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## An International Commission of Inquiry for the South China Sea?

Ryan Mitchell

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# An International Commission of Inquiry for the South China Sea?: Defining the Law of Sovereignty to Determine the Chance for Peace

Ryan Mitchell\*

## ABSTRACT

*The multilateral territorial dispute over the South China Sea has intensified in recent years. In response, some observers endorse the apparent turn to “lawfare” on display in the ongoing Philippines v. China arbitration, conducted under Annex VII of the UN Convention on the Law of the Sea (UNCLOS). Yet the limited subject matter of this arbitration means that it can contribute only modestly to any ultimate resolution between claimants. Indeed, the Chinese side has argued against tribunal jurisdiction precisely on the basis of the primacy of questions over territorial sovereignty—which are barred from UNCLOS proceedings—to the determination of all other legal issues being contested between the parties.*

*This Article assesses the merits of these and other major objections to the UNCLOS arbitration and proposes a supplemental legal mechanism: an international Commission of Inquiry (COI) by involved states, addressing French, Japanese, and other extra-regional states’ now inactive claims regarding the sovereign status of the region’s various island territories through the end of World War II hostilities in 1945. Such a COI would acknowledge, as the UNCLOS arbitration does not, the centrality of the legal issue of territorial sovereignty to the dispute. Yet by limiting its findings to the islands’ contested status during the period of European and Japanese colonialism in Asia, rather than determining current ownership, a COI could nonetheless avoid exacerbating tensions or alienating claimants.*

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Most importantly, such an approach could serve to establish a narrowed, but still ample, range of possible legal claims and outcomes for further adjudication. Claims based on “discovery” and “conquest” could at least potentially be ruled out, leaving only “cession”-based arguments (the implications of which are considerably less divisive, as they are premised on mutual recognition between equal states). A COI would also be based upon and contribute to a regional “epistemic community” of juridical expertise, furthering transnational civil society ties between claimant states. Finally, the positivistic discourse based on the principle of legal equality pursued by a COI as here proposed could, potentially, more generally dissuade unilateral behavior by individual states, while promoting mutual recognition and cooperative arrangements among regional actors.

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## I. INTRODUCTION

“[T]hey say that *justice is the constant will of giving to every man his own*. And therefore where there is no *own*, that is, no propriety [property], there is no injustice.”

- Thomas Hobbes, *Leviathan*, (1651)

“[The State of] Qi was once planning an attack on Lu. Lu dispatched Zigong to dissuade the men of Qi, but they replied: ‘Your words are eloquent enough. But what we want is territory, and that is the one thing you have not mentioned.’”

- Han Fei, *The Five Vermin*, (mid-3<sup>rd</sup> century B.C.)

There are at present two prevailing and opposing views on the best means by which the intensifying territorial disputes over the South China Sea may ultimately be resolved. These are, on one side, the position of the United States and its regional allies that sovereignty claims should be shelved in favor of the adjudication<sup>1</sup> of law of the sea issues under the 1982 UN Convention on the Law of the Sea (UNCLOS), usually accompanied by the general directive to promote peaceful joint development of the territories and to avoid disruption to a (presumably) non-sovereign status quo.<sup>2</sup> On the other side is the Chinese position that sovereignty claims—the idea that *some* state must own the territory in controversy and that this question is conceptually antecedent to any generalized international legal adjudication of rights or duties—should be resolved via bilateral

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1. A helpful introduction to the role of the ongoing *Philippines v. China* arbitration in the context of attempts to adjudicate the overall dispute on a multilateral basis is provided in Robert C. Beckman, *The Philippines v. China Case and the South China Sea Disputes*, in *TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: NAVIGATING ROUGH WATERS* (Andrew Billo & Jing Huang eds., 2014).

2. See, e.g., Michael McDevitt, *The South China Sea: Assessing US Policy and Options for the Future*, CENTER FOR NAVAL ANALYSES OCCASIONAL PAPER, v–vii (2015) (“The United States takes no position on the relative merits of competing sovereignty claims” but “does consider establishing rule-based stability in the SCS to be an important U.S. national interest. This includes a peaceful, non-coercive resolution of disputes over sovereignty and maritime entitlements.”); POWER, LAW, AND MARITIME ORDER IN THE SOUTH CHINA SEA 63–71 (Tran Truong Thuy & Le Thuy Trang eds., 2015) (ebook).

negotiations between the various parties to the dispute.<sup>3</sup> The two sides have so far shown scant indication of compromise on this fundamental *dissensus*.<sup>4</sup>

This Article proposes a third alternative. Because the issue of territorial sovereignty is, in fact, central to the ultimate disposition of some legal issues in controversy (and is, as the Chinese side points out, outside of the scope of UNCLOS), there must be some legal process for the resolution of this question that is recognized by the parties to the dispute. At the same time, in order to ensure results that are viewed as legitimate by all parties, that give an adequate legal hearing to all relevant claims, and that ultimately promote peaceful cooperation between regional states and their increasing integration into a community bound by international law norms, bilateral negotiations should serve at most a supplementary role to legal adjudication.

