.[236] Except the US, no other countries have openly protested Russia's control over the NSR.[237]

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230 For an overview of the opinions of Soviet jurists on Soviet historic waters, *see* WILLIAM E. BUTLER, NORTHEAST ARCTIC PASSAGE 82-87 (Alphen aan den Rijn, Sijthoff and Noordhoff 1978).

231 DONALD R. ROTHWELL, THE POLAR REGIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW 209 (Cambridge University Press 1996).

232 *Federal Law of 31 July 1998 N 155-FZ on Internal Sea Waters, Territorial Sea, and Contiguous Zone of the Russian Federation*, RUSSIAN MARITIME STUDIES INSTITUTE (Feb. 1, 2023) https://dnnlgwick.blob.core.windows.net/portals/0/NWCDepartments/Russia%20Maritime%20Studies%20Institute/1998Law_Amendments_ENG_RUS_FINAL.pdf?sv=2017-04-17&sr=b&si=DNNFileManagerPolicy&sig=iI64NzYwxyzNDmxV44hOnjMfqXgDSgyxN37CnfCufpU%3D (translated by Anna Davis).

233 Fahey, *supra* note 224, at 196.

234 *Diplomatic Note from the Government of the United States to the Government of the Russian Federation regarding the Northern Sea Route Regulatory Scheme, in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 526-28 (CarrieLyn D. Guymon ed., 2015).

235 *Id.*

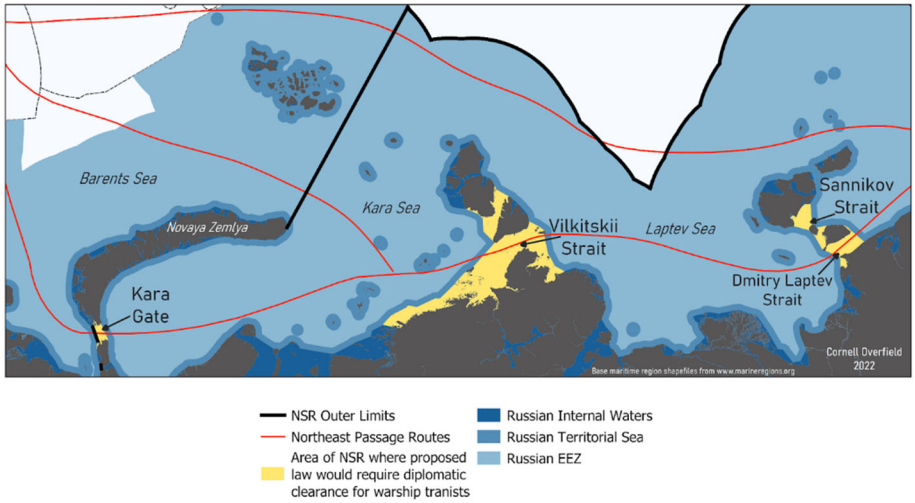
236 Fahey, *supra* note 224, at 196.

237 Gavrilov, *supra* note 222, at 260.

It is worth noting that, in 2018, a French Navy's vessel "unexpectedly" transited the NSR, starting in Tromsø, Norway, 1 September and ending in Dutch Harbor, Alaska, on 17 September. Soon after, in November 2018, Russia declared that it plans to introduce a notification-based procedure for passage along the NSR for foreign warships. For a further discussion, *see* Andrey

Finally, Russia has also established straight baselines along its coast in the Arctic Ocean, including those surrounding its archipelagos.238 The 1985 Decree on Baselines specified that Russia's territorial waters, EEZ and continental shelf are measured from the established straight baselines.[239] However, unlike Canada, Russia did not establish these straight baselines to delineate Russia's "historic waters."[240]

FIGURE 3: NSR AREAS OF EFFECT FOR 2023 FEDERAL LAW ON INTERNAL WATERS, TERRITORIAL SEA AND CONTIGUOUS ZONE OF THE RUSSIAN FEDERATION



Source: Cornell Overfield, Wrangling Warships: Russia's Proposed Law on Northern Sea Route Navigation, LAWFARE (Oct. 17, 2022), https://www.lawfareblog.com/wrangling-warships-russias-proposed-law-northern-sea-route-navigation.

Todorov, *Where does the Northern Sea Route Lead to?* RUSSIAN INTERNATIONAL AFFAIRS COUNCIL (Mar. 18, 2019), https://russiancouncil.ru/en/analytics-and-comments/analytics/where-does-the-northern-sea-route-lead-to/.

238 TULLIO SCOVAZZI, THE BASELINE OF THE TERRITORIAL SEA: THE PRACTIVE OF ARCTIC STATES, *in* THE LAW OF THE SEA AND POLAR MARITIME DELIMITATION AND JURISDICTION 69, 81-83 (Alex G. Oude Elferink & Donald R. Rothwell eds., 2001).

239 1985 Decree, *supra* note 228.

240 Jan Jakub Solski, *Navigational Rights of Warships Through the Northern Sea Route (NSR): All bark and No Bite?,* NCLOS BLOG (May 31, 2019), https://site.uit.no/nclos/2019/05/31/navigational-rights-of-warships-through-the-northern-sea-route-nsr-all-bark-and-no-bite/.