Instead, an approach is called for by means of which the parties can at least eventually reach a practicable solution to the key issues in dispute, while agreeing on a set of procedural legal “rules fixed and announced beforehand”<sup>5</sup> rather than letting political exigencies or *realpolitik* considerations decide the issue of ownership (or, just as problematically, deciding unilaterally that the sovereignty issue must be ignored, a position that some see emerging in recent U.S.

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3. See, e.g., THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE 149–52 (Bing Bing Jia & Talmon Stefan eds., 2014); Henry Curtis, *Constructing Cooperation: Chinese Ontological Security Seeking in the South China Sea Dispute*, J. BORDERLANDS STUD., 1–13 (2015).

4. Use of the word *dissensus* here to describe the conflict evokes the thought of Jacques Rancière, who writes that “[d]issensus does not refer to a conflict of interests, opinions or values, but to the juxtaposition of two forms of the sensory implementation of collective intelligence.” JACQUES RANCIÈRE, DISSENSUS: ON POLITICS AND AESTHETICS 80 (Steve Corcoran ed., trans., 2010). As will be shown in this Article, the two sides’ difference over *legal frameworks* divides the way that the dispute can even be initially conceptualized via the deployment of *a priori* categories; in other words, the issue in controversy is not only whether or not a law has been broken but also *what set of norms* could even be relevant to the parties’ claims and what legal idiom could be used to formulate and communicate those claims. In terms of the overall structure of UNCLOS and its basic conception of a legal framework for international waters not commenting upon prior questions of underlying sovereign ownership, the long-running South China Sea dispute (in part over issues of ownership) implicates “how to deal with events that are heterogeneous to the established order.” *Id.* at 24. A related theoretical conception of how hypostatized “law” can fail to provide parties with even a mutual vocabulary for communication of perceived harms or rights is the “differend” as developed in FRANÇOIS LYOTARD, THE DIFFEREND: PHRASES IN DISPUTE xi (Georges Van Den Abbeele trans., 1988) (“As distinguished from a litigation, a differend [*différend*] would be a case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgment applicable to both arguments.”). See Part III, *infra*, for development of this point.

5. Cf. FRIEDRICH HAYEK, THE ROAD TO SERFDOM 110 (1944); see also Joseph Raz, *The Rule of Law and Its Virtue*, in LIBERTY AND THE RULE OF LAW 3, 5 (Robert L. Cunningham ed., 1979).

statements).<sup>6</sup> Assuming that claimants are not likely to simply abandon all territorial claims sans argument, at stake in finding a legal means to adjudicate these claims is the question as to whether such disputes can be “bracketed” within the framework of legal institutions.<sup>7</sup>

Complicating the effort to find such a solution is the fact that there are two different bodies of “international law” that apply to various issues under dispute: the law of sovereignty and the law of the sea.<sup>8</sup> Indeed, one virtue claimed for the ongoing UNCLOS arbitration, *Philippines v. China*,<sup>9</sup> is that it can serve to clarify and unite on a set of shared bases the positions of all those seeking to oppose China’s “nine-dashed line” (or “U-shaped line”) -based claims.<sup>10</sup> This goal, some assert, can be achieved by using several relatively well-defined and at least formally agreed-upon principles of maritime law, such as the size limits of continental shelf-based claims or Exclusive Economic Zones, to replace messy, volatile, and sometimes conceptually unclear arguments over territorial sovereignty.<sup>11</sup> In the words of one advocate of this model of maritime lawfare,

by emphasizing *just* the law of the sea in its attempts to promote a peaceful settlement, Washington can accomplish two objectives: first, it can improve the relationship of the smaller claimants with each other, paving the way to a more

6. See, e.g., Ben Blanchard, *China Says U.S. Trying to Influence Philippines' Sea Case*, REUTERS (July 24, 2015); see also discussion in Beina Xu, *South China Sea Tensions*, COUNCIL ON FOREIGN RELATIONS 14 (2014); Brendan Taylor, *The South China Sea Is Not a Flashpoint*, 37 WASHINGTON Q. 99 (2014) (discussing the conflict between China and the Philippines over the South China Sea in 2012).

7. For a useful overview of reasons for seeking such a framework, see generally Hayley Roberts, *Responses to Sovereign Disputes in the South China Sea*, 30 INT'L J. MARINE & COASTAL L. 199 (2015); Jonathan G. Odom, *How a “Rules-Based Approach” Could Improve the South China Sea Situation*, in PERSPECTIVES ON THE SOUTH CHINA SEA: DIPLOMATIC, LEGAL, AND SECURITY DIMENSIONS OF THE DISPUTE—A REPORT OF THE CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Hiebert et al. eds., 2014).

8. See, e.g., Mark E. Rosen, *Using International Law to Defuse Current Controversies in the South and East China Seas*, CENTER FOR NAVAL ANALYSES (2015) (discussing the survey of UNCLOS and its mechanism for maintaining the public order of the oceans, the stresses and issues with maintaining public order, and the dispute-settlement mechanisms); Sean Mirski, *How America Should Wage ‘Lawfare’ in the South China Sea*, NATIONAL INTEREST (June 4, 2015), <http://nationalinterest.org/feature/how-america-should-wage-lawfare-the-south-china-sea-13040?page=2> [<https://perma.cc/89Q4-25CC>] (archived Feb. 13, 2016) (discussing sovereignty law under UNCLOS).

9. Arbitration between Republic of Philippines v. People’s Republic of China, Permanent Court (Phil. v. China), Arbitration, 2013-19 (Jan. 2013).

10. A useful overview of the U-shaped line claim is provided in Keyuan Zou, *The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands*, INT'L J. MARINE & COASTAL L. 27, 27 (1999).

11. See, e.g. Mirski, *supra* note 8.

functional coalition against China, and second, it can illegitimate (sic) Beijing's attempt to dominate the entire South China Sea.<sup>12</sup>

Yet, as noted, the South China Sea dispute sits uneasily within the framework of UNCLOS arbitration. Since the Philippines launched its case against China in 2013,<sup>13</sup> China has adopted a policy of “no accepting and no participating,” due to its view that the Tribunal has no jurisdiction.<sup>14</sup> In large part, this position is based precisely on the argument that issues of territorial sovereignty—determining the legal ownership of specific territories, in this case, primarily the main island groups of the South China Sea—are both central to the dispute and outside the scope of UNCLOS. Indeed, the Tribunal has no power to rule on such questions, and the Philippines has admitted as much in its own submissions.<sup>15</sup> Nonetheless, it argued that there are a number of issues in dispute that UNCLOS can rule on that are separable from the issue of territorial sovereignty.<sup>16</sup>

The Tribunal ruled in November 2015 that it had jurisdiction to hear some of the Philippines' claims, while acknowledging its inability to consider the issues of sovereignty that lie outside its remit.<sup>17</sup> Yet, as will be argued below, this ruling leaves unaddressed,

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12. *Id.*

13. A helpful overview of the way that the arbitration is situated in the overall UNCLOS framework (and arguing that it is the best legal option from the Philippine perspective) is Emma Kingdon, *A Case for Arbitration: The Philippines' Solution for the South China Sea Dispute*, B.C. INT'L & COMP. L. REV. 38, 129–159 (2015). The normative claim advanced by this Article regarding *Philippines v. China*—that the sovereignty issues it ignores are central and require some legal consideration—is not necessarily in tension with views like that advanced by Kingdon. Rather, this Article seeks to acknowledge Chinese critiques based on jurisdiction and other factors, and to seek a supplemental legal approach that takes account of these varied viewpoints.

14. Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (December 7, 2014). Regarding China's “informal” participation in the dispute by use of such official statement, see, e.g., Mincai Yu, *China's Informal Participation in the Annex vii Philippines v. China Arbitral Tribunal's Proceedings*, 30 INT'L J. MARINE & COASTAL L. 54 (2015).

15. See Press Release, Arbitration Between the Republic of the Philippines and the People's Republic of China, Permanent Court of Arbitration, The Hague (July 13, 2015) (“The Philippines is not asking the Tribunal to rule on the territorial sovereignty aspect of its disputes with China.”).

16. For U.S. and European views generally in support of this idea, see MAJOR LAW AND POLICY ISSUES IN THE SOUTH CHINA SEA: EUROPEAN AND AMERICAN PERSPECTIVES (Yann-huei Song & Keyuan Zou eds., 2014).

17. For a summary, see, e.g., Jay Batongbacal, *Implications of the Philippines v. China Award on Jurisdiction*, ASIA MARITIME TRANSPARENCY INITIATIVE (November 5, 2015), <http://amti.csis.org/implications-of-the-philippines-v-china-award-on-jurisdiction/> [<https://perma.cc/5CHU-9LNV>] (archived Sept. 13, 2016). The Tribunal, in accepting jurisdiction, “accepted the Philippine formulation that the 15 claims submitted for judgement only concern the interpretation and application of UNCLOS, not the sovereignty disputes over the various maritime features dotting the South

though it may well affect, the underlying basis for the entire dispute between the parties. This Article seeks both to help clarify the relative strengths of the Chinese and Philippine arguments on jurisdiction as well as the potential enforceability and relevance of the forthcoming judgment on the merits, and to propose an *alternative* legal mechanism to resolve at least some of the fundamental issues left out of the present arbitration. As this Article will argue below, an international Commission of Inquiry (COI)<sup>18</sup> could be set up collaboratively by claimant states to determine sovereignty over the disputed territories from France's assertion of its claims in 1933 through 1945, when Japan (which by then claimed control over the entirety of the South China Sea) recognized defeat in the Second World War. As will be explained, a successful and mutually-recognized determination of this kind would serve to greatly clarify the legal issues involved in determining present ownership, and yet permit involved parties to continue pursuing their most legally persuasive claims. Though only an initial step towards resolving the question of ownership, a successful COI would deter extralegal, escalatory behavior by regional powers and promote the pursuit of recognized ownership in a shared idiom of legal discourse.