3. The Implications of the SCS Arbitration Award for Historic Claims in the Arctic Ocean

In sum, despite their ambiguities, the historic claims in the Arctic Ocean are different from China's historic claims in the SCS in many aspects. First, unlike China's historic claims in the SCS, the sovereignty over maritime features within the NWP and NSR waters is settled. For instance, all the "islands" of the Arctic Archipelago are Canada's territory. Second, geographically speaking, the historic waters that Canada claims are located to the north of its coastline.[241] Similarly, the "historic" maritime areas that Russia claims are closely located to its northern coastline. However, the historic maritime area that China claims in the SCS is located far off its mainland.[242] Furthermore, although both Canada and China officially invoke historic grounds to claim sovereignty and sovereign rights over extensive waters in the Arctic Ocean and the SCS, their approaches and the nature of the claimed waters are very different. Canada has clearly stated that the Arctic Archipelago waters are its "historic *internal* waters." Thus, Canada claims to enjoy *full sovereignty* in the waters, including the control of the NWP. Canada has established straight baselines around the Canadian Arctic Archipelago to define the outer limit of its "*historic waters*." In the SCS, China has linked the "nine-dash line" to define and support its historic titles and historic rights claims. However, the line seems not intended to assert "historic waters" over the entire water area.[243] In other words, China does not consider the water areas within the nine-dash line to be equivalent to its territorial sea or internal waters.[244] Rather, China seems to claim exclusive historic rights short of sovereignty to the resources within the line.[245] In addition, although China has established straight baselines around the Paracel Islands and intends to establish straight baselines over the Spratly Islands, these baselines are not intended to support any "historic waters" claims either. Lastly, Canada has particularly formed the basis of its historic title claim on Inuit People's habitation of the North.[246] With respect to China's historic claims in the SCS, the issue of indigenous peoples is irrelevant.

Despite the above differences, the findings and the approach that were adopted by the SCS Arbitration Tribunal on China's "historic rights" claim in the SCS have substantial implications for assessing the legality of Canada and

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241 Singh & Koivurova, *supra* note 5, at 387.

242 *Id.*

243 Award, *supra* note 18, at 91.

244 *Id.*

245 *See Id*. at 114.

246 *See* discussion *supra* Part IV.A.1.

Russia's historic claims in the Arctic Ocean. First, as clarified and reaffirmed by the SCS Arbitration Tribunal, the legal requirements for establishing a historic title (full of sovereignty) or a historic right (short of sovereignty) under the law of the sea should be the same.247 Thus, the "historic waters" claims in the Arctic should also pass the three-element test for forming a historic title or historic right (i.e., the exercise of authority, the continuity of the exercise of authority, and the acquiescence of other states). However, as analyzed by Krittika Singh and Timo Koivurova, it is hard for Canada to satisfy the three-element requirement regarding its historic waters claim in the Arctic.[248]

Furthermore, as discussed previously, instead of taking the orthodox three-element approach to examine each factor of historic rights in the case, the SCS Arbitration Tribunal adopted a "high seas freedom" approach to China's historic rights claim in the SCS. The Tribunal ruled that "[f]or much of history …. China's navigation and trade in the [SCS], as well as fishing beyond the territorial sea, represented the exercise of high seas freedoms."[249] "[T]he exercise of freedoms permitted under international law cannot give rise to a historic right; it involves nothing that would call for the acquiescence of other States and can only represent the use of what international law already freely permits."[250] This "high seas freedom" approach could have considerable impact on Canada's historic maritime claims in the Arctic, especially regarding its argumentation based on the use and occupation of the sea ice by the Inuit People in the area. Specifically, the Canadian Government has highlighted that the sea ice in the Arctic Archipelago has been used from "time immemorial" by Canadian Inuit People in their everyday activities the same way as they had been using the land.[251] From this perspective, it may be argued that the Inuit People acquired a "historic title" or an "original title" over the waters (and sea ice) before the arrival of the Europeans, and subsequently transferred it to Canada.[252] However, as noted by Michael Byers and Suzanne Lalonde, to succeed with this argument, Canada would have to prove: (1) Arctic sea ice can be subject to occupancy and appropriation like land; (2) indigenous peoples can acquire and transfer sovereign rights under

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247 Award, *supra* note 18, ¶265.

248 *See* Singh & Koivurova, *supra* note 5, at 23.

249 Award, *supra* note 18, ¶269.

250 *Id.* ¶268.

251 *Supra* note 212.

252 *See* Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada as Amended, (May 25, 2018), art 15.1.1(c), https://www.tunngavik.com/documents/publications/LAND_CLAIMS_AGREEMENT_NUNAVUT.pdf ("Canada's sovereignty over the waters of the arctic archipelago is supported by Inuit use and occupancy").

international law; and (3) indigenous rights holders ceded such rights.[253] In particular, with respect to the first two component issues, in light of the SCS Arbitration Tribunal's "high seas freedom" approach, can it be argued that Canadian Inuit People's historical activities in the Arctic Ocean also represented the exercise of "high seas freedoms,"[254] which predated the imposition of Crown sovereignty in the region? [255] Lastly, whereas aboriginal titles and rights to exploit marine resources for living or commercial purposes should be recognized under the law of the sea, there is a question of whether such titles or rights are exclusive or non-exclusive in nature.[256]

All in all, the SCS Arbitration award demonstrated that the use of the legal concept of historic titles and historic rights has kept diminishing in recent years.[257] As noted by Yoshifumi Tanaka, the role of the "historical" element was "reduced almost to a vanishing point" in the SCS Arbitration.[258] The SCS Arbitration Tribunal's unique "high seas freedom" approach to the issue of HTHRs in the law of the sea could bring significant challenges for Canada (and Russia) to present their historical evidence and prove their historic claims in the Arctic Ocean.

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253 Byers & Lalonde, *supra* note 217, at 1156.

254 In this regard, it is worth noting that there has been increasing but still limited attention to indigenous or aboriginal titles and rights to sea spaces, especially through the lens of critical approaches to international law. As some scholars have noted, European law espoused a strict freedom of the seas approach and indigenous peoples were excluded from Eurocentric forms of international law which denied their sovereignty and jurisdiction in the sea. *See generally* Endalew Lijalem Enyew, *Sailing with TWAIL: A Historical Inquiry into Third World Perspectives on the Law of the Sea*, CHINESE J. INTL L. 439, 456-60 (2022) (noting that the freedom of high seas principle gave European maritime powers free access to marine areas traditionally used by indigenous peoples, ignoring the latter's customary rights to the sea and its resources); *see also* Amiel Ian Valdez, *Balancing the Indigenous Peoples' Ancestral Sea Rights, and the State's Obligation to Protect and Preserve the Marine Environment: A Comparative Study of the Philippine and Australian Approaches*, 23 ASIA-PACIFIC J. HUM. RTS. & L. 47, 67 (2022) (arguing that the place of indigenous peoples in the state-centric UNCLOS is vague; Coastal states' sovereignty and sovereign rights in their maritime zones should be balanced under the relevant provisions of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and the International Covenant on Civil and Political Rights (ICCPR)).

255 *See generally* Nigel Bankes, *Modern Land Claims Agreements in Canada and Indigenous Rights with Respect to Marine Areas and Resources, in* THE RIGHTS OF INDIGENOUS PEOPLES IN MARINE AREAS 149 (Stephen Allen, et al., eds., 2019) (describes Canada's sovereignty and indigenous rights concerning marine areas and resources, including the Arctic Ocean).

256 For a further discussion on the exclusive or non-exclusive nature of indigenous people's rights in the sea, *See* Samantha Hepburn, *Native Title Rights in the Territorial Sea and Beyond: Exclusivity and Commerce in the Akiba Decision*, 34 (1) UNSW L. J. 159 (2011).

257 *See* Rob Huebert, *Climate Change and Canadian Sovereignty in the Northwest Passage, in* Canadian Arctic Sovereignty and Security: Historical Perspectives, Calgary Papers in Military and Strategic Studies, Occasional Paper No. 4, 383, 387 (P. Whitney Lackenbauer ed., 2011), https://journalhosting.ucalgary.ca/index.php/cpmss/issue/view/2442.

258 Tanaka, *supra* note 75, at 475.

B. The Status of Maritime Features in the Arctic Ocean

Second, as discussed in Part III, the SCS Arbitration Tribunal offered the first judicial interpretation of Article 121 of UNCLOS and thus shed much light on assessing the legal status of maritime features around the world. The Tribunal particularly explained the capacity of a maritime feature to sustain human habitation or has an economic life of its own in distinguishing a "rock" from an "island."[259] Its interpretation has a special relevance for the Arctic Ocean where many maritime features are not sustainable for human habitation or economic life of their own.[260]

On the other hand, as argued by Warwick Gullett, the future international courts or tribunals might wish to distinguish their decisions on factual grounds and adopt a broader interpretation of the provision in light of the different characteristics of the maritime feature under examination.[261] In this regard, Gullett particularly noted, but without further elaboration, that the characteristics of many remote high latitude insular features "may differ remarkably from" the small tropical features in the SCS.[262] As discussed in this article, for example, the human characteristics of the Arctic Ocean and the SCS are quite different. Many indigenous communities in the Arctic have long relied on the sea ice and Arctic maritime features for travel, hunting, and other activities.[263] Therefore, when assessing the status of some maritime features in the Arctic Ocean, the following findings of the SCS Arbitration Tribunal regarding Article 121 (3) of UNCLOS could also be highly relevant and influential: first, with respect to "human habitation," the Tribunal highlighted that:

> The term "human habitation" should be understood to involve the inhabitation of the feature by a stable community of people for whom the feature constitutes a home and on which they

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[259] *See supra* Part III.B.1.

[260] *See also* Finneran, *supra* note 5, at 310 (arguing that the SCS arbitration award on the maritime features has the potential to affect maritime entitlements to some of Canada's "islands" in the Arctic); Alex Oude Elferink, "*The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First*," NCLOS BLOG (Sept.7, 2016), https://site.uit.no/nclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/ (noting that the isolated islands in the polar regions, such as Jan Mayen, the Russian Islands of Henrietta and Jeannetta, Heard and MacDonald Islands or Bouvet Island, would likely to be categorized as rocks according to the SCS Arbitration ruling); Natalia Prisekina & Roman Dremliuga, *United Nation Convention on the Law of the Sea: Inevitable Way towards Revision to Overcome South China Sea Disputes*, 11 (18) ASIAN SOC. SCI. 274, 274 (2015) (noting that Russia has many "islands" in the Arctic that probably are not sustainable for habitation or economic life).

[261] Gullett, *supra* note 140, at 37.

[262] *See Id.*

[263] *See* Charlie Watt, *Inuit Rights to the Arctic*, LAWNOW (May 7, 2015), https://www.lawnow.org/inuit-rights-to-the-arctic/.