Part II of this Article explains the background of and primary issues in controversy in *Philippines v. China*, the rationale behind the mechanism of UNCLOS arbitration and its role in the present dispute, and the potential scope of a final ruling on the merits. Part III addresses the primary arguments against Tribunal jurisdiction and generally finds that China is right to identify issues of territorial sovereignty as being at the core of the dispute. At the same time, the rhetoric of territorial sovereignty as articulated by most claimant states—frequently described in terms of ancient political or cultural affiliations that pose heuristic difficulties for modern legal adjudication<sup>19</sup>—has up to this point served to intensify nationalistic tensions and to deter an objective and mutually-recognized legal determination regarding current ownership.

Part IV proposes a solution to this dilemma by outlining the structure and function of a potential Commission of Inquiry (COI) among claimant states to determine the disputed territories'

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China Sea, and are therefore subject to arbitration," however, "Beijing's secondary line of defense—that each measure for relief requested by Manila ultimately requires maritime delimitation to be carried out before it can be granted—remains to be considered with the merits of the case." *Id.*

18. The presentation of COIs developed in this Article owes much to the very different (but arguably not irreconcilable) views developed in Larissa J. van den Herik, *An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions Between Fact-Finding and Application of International Law*, CHINESE J. INT'L L. (2014), and Adam Ashforth, *Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms*, 3 J. HIST. SOC. 1 (1990).

19. *Cf.*, e.g., Leanne Sharp, *Cognitive Heuristics and Law: An Interdisciplinary Approach to Better Judicial Decision-Making*, 20 BULL. AUSTL. SOC. LEG. PHIL. 71 (1995).



sovereign status through the end of World War II hostilities in 1945. First, this Article examines the nature and role of such commissions since their development in The Hague Conventions<sup>20</sup> and the unique advantages that they enjoy over other international legal mechanisms. The more particular benefits of a COI in this specific controversy, especially the reframing of legal discourse away from historically vague, elastic, nationalistic, and culturally volatile arguments over “discovery” and towards a more positivistic, formalized, modern, and Westphalian idiom of clearly documented legal title, are also explored. The promising recent history of regional COIs is also analyzed.

Part V places both the problem and proposed solution in the broader context of key foundational theories of international law, and, in particular, prominent competing schools of thought regarding the relative importance of state sovereignty (e.g., territorial sovereignty) vis-à-vis universal norms and rules (e.g., universal ordering schemes such as UNCLOS). Liberal, realist, and constructivist positions on this relationship are compared, and a working rubric of modified realism is adopted for the purposes of providing an account of the potential justifications for and function of the COI proposed in this Article. This Part also seeks to provide an account of the role that such a COI can play in development of regional cooperation between competitive, but rational, neighboring powers. Both of these accounts draw upon the Hobbesian understanding that communally shared concepts of *injustice* (and thus legal order) presuppose shared concepts of *property*; the Kantian aspiration for a stable order of peaceful sovereign states; and, finally, the Hegelian insight that much behavior arises in reaction to and pursuit of various forms of status recognition.<sup>21</sup> Such *recognition*, in turn, can only be granted by means of active, participatory legal and political performances between interacting political equals; issues of territorial sovereignty, too, should be heard in such forums.<sup>22</sup> This Article argues that, in place of its current status as one of the region’s most intractable

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20. Cf. ALEXANDER PEARCE HIGGINS, *THE HAGUE PEACE CONFERENCES: AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND USAGES OF WAR: TEXTS OF CONVENTIONS WITH COMMENTARIES* (1909).

21. Cf. Erik Ringmar, *The Relevance of International Law: A Hegelian Interpretation of a Peculiar Seventeenth-Century Preoccupation*, 21 REV. INT’L STUD. 87 (1995).

22. An exploration of this theme in the context of global post-colonial state independence movements is presented in JOSHUA CASTELLINO, *INTERNATIONAL LAW AND SELF-DETERMINATION: THE INTERPLAY OF THE POLITICS OF TERRITORIAL POSSESSION WITH FORMULATIONS OF POST-COLONIAL NATIONAL IDENTITY*, 149–72 (Martinus Nijhoff Publishers, 2000). As I write below, the South China Sea dispute, too, ultimately cannot be divorced from its own “post-colonial” historical context. International legal approaches to resolution of today’s disputes should take their colonial background into account in crafting forums for adjudication of territorial or related issues.

geopolitical conflict zones—a site of law’s failure—a joint COI could ultimately turn the South China Sea territorial dispute into an important regional example of enlightened cooperation and mutual recognition among equal sovereigns, without the need for management or intervention by extra-regional powers.