> can remain. *Such a community need not necessarily be large, and in remote atolls a few individuals or family groups could well suffice. Periodic or habitual residence on a feature by a nomadic people could also constitute habitation. . . . An indigenous population would obviously suffice*, but also non-indigenous inhabitation could meet this criterion if the intent of the population was truly to reside in and make their lives on the islands in question.[264]

Secondly, the Tribunal ruled that the capacity of a maritime feature should be assessed with "due regard" to the possibility for a group of small island feature to *collectively* sustain human habitation and economic life.[265] Lastly, the Tribunal emphasized that the assessment of maritime features should be on a "case-by-case basis."[266] Taken together, these considerations allow a wide room of discretion in future assessment of whether a particular maritime feature in the Arctic (and beyond) should be classified as an island or a rock.[267]

Overall, many coastal states should be mindful of the SCS Arbitration award when determining how they characterize the maritime features under their sovereignty.[268] As far as the Arctic Ocean is concerned, none of the Arctic states is known to have taken actions to change its practice following the SCS Arbitration outcomes with reference to their own maritime features and maritime entitlements in the Arctic Ocean. For example, Jan Mayen was recognized as an "island" by both the Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen[269] and the ICJ,[270] despite that it "has no settled population, as only 25 persons temporarily inhabit the island for purpose of their employment."[271]

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264 Award, *supra* note 18, ¶543 [emphasis added].

265 *Id.* ¶547.

266 *Id.* ¶546.

267 *See also* Schofield, *supra* note 5, at 341.

268 Gullett, *supra* note 140, at 37.

269 Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen: Report and Recommendations to the governments of Iceland and Norway, Decision of June 1981, 10, *available at* https://legal.un.org/riaa/cases/vol_XXVII/1-34.pdf.

270 *Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.)*, Judgement, I.C.J. 38 (June 14, 1993) (It is worth noting that the case was not decided under UNCLOS).

271 *Id*. ¶79; For an illustrative map of the 200nm EEZ of Jan Mayen, *see* U.S. DEP'T OF STATE, *Norway: Maritime Claims and Boundaries*, Limits in the Seas, No.148, (Aug. 28, 2020), at 27, https://www.state.gov/wp-content/uploads/2020/08/LIS148-Norway.pdf.

C. The Application of Archipelagic Straight Baselines in the Arctic Ocean

Furthermore, the SCS Arbitration award offers important insights into how to apply the archipelagic rules in the Arctic, particularly concerning the drawing of straight baselines around outlying archipelagos. As discussed earlier, the SCS Arbitration Tribunal made it clear that the archipelagic regime provided by UNCLOS only applies to archipelagic states, especially regarding the use of straight archipelagic baselines. As far as outlying archipelago is concerned, The Tribunal emphasized that Article 7 of UNCLOS provides for the application of straight baselines *only* in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity; These conditions do not include the situation of an offshore archipelago. Finally, the Tribunal held that there are no crystallized rules of customary international law regarding the drawing of straight baselines over outlying archipelagos.[272]

In the Arctic, several Arctic states have enclosed their outlying archipelagos with straight baselines.[273] For instance, as a non-archipelagic state, Canada established a straight baseline system to enclose the Arctic archipelago.274 Denmark established its straight baseline system enclosing the entirety of the Faroe Islands in 1963 (revised in 1979 and 2002).[275] Norway revised its straight baseline system around the Svalbard archipelago in 2001,[276] which enclosed a substantially larger portion of Storfjorden as internal waters.[277] None of these Arctic states has taken actions to alter its straight archipelagic baselines practice following the ruling of the SCS Arbitration.

D. Adjudicating the Arctic Maritime Disputes

Finally, as a landmark case of UNCLOS dispute settlement, the SCS Arbitration carries practical implications for how to adjudicate some Arctic

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272 *See supra* Part III.B.1.

273 *See supra* note 185.

274 *See supra* Figure 2.

275 The Ministry of Foreign Affairs of Denmark, *Decree on the Coming into Force of the Act on the Delimitation of the Territorial Sea for the Faroe Islands*, No. 240 (Apr. 30, 2002), https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/dnk_2002_order_and_decrees.pdf.

276 Ministry of Foreign Affairs of Norway, *Regulations relating to the Limits of the Norwegian Territorial Sea around Svalbard*, Royal Decree of June 2001, https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_2001_DecreeTS.PDF.

277 For a further discussion of the straight baselines with respect to Svalbard, *see Den. v. Nor.,*1993 I.C.J. at 13-20.

maritime disagreements in international courts or tribunals. As noted by Robert Beckman, although Arctic states and non-Arctic actors have worked well together to establish cooperative regimes for the management of the Arctic Ocean, disputes still arise on how provisions of UNCLOS should be applied to maritime issues in the Arctic Ocean.[278] As summarized earlier, there exist several important maritime disputes and disagreements in the Arctic that require legal-based solutions.

However, many Arctic states' engagement with international third-party adjudication (including UNCLOS dispute resolution mechanism) has been complicated and uneasy. Under UNCLOS Part XV dispute settlement regime, most disputes between state parties on interpretation or application of UNCLOS provisions are subject to a system of compulsory procedures entailing binding decisions by an international court or international arbitral tribunal.[279] Which court or tribunal that has jurisdiction to hear a given dispute is determined by whether the states parties to the dispute have elected to declare officially which court or tribunal they prefer.[280] With respect to Arctic maritime disputes, for example, Canada and Russia have made declarations to exclude disputes on the interpretation or application of the provisions of UNCLOS on all categories of disputes stated in Article 298 (1) of UNCLOS, including disputes concerning *historic bays or titles*.[281] In the Arctic Sunrise Arbitration,[282] Russia also declined to appear in the proceedings.[283]

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278 Robert Beckman, *UNCLOS Dispute Settlement Regime and Arctic Legal Issues, in* CHALLENGES OF THE CHANGING ARCTIC 573, 573 (Myron H. Nordquist et al. eds., 2016).

279 UNCLOS, art. 286 & art. 288 (1).

280 According to Article 287 of UNCLOS, when signing, ratifying, acceding or at any time thereafter, a state shall be free to choose, by means of a written declaration, one or more of the following four procedures concerning the interpretation or application of the Convention: 1) the International Tribunal for the Law of the Sea (ITLOS); 2) the ICJ, 3) an Arbitral Tribunal established in accordance with Annex VII of UNCLOS, and 4) a Special Arbitral Tribunal established in accordance with Annex VIII of UNCLOS, art. 287(1).

281 The Government of Canada, *Declaration Made upon Ratification* (Nov. 7, 2003), https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en; Russian Federation, *Declaration Made upon Ratification*, reprinted in UN Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, Law of the Sea Bulletin No. 34 (1997), at 9, https://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletinE34.pdf.

282 The Arbitration was brought by the Netherlands before an ad hoc Tribunal pursuant to Annex VII of UNCLOS in October 2013 regarding the legality of the detention of the Arctic Sunrise and its crew by Russia. The Arctic Sunrise Arbitration (Neth. v. Russ.), 32 R.I.A.A. 183,191(Perm. Ct. Arb. 2014), ¶9, https://pcacases.com/web/sendAttach/1325.

283 *See generally* Otto Spijkers, *Non-participation in Arbitral Proceedings Under Annex VII United Nations Convention on the Law of the Sea: Arctic Sunrise and South China Sea Compared, in* INTERPRETATIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA BY INTERNATIONAL COURTS AND TRIBUNALS 171 (2019) (noting that the procedural issue of non-participation in the SCS Arbitration is in many ways similar to the Arctic Sunrise proceedings); Chao Zhang & Yen-Chiang Chang, *Russian Absence at the Arctic Sunrise Case:*

Furthermore, Norway's obligations under the Svalbard Treaty have long been controversial. The Svalbard Treaty (also known as the "Spitsbergen Treaty") was signed on 9 February 1920 and entered into force on 14 August 1925.[284] It recognizes the full and absolute sovereignty of Norway over the archipelago of Svalbard while limits the sovereignty by granting the parties to the treaty equal enjoyment and "liberty of access" rights on Svalbard and in its "*territorial waters*."[285] Many parties have found that Norway has not in all respects complied with its obligations under the Svalbard Treaty, especially concerning the rights of non-Norwegians and Norway's administrative and regulatory measures in the sea adjacent to Svalbard.[286] For example, Norway established a 200 nautical miles Svalbard Fisheries Protection Zone (SFPZ) around Svalbard in 1977, which has created numerous disputes with Russia and other parties regarding the living resources in the area.[287] In recent years, many marine species, such as Atlantic mackerel and the snow crab, have shifted their distributions northward to the Arctic Ocean (including the Svalbard area) in response to increasing ocean temperatures.[288] These changes in marine resource distribution and migration could significantly impact the already contested SFPZ in the region.[289] Moreover, the European Union (EU)[290] and many other states strongly disagree with Norway about the application of the non-discriminatory access provisions of the Svalbard Treaty to the *continental shelf* around Svalbard, particularly regarding its snow crab access (known as the "snow crab dispute").[291] However, the Treaty does not provide any dispute settlement mechanisms.

A Comparison with the Chinese Position in the South China Sea Arbitration, 8 J. E. ASIA & INT'L L. 413 (2015).

284 Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British Overseas Dominions and Sweden Concerning Spitsbergen Signed in Paris 9th February 1920, http://library.arcticportal.org/1909/1/The_Svalbard_Treaty_9ssFy.pdf.

285 *Id.* arts. 2&3.

286 Øystein Jensen, *The Svalbard Treaty and Norwegian Sovereignty*, 11 ARCTIC REV. L. & POL. 82, 93 (2020).

287 *See generally* Andreas Østhagen, *Managing Conflict at Sea: The Case of Norway and Russia in the Svalbard Zone*, 9 ARCTIC REV. L. & POL. 100 (2018).

288 *See generally* Jørgen Berge et al., *Frist Records of Atlantic Mackerel (Scomber scombrus) from the Svalbard Archipelago, Norway, with Possible Explanations for the Extension of Its Distribution*, 68 (1) ARCTIC 54 (2015).

289 Elizabeth Nyman & Rachel Tiller, *'Is there a Court that Rules Them All'? Ocean Disputes, Forum Shopping and The Future of Svalbard*, 113 (103742) MARINE POL'Y 1, 2 (2020).