## II. *PHILIPPINES V. CHINA*: BACKGROUND AND POTENTIAL OUTCOMES

### A. *Summary of the Dispute*

Based on both parties’ membership in UNCLOS, the Philippines filed its request under Annex VII of that instrument for a compulsory arbitration of maritime dispute claims against China on January 22, 2013.<sup>23</sup> In the submission containing its Notification and Statement of the Claim, the Philippines asked the Tribunal (1) to make the determination that both Chinese and Philippine rights within the South China Sea are restricted to those defined as part of Territorial Seas and Contiguous Zones, to Exclusive Economic Zones (EEZ), and/or to Continental Shelves; and also (2) to officially declare that any claims China might make based on its “U-shaped line” contravene UNCLOS, do not (at least as articulated so far) constitute a valid legal claim to any of the forms of territorial rights noted above, and cannot constitute a valid assertion of “historic rights” within the area delimited by the U-shaped line claim.<sup>24</sup> In addition, the Philippine side has asked for more specific determinations supplemental to or derived from the above, which will be detailed below in Part II.D.

The specific conduct to which the Philippines objects in its submission consists of both Chinese articulations of maritime claims and also state activity, such as island reclamation and construction, undertaken in accordance with those claims. In particular, the Philippines has objected to alleged Chinese interference with, for example, fishing rights guaranteed under UNCLOS, as well as to alleged environmental damage associated with island reclamation activities, and, most importantly, to what it argues are the impermissibly broad scale and scope of China’s own maritime territorial claims.<sup>25</sup> Ultimately, as noted, much of the Philippines’

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23. See generally Greg Torode, *Philippines South China Sea Legal Case Against China Gathers Pace*, REUTERS (Sept. 27, 2013), <http://www.reuters.com/article/2013/09/27/us-china-philippines-idUSBRE98Q0BX20130927> [<https://perma.cc/3NXT-JUY4>] (archived Feb. 15, 2016) (providing basic background of the case’s filings).

24. See Beckman, *supra* note 1; see also, e.g., Michael Sheng-ti Gau, *The Prospects for the Sino-Philippine Arbitration and the Territorial Disputes in the South China Sea*, J. E. ASIA & INT’L L. 7, 561, 562 (2014).

25. See, e.g., Jim Gomez, *Philippines Asks Tribunal to Invalidate China’s Sea Claims*, THE BIG STORY (July 8, 2015), <http://bigstory.ap.org/article/e990db61f27>

argumentation centers on the question of the validity and/or interpretation of China's U-shaped line claim.<sup>26</sup> Though not requesting that the Permanent Court of Arbitration (PCA) tribunal hearing the dispute rule on the claim itself, which as an issue of territorial sovereignty is outside of the scope of UNCLOS, the Philippines has nonetheless brought the U-shaped line under judicial scrutiny by asking the Tribunal to rule on the maximum possible scope of rights the claim could or could not convey under the treaty.<sup>27</sup>

Chinese objections to the litigation focused on precisely this point. Given that issues of sovereignty are not covered by UNCLOS, the Chinese side holds that the *Philippines v. China* arbitration impermissibly introduces such issues into the forum. Though this essentially jurisdictional point of controversy is analyzed in more detail in Part III.A., *infra*, it is important to note that in its own statement of its claims the Philippines acknowledges the contention that sovereignty claims are barred under UNCLOS.<sup>28</sup> Indeed, the Philippines also explicitly acknowledges another Chinese jurisdictional objection, based in the latter's 1996 official declaration under Article 298 of the treaty that it does not accept provisions for binding dispute resolution under UNCLOS Part XV insofar as they relate to, *inter alia*, sea boundary delimitations or so-called "historic rights."<sup>29</sup> Both acknowledgments by the Philippines, in fact, play an important role in its own articulation of its legal claims, as these are crafted in the attempt to avoid the appearance of addressing this potentially precluded subject matter.<sup>30</sup>

China has not made an official appearance in the arbitration, opting instead to make its jurisdictional objections known via public statements.<sup>31</sup> Instead, it has reiterated its jurisdictional and other related objections to the case via official statements by its Ministry of Foreign Affairs, with the understanding that these statements will be taken into account by the PCA panel currently considering the

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84e9c8c4c471fbf8f978b/philippines-asks-tribunal-invalidate-chinas-sea-claims [https://perma.cc/5KUB-TU9D] (archived Feb. 15, 2016) (providing a Philippine perspective on the scope and nature of China's sea claims).

26. *Id.*

27. *Id.*

28. See Press Release, *supra* note 15.

29. *Id.*; see also THE SOUTH CHINA SEA ARBITRATION, *supra* note 3.

30. See, e.g., Sean Mirski, *Should the Philippines' South China Sea Case Against China Proceed?: China Argues It Should Not, On Jurisdictional Grounds*, DIPLOMAT (Aug. 21, 2015), <http://thediplomat.com/2015/08/should-the-philippines-south-china-sea-case-against-china-proceed/> [https://perma.cc/GQ8D-CD7A] (archived Apr. 1, 2016).