290 While the EU is not a party to the Svalbard Treaty, several of its member states are, such as Latvia.

291 *See generally* Valentin J. Schatz, *The Snow Crab Dispute on the Continental shelf of Svalbard: A Case-Study on Options for the Settlement of International Fisheries Access*

In light of the SCS Arbitration Tribunal's approach and findings, this article submits that it is possible to utilize UNCLOS dispute resolution mechanism to resolve some Svalbard-related maritime disputes[292] in the future. First, other state parties to UNCLOS could innovatively frame the Svalbard-related disputes, such as the snow crab dispute, as a dispute concerning the interpretation or application of UNCLOS, *or* a dispute concerning interaction of UNCLOS with another international law.[293] In this regard, it is particularly worth noting that the SCS Arbitration Tribunal ruled that "[a] dispute concerning the interaction of the Convention with *another* instrument or body of law, including the question of whether rights arising under another body of law were or were not preserved by the Convention, is *unequivocally* a dispute concerning the interpretation and application of the Convention."[294] Moreover, unilateral submission of a maritime dispute to an UNCLOS dispute settlement mechanism has become a normal and acceptable practice in recent years.[295] As confirmed in the SCS arbitration, the non-participation of a party does not constitute a bar to the proceedings nor deprive a tribunal's jurisdiction.[296] However, a tribunal "must satisfy itself not only

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Disputes, 22 INT'L COMTY. L. REV. 455 (2020) (examining options for adjudicating EU/Norway snow crab dispute over the continental shelf of Svalbard).

[292] As discussed in this article, the Svalbard-related maritime disputes encompass two key sets of disputes and disagreements: (1) Norway's current straight baseline systems for the Svalbard archipelago, and (2) the geographical scope and application of the Svalbard Treaty. With respect to the first issue, as noted by Robert Beckman, a dispute on the interpretation or application of Article 7 of UNCLOS on the use of straight baselines would be subject to UNCLOS compulsory procedures. Beckman, *supra* note 278, at 578.

[293] For example, as argued by Valentin J. Schatz, the snow crab dispute could concern the interpretation and application of Article 78 (2) of UNCLOS. Schatz, *supra* note 291, at 464. Also, as ruled by the Chagos Marine Protected Area Arbitration Tribunal, the continental shelf (Article 78 (2)) has "the effect that States will exercise their rights under the Convention subject to, or with regard to, the rights and duties of other States or *rule of international law beyond the Convention itself*." *Chagos Marine Protected Area Arbitration* (Mauritius v. UK), Perm. Ct. Arb. Case No. 2011-03, Award of March 18, 2015, ¶503, https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf [emphasis added]. Moreover, whether snow crab is qualified as a "sedentary species" under Article 77(4) of UNCLOS remains a controversial issue.

But see Tore Henriksen, *Snow Crab in the Barents Sea: managing a Non-native Species in Disputed Waters*, 11 ARCTIC REV. L. & POL. 108, 123 (2020) (contending that UNCLOS dispute settlement procedures are not applicable to the snow crab dispute between Latvia and Norway because it is [only] related to interpretation and application of the Svalbard Treaty); Robin Churchill & Geir Ulfstein, *The Disputed Maritime Zones around Svalbard, in* CHANGES IN THE ARCTIC ENVIRONMENT AND THE LAW OF THE SEA 589 (2010) (arguing that the UNCLOS dispute resolution mechanism applies only to disputes concerning the interpretation and application of UNCLOS and does not cover disputes concerning the Svalbard Treaty).

[294] Award on Jurisdiction, *supra* note 133, ¶168 [emphasis added].

[295] Hao Duy Phan & Lan Ngoc Nguyen, *The South China Sea Arbitration: Bindingness, Finality, and Compliance with UNCLOS Dispute Settlement Decisions*, 8 ASIAN J. I. L. 36, 49 (2018).

[296] Award on Jurisdiction, *supra* note 133, ¶12 &¶413.

that it has jurisdiction over the dispute but also that the claim is well founded in fact and law" according to Article 9 of Annex VII of UNCLOS.[297] In the SCS Arbitration, by compelling China to arbitrate, the Philippines took a significant step that helped clarify many important legal issues in the SCS and the law of the sea.[298] In addition, in both the Arctic Sunrise Arbitration and the SCS Arbitration, non-participation in the arbitration proceedings led to a complete defeat of the non-appearing state.[299] Lastly, it may be noted that Norway accepts the compulsory jurisdiction of the International Court of Justice (ICJ) under the Article 36(2) of the Statute of the Court.[300] Norway would have no problem with appearing in the Court[301] if other state parties to the Svalbard Treaty bring a dispute before the ICJ.[302]

Finally, the SCS Arbitration has special implications for the United States in terms of its non-ratification of UNCLOS[303] and the protection of its Arctic interests. The US has been a loud dissenter regarding many Arctic maritime disputes. For example, the US has long asserted that the NWP and NSR are international straits.[304] However, given that it is not a party to UNCLOS, the US cannot utilize any UNCLOS dispute resolution mechanism to serve its Arctic interests.305 Moreover, it is also challenging for the US to make a formal submission to the Commission on the Limits of the Continental Shelf (CLCS) to support its extended continental shelf claim in the Arctic Ocean.[306]

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297 UNCLOS, Annex VII. Arbitration, art. 9.

298 Je'an-Luc Hebert, *The South China Sea Arbitration Award and Its Widespread Implications*, 19 OR. REV. INT'L L. 289, 313 (2018).

299 Spijkers, *supra* note 283, at 187.

300 Norway, *Declarations Recognizing the Jurisdiction of the Court as Compulsory* (June 24, 1996), https://www.icj-cij.org/declarations/no.

301 Personal communication with Timo Koivurova, an Arctic law expert at University of Lapland Arctic Center (Apr. 28, 2023).

302 *See* Schatz, *supra* note 291, at 465-68 (noting that Latvia, as a party to the Svalbard Treaty, could bring a case before the ICJ); Henriksen, *supra* note 293, at 123 (noting that Latvia filed a declaration under Article 36 of the ICJ Statute recognizing the compulsory jurisdiction of the Court in 2019).

303 The US is a non-party to UNCLOS but accepts the normative provisions of UNCLOS as customary international law. Bernard Gwertzman, *U.S. Will Not Sign Sea Law Treaty* (July 10, 1982), N.Y. TIMES, at A5.

304 Jacques Hartmann, *Regulating Shipping in the Arctic Ocean: An Analysis of State Practice*, 49 (3) OCEAN DEV. & INT'L L. 276, 292 (2018).

305 *See* Marta Kolcz-Ryan, *An Arctic Race: How the United States' Failure to Ratify the Law of the Sea Convention Could Adversely Affect Its Interests in the Arctic*, 35 U. DAYTON L. REV. 149, 172-73 (2009) (discussing various UNCLOS dispute settlement options available to the United States to enforce its rights in the Arctic).

306 The United States has been preparing the necessary documentation to establish its outer continental shelf limits in the Arctic Ocean and elsewhere through the U.S. Extended Continental Shelf (ECS) Project. *See* U.S. DEP'T OF STATE, *Missions and Data - U.S. Extended*

Taken together, although some Arctic maritime disputes are arguably excluded from the UNCLOS compulsory dispute settlement mechanism, many Artic maritime claims and state practices could be properly assessed by international third-party adjudication.[307]

V. CONCLUSION

This article has revisited some key maritime disputes and disagreements in the Arctic Ocean in light of the South China Sea Arbitration ruling. It argues that the SCS Arbitration award is more than a "piece of paper" and has considerable legal implications for assessing and resolving maritime disputes in the Arctic, especially with respect to four issues: (1) the historic maritime claims in the Arctic Ocean, (2) the legal status and maritime entitlement of Arctic maritime features, (3) the application of straight baselines around outlying archipelagos in the Arctic Ocean, and (4) the adjudication of some Arctic maritime disputes in international courts or tribunals.

In doing so, this article particularly hopes to offer some critical insights into the existing opportunities and challenges for constraining maritime states' creeping claims in the sea. The SCS Arbitration demonstrated that weak states with limited control over their territories and resources have increasingly fought their battles in the court rooms of international tribunals.[308] This can prompt powerful states to clarify their claims and actions under international law.[309] The increasing judicialization of international law also provides good opportunities for international courts and tribunals to consider various contentious fundamental issues of global order and play important roles in developing international law.[310]

Continental Shelf Program, https://www.state.gov/missions-and-data-u-s-extended-continental-shelf-program/.

[307] In this regard, it is worth noting that a Latvian fishing company innovatively initiated an investor-State arbitration against Norway concerning the snow crab dispute under International Centre for Settlement of Investment Disputes (ICSID) in April 2020. *See* Peteris Pildegovics & SIA North Star v. Kingdom of Norway, ICSID Case No. ARB/20/11, Award (Dec.22, 2023), https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8394/DS19308_En.pdf.

[308] Iryna Marchuk, *Powerful States and International Law: Changing Narratives and Power Struggles in International Courts*, 26 U.C. DAVIS J. INT'L L. & POL'Y 65, 96 (2019).

[309] *Id*.

[310] *See generally* Andreas Follesdal & Geir Ulfstein, *International Courts and Tribunals: Rise and Reactions, in* THE JUDICIALIZATION OF INTERNATIONAL LAW: A MIXED BLESSING? 1 (Andreas Follesdal & Geir Ulfstein eds., 2018) (noting that the increasing judicialization of international relations has been regarded as a glimmer of more effective and legitimate global governance promoting peace, justice, community interests, and human rights); THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS (Theresa Squatrito et al. eds, 2018) (offering an interdisciplinary, well-researched overview of the performance and roles of international courts and tribunals in different issue areas); Armin von Bogdandy & Ingo Venzke, *International Judicial Institutions in International Relations: Functions, Authority and Legitimacy, in* ROUTLEDGE HANDBOOK OF INTERNATIONAL ORGANIZATION 461 (Bob

On the other hand, challenges abound. For instance, as discussed in this article, the SCS Arbitration award constitutes an authoritative decision on several important maritime issues under the law of the sea. The award turns seven this year. Yet to date, China has openly refused to be bound by it. Globally, many states have endorsed the SCS Arbitration award and called for China and the Philippines to abide by it. However, many of them have paid lip service to the decision. Take some Arctic states as examples.[311] As analyzed in this article, many maritime claims and state practices in the Arctic Ocean are arguably inconsistent with UNCLOS and the ruling of the SCS Arbitration. However, many Arctic states have not altered their practices in accordance with the SCS Arbitration award. As some observers have noted, the Arctic states' territorialization of the sea[312] in the Arctic Ocean resembles in part China's assertiveness in the SCS.[313] Acknowledging these creeping claims in the two regions would increase the possibility of a future international environment in which more portions of the global commons are cut off and controlled by individual states.[314] As far as the freedom of the seas is concerned, it is quite ironic that many American and Canadian scholars and practitioners have portrayed Russia, China, Iran, and others as threats to the freedom of the seas and accused them of not fulfilling their UNCLOS obligations on the one hand,[315] and on the other hand, applause their

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Reinalda ed., 2013) (discussing four main functions of the international judicial institutions: settling disputes, stabilizing normative expectations, making law, and controlling as well as legitimizing public authority); Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697 (1999) (noting that the multiplicity of international tribunals allows a great degree of exploration and experimentation, which can lead to improvement in international law).