31. See Lan Nguyen, *South China Sea: Philippines v. China: Legal Questions Regarding China's Non-Participation in the Philippines v. China Arbitration*, DIPLOMAT (July 27, 2015), <http://thediplomat.com/2015/07/south-china-sea-philippines-v-china/> [https://perma.cc/B9U7-JV9T] (archived Apr. 1, 2016) (explaining China's choice to use a "position paper" to advance its jurisdictional argument).

jurisdictional question.<sup>32</sup> Indeed, this is a relatively common procedure in arbitrations where one party does not appear, and arbitrators are generally expected to make every effort to consider the possible arguments that would be raised by the non-appearing party.<sup>33</sup> Following initial written submissions and oral hearings at The Hague in July 2015, the Tribunal decided on the issue of jurisdiction in November 2015, finding that it could hear most of the Philippines' claims and that these did not necessarily require a ruling on the underlying question of sovereign ownership.<sup>34</sup> On the other hand, however, the Tribunal noted that its ability to address the merits of many of the Philippines' claims would rely on that party's assertion that "no maritime feature in the South China Sea generates more than a 12 nautical mile territorial sea." In other words, as the Tribunal explained, "if (contrary to the Philippines' position) any maritime feature in the Spratly Islands constitutes an "island" within the meaning of Article 121 . . . the Tribunal may not be able to reach the merits of certain of the Philippines' Submissions."<sup>35</sup>

### B. *The Structure and Purpose of UNCLOS Arbitration*

Annex VII of UNCLOS provides for the establishment of an arbitral tribunal to hear disputes between treaty members, barring two states parties' agreement to one of the alternative mechanisms specified under the treaty.<sup>36</sup> These alternatives are (1) adjudication before the International Tribunal for the Law of the Sea (ITLOS), (2) adjudication before the International Court of Justice, or (3) adjudication by means of a special arbitration tribunal established via UNCLOS's Annex VIII (and requiring the UN Secretary General to act in a judicial appointment capacity).<sup>37</sup> In this case, neither of

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32. *Id.*

33. *Id.*

34. Shannon Tiezzi, *China: Court Ruling on South China Sea Case 'Null and Void'*, DIPLOMAT (Oct. 31, 2015), <http://thediplomat.com/2015/10/china-court-ruling-on-south-china-sea-case-null-and-void/> [<https://perma.cc/3BJ4-L6NU>] (archived Apr. 1, 2016).

35. Philippines/China Award on Jurisdiction and Admissibility (Oct. 29, 2015) <http://www.pcacases.com> [<https://perma.cc/G7M7-MHTZ>] (archived Apr. 21, 2016).

36. See, e.g., Kingdon, *supra* note 13, at 141–47, whose excellent summary forms the basis for the account provided in this section. The available mechanisms have been criticized as failing to offer states attractive options for the effective or predictable resolution of disputes, as well as requiring them to sacrifice control (or rights of withdrawal) that might be able to entice greater cooperation and integration within the overall regime. See, e.g., Natalie Klein, *The Effectiveness of the UNCLOS Dispute Settlement Regime: Reaching for the Stars?*, PROCEEDINGS OF THE ANNUAL MEETING (AMER. SOC. OF INT'L LAW) 108, 359–64 (2015).

37. United Nations Convention on the Law of the Sea art. 287, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS], [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) [<https://perma.cc/26ZT-T2L5>] (archived Apr. 1, 2016); Kingdon, *supra* note 13, at 141–42.

the two states involved in the dispute indicated, during the course of the present matter or at any time previously, that they preferred any of the alternative forums offered under the treaty.<sup>38</sup> By default, the case has thus proceeded via Annex VII's option for an "ad hoc arbitration panel"; though, as noted, China has indicated that it views its prior declarations of reservation to UNCLOS's arbitration provisions (as well as the treaty text) as precluding the subject matter of the present dispute.

The potential scope of subject matter for arbitration under UNCLOS is, indeed, highly circumscribed. Acceptable claims must center on the specific provisions of the treaty, which, despite its considerable importance and influence as a "constitution of the oceans,"<sup>39</sup> nonetheless covers only issues related to the definition, uses, rights, and obligations attached to states in connection with international waters. Under the treaty, all maritime claims must be based on either baselines generated by land territory, or fall into a restricted category of "historic rights" based on long-running customary use of a body of water, with the assent of other states, in general contravention of the rights otherwise applicable.<sup>40</sup>

More specifically, the treaty establishes a set of legally-determined maritime zones in which states can legitimately claim varying political and economic rights. Most robust are "territorial sea" zones, which must extend no more than twelve nautical miles from the land territory of the state in question and which confer on the possessing state full sovereignty equivalent to that enjoyed on land.<sup>41</sup> The political and economic rights of that sovereign ownership apply to the ocean floor, subsoil, water, and airspace, and cover the ability to exclude non-nationals from entering these spaces.<sup>42</sup> States may also enjoy such rights within the boundaries of their "Continental Shelf" as defined in UNCLOS Part VI, which comprises "the seabed and subsoil of the submarine areas that extend beyond [the state's] territorial sea throughout the natural prolongation of its land territory," up to 200 nautical miles from a territorial baseline.<sup>43</sup> Continental shelf determinations are based on factors such as elevation, slope, and geological composition of the claimed territory.