311 Many of the Arctic states have been known as strong supporters of international law. *See* Mark A. Pollack, *Who Supports International Law and Why? The United States, the European Union, and the International Legal Order*, 13 (4) INT'L J. CONST. L. 873 (2014) (noting that the EU and European countries have been seen as strong supporters of international law); Elizabeth Riddell-Dixon, *Canada's Human Security Agenda: Walking the Talk?* INT'L J. 1067, 1078 (2005) (arguing that Canada has a reputation for being a strong supporter of international law).

312 According to Edyta Roszko, the term "maritime territorialization" refers to the process in which states treat the sea as "land" and transform it into state territory. Edyta Roszko, *Maritime Territorialisation as Performance of Sovereignty and Nationhood in the South China Sea*, 21 (2) NATIONS & NATIONALISM 230, 239 (2015).

313 *See, e.g.,* Christopher R. Rossi, *Norway's Imperiled Sovereignty Claim over Svalbard's Adjacent Waters*, 18 GERMAN L. J. 1497, 1506 (2017) (arguing that Norway's strategy for securing its Arctic interests resembles in part China's sovereignty claims in the SCS).

314 *See* Jeff Becker, *How to Stop China Completing Its Takeover of the South China Sea*, AUSTRALIAN STRATEGIC POLICY INSTITUTE (ASPI) (July 21, 2020), https://www.aspistrategist.org.au/how-to-stop-china-completing-its-takeover-of-the-south-china-sea/.

315 *See, e.g.,* J Ashley Roach, *Freedom of the seas in the Arctic Ocean, in* THE ARCTIC AND WORLD ORDER 226 (Kristina Spohr, et al., eds., 2021) (discussing China and Russia's hypocrisies in terms of UNCLOS); Captain Todd Bonnar, MSC, CD, *Opinion: Maritime*

"agreement to disagree" on many important maritime legal issues[316] given the countries' "premier partners" relationship.[317] These double-standard approaches to international law are not new to many states but constitute a significant challenge in constraining state's creeping claims in the sea. As commented by Sondra Faccio, "if a number of States have paid lip service to the [SCS Arbitration] Award, none is known to have taken concrete actions to change its practice …. This won't certainly persuade China to comply with the Award."[318] Last but not least, further research should be done to supplement the discussion herein from perspectives of critical approaches to international law.[319] It is fair to say that some challenges and obstacles in constraining maritime states' territorialization in the sea may arise from UNCLOS itself.[320] The existing and future maritime battles emerge not only

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Freedom & the Global Commons, MARINELINK (Mar. 18, 2020), https://www.marinelink.com/news/opinion-maritime-freedom-global-commons-476727 (Alarming that nations such as Iran, China, and Russia are seeking to consolidate power and redefining international maritime norms).

316 For example, the US and Canada have "agreed to disagree" over the status of the Northwest Passage for decades. *See* Agreement Between the Government of Canada and the Government of the United States of America on Arctic Cooperation, Can.-U.S., Jan.11, 1988, T.I.A.S.11565, https://treaties.un.org/doc/publication/unts/volume%201852/volume-1852-i-31529-english.pdf.

317 *See* Suzanne Lalonde, *The U.S.-Canada Northwest Passage Disagreement: Why Agreeing to Disagree Is More Important than Ever, in* THE ARCTIC AND WORLD ORDER 267 (Kristina Spohr et al., eds., 2021).

318 Sondra Faccio, *"Human Habitation or Economic Life of Their Own": The Definition of Features Between History, Technology and the Law*, 42 LIVERPOOL L. REV. 15, 30-31 (2021).

319 In recent years, critical international law has become increasingly influential in the discourse on international law. Under the umbrella term of "critical approaches to international law," international legal scholars have used a broad range of methodologies to address different but interrelated failings perceived in contemporary international law, such as imperialism, poverty, and gender biases. For instance, Third World Approaches to International Law (TWAIL) refers to the international legal scholarship and an intellectual movement encompassing all scholarships that have advocated for a postcolonial approach to international law. Fourth World Approaches to International Law (FWAIL) refers to the scholarship examining indigenous people's struggles for their rights and interests under international law. For further discussions, *see generally* Chidi Anselm Odinkalu, *Re-Examining Third World Approaches to Decolonizing International Law (TWAIL)*, 46 FLETCHER F. WORLD AFF.157 (2022); Hiroshi Fukurai, *Fourth World Approaches to International Law (FWAIL) and Asia's Indigenous Struggles and Quests for Recognition under International Law*, 5 ASIAN J. L. S. 221 (2018); B. S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES (2017).

320 *See, e.g.,* Carina Radler, Decolonizing the UNCLOS? The Areas of Exclusive Economic Zones and Common Heritage of Mankind Under Review (Sept. 2021) (M.A. thesis, American University of Beirut), https://scholarworks.aub.edu.lb/handle/10938/23017 (discussing the extent to which the UNCLOS is a "colonial legal instrument" supporting economic interests rather than equal development and independency); Valdez, *supra* note 254, at 78 (noting that, as a state-centric treaty, UNCLOS only provides that sovereignty over internal, territorial and

between weak states and power states, but also between the Global North and South, as well as between national governments and indigenous maritime peoples around the world.

archipelagic waters is vested with the coastal *state*; it mentions neither the rights of indigenous peoples nor their participation).