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38. Kingdon, *supra* note 13, at 145.

39. See, e.g., Stephanie Holmes, *Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty*, 9 CHICAGO J. INT'L L. 323, 330–31 (2008).

40. See generally Florian Dupuy & Pierre-Marie Dupuy, *A Legal Analysis of China's Historic Rights Claim in the South China Sea*, 107 AM. J. INT'L L. 124 (2013) (providing a legal analysis of China's historic rights claim in the South China Sea); Zou Keyuan, *Historic Rights in International Law and in China's Practice*, 32 OCEAN DEV. & INT'L L. 149 (2001) (providing an overview of historic rights in international law).

41. UNCLOS, *supra* note 37, art. 2.

42. *Id.*

43. *Id.* art. 57

In addition to the “full sovereign” rights accorded to states within their territorial sea or Continental Shelf claims, states under UNCLOS are also accorded Exclusive Economic Zones (EEZs), which bundle exclusive rights related to exploration and economic exploitation of all resources within the space so delimited.<sup>44</sup> EEZs may extend up to 200 nautical miles from a territorial baseline.<sup>45</sup> Within its EEZ, moreover, a state may engage in various forms of activity not strictly limited to narrowly-defined “economic” behavior, including the construction and operation of artificial structures, permanent maritime bases, island reclamation or the construction of artificial islands, and the like.<sup>46</sup> Other states may be precluded from engaging in such activities within the EEZ zone, though states are obliged to recognize rights to peaceful and unmolested transit by all others.

Finally, specific rights attach to various categories of offshore geological features, which vary greatly depending on the size, habitability, and other characteristics of claimed territory so-defined. Within the parameters of UNCLOS, features claimed by states may fall into the general categories of islands, rocks, low tide elevations, or artificial islands—the distinctions among which are at least partially (but not exhaustively) defined by the treaty.<sup>47</sup> These categorical distinctions can have quite dramatic implications, as of the four categories “islands” form baselines generating all of the maritime zones that characterize land territory; twelve nautical miles of territorial sea, 200 nautical miles of EEZ, and any potential Continental Shelf claims.<sup>48</sup> “Islands” are defined (with problematic vagueness) as naturally formed areas of land, remaining above water at high tide, which are capable of sustaining human habitation or economic life.<sup>49</sup>

“Rocks,” by contrast, are also areas of land that remain above sea level at high tide, yet which “cannot sustain human habitation or economic life” on their own, and which grant twelve nautical miles of territorial sea without conferring the EEZ or Continental Shelf rights associated with islands.<sup>50</sup> This island/rock distinction, introduced in UNCLOS Article 121, has generated a substantial literature regarding its vagueness, potential conflicting interpretations of such factors as “sustaining human habitation,” and also the tactical political maneuvering by states parties that led to the form taken by

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44. *Id.* art. 121.

45. *Id.* art. 57

46. *Id.* art. 57, 60.

47. *See id.* art.12, 121(1-2).

48. *Id.* art. 3, 121(2).

49. *Id.* art. 121(1-2).

50. *Id.* art. 3, 121(1, 3).

these clauses.<sup>51</sup> Indeed, no all-purpose metric for making this distinction has yet been developed, complicating efforts to resolve territorial disputes under these categories.<sup>52</sup>

“Low tide elevations,” which are areas of land that are submerged under water at high tide but exposed at low tide, are capable of extending a state’s territorial sea only if they are located within that zone as otherwise defined.<sup>53</sup> They cannot, however, themselves act as baselines to generate territorial seas, EEZs, or other rights. “Artificial islands,” finally, are constructed features not naturally formed and are accorded no rights in and of themselves aside from a 500-meter safety zone.<sup>54</sup>

As noted, UNCLOS provides a set of definitions for each of these categories, but these have been criticized as lacking in precision and susceptible to multiple competing interpretations.<sup>55</sup> Perhaps most importantly, the island/rock distinction leaves in doubt the exact method of ascertaining the question of “habitability,” with the result that any state believing itself to be in possession of a given maritime feature is incentivized to attempt to characterize it as an “island,” while states opposing such claims may develop various lines of argumentation for why the feature should be considered a “rock.”<sup>56</sup>

The above legal issues all play a role in the current dispute over South China Sea maritime claims by China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei, but even if fully determined by the Tribunal, would not suffice to resolve the underlying controversy. Because it is generally accepted that at least some features within the contested area are fully qualified as “islands,” the actual ownership of these areas of land must be determined before any final boundary determinations could be assigned to particular states. Indeed, even if some or all of the features in dispute were to be defined as “rocks,” these would still convey twelve-mile territorial sea zones to the power successfully claiming legal title to them. UNCLOS, for its part, does not cover the issue of territorial ownership over islands, rocks, or any other feature: it applies only to the question of

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51. On the political context in which the distinction was made, and an analysis of its problematic vagueness, see James Crawford, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 262–65 (2012).

52. *Id.*; see also Marius Gjetnes, *The Spratlys: Are They Rocks or Islands?*, 32 *OCEAN DEV. & INT'L L.* 191, 192 (2001). For examples of decisions applying the rule, see, e.g., *Nicaragua v. Honduras (Nicar. v. Hond.)*, Judgment, I.C.J. Reports (2007); *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.)*, Judgment, I.C.J. Reports (2008).

53. UNCLOS, *supra* note 37, art. 13.

54. *Id.* art. 60.

55. See, e.g., Tommy Koh, *Mapping out Rival Claims in the South China Sea*, *STRAITS TIMES* (2011) (summarizing the multiple interpretations of the UNCLOS definitions).

56. See *id.* (“They seem to be saying that ‘my rock is an island and your island is only a rock’”).

how maritime boundaries may be delimited after such ownership determinations have been settled.<sup>57</sup>

### C. Facts Underlying (and Complicating) the Dispute

The basic geopolitical facts underlying the controversy are, on the one hand, very explicit—they have to do with the movements of vessels, people, resources, and land<sup>58</sup> within various parts of the South China Sea, as well as the justifications for or complaints against such movements by the various states involved in the region, and on the other hand, quite dynamic and complex. Since global news media began to increasingly fixate on the region as a potential military flashpoint, updates and information about state behavior or official statements have been broadcast worldwide in a constant stream, generating a vast body of governmental, journalistic, academic, and other forms of discourse and commentary. New events are regularly generated due to the extreme economic importance of this maritime area for global commerce, with roughly \$5.3 trillion of trade making use of its sea lanes,<sup>59</sup> as well as the ongoing processes of economic and military expansion and development by regional powers,<sup>60</sup> and more specifically the decades of generally intensifying efforts by states to bolster their claims via competing military or civil occupations and development of claimed features.<sup>61</sup>

The involvement of U.S. naval forces in the region, as well as the complex alliances or hostilities resulting from the legacies of World War II and Cold War frameworks of international relations, further complicate the interactions of regional states.<sup>62</sup> Indeed, today territorial disputes in the South China Sea have become a source of intense international concern, and of often escalating confrontational

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57. See generally Klein, *supra* note 36 (assessing the effectiveness of the UNCLOS dispute settlement regime).

58. Given the artificial island construction and land reclamation activities by a number of states in the region, the “movement of land” is applicable both figuratively, in terms of the assignation of rights to territory between different states, and literally, as in the actual act of moving land from one place to another or creating it from dredged soil.

59. For a highly readable account of the region’s economic, political, and diplomatic dynamism, see ROBERT D. KAPLAN, *ASIA’S CAULDRON: THE SOUTH CHINA SEA AND THE END OF A STABLE PACIFIC* (2014).

60. See generally *id.* The South China Sea claimant states represent some of the world’s fastest growing and largest economies.

61. See, e.g., Edward Wong, *Chinese Military Seeks to Extend Its Naval Power*, N.Y. TIMES (Apr. 23, 2010), [http://www.nytimes.com/2010/04/24/world/asia/24-navy.html?\\_r=0](http://www.nytimes.com/2010/04/24/world/asia/24-navy.html?_r=0) [<https://perma.cc/NJE8-FX7C>] (archived Apr. 4, 2016).

62. See, e.g., Thomas J. Christensen, *China, the US–Japan Alliance, and the Security Dilemma in East Asia*, 23 INT’L SECURITY 49, 67–69 (1999) (discussing the precautionary and defensively motivated measures taken in East Asia and their potential issues).



rhetoric by involved parties.<sup>63</sup> In particular, the area has turned into the key space in which it has become possible—even increasingly common—for Western expert analysts and news media to imagine military conflict between an increasingly “belligerent” China and a United States determined to maintain the “status quo,” even by arms if necessary.<sup>64</sup>

Physical occupation of disputed territories and the forcible exclusion or expulsion of other claimants is, without doubt, the single most volatile form of behavior undertaken by claimant states. Modern geopolitical wrangling over the region, in fact, began in large part with France’s occupation of the Paracel and Spratly Island chains of the South China Sea in 1933, when it unilaterally declared its “discovery” and occupation of these island territories as *terra nullius*—eliciting protests from both Chinese and Japanese authorities who claimed prior “discovery” and occupation.<sup>65</sup> By 1939, a militant Japan had seized all of the South China Sea’s major islands, including those occupied by France, and asserted its own occupation in keeping with its earlier claim, only to renounce the territories in the 1951–1952 peace treaties ending World War II hostilities.<sup>66</sup> In the postwar period, Vietnam, the Philippines, China, and Taiwan have all occupied various marine features, and indeed each continues to do so.<sup>67</sup> Likewise, associated activities such as naval patrols, construction of improvements or artificial features, declarations of airspace restrictions, harassment of foreign states’ fishing vessels or transiting civilians, and various forms of symbolic assertions of ownership or control have all served to intensify interstate conflicts or inflame nationalist passions.<sup>68</sup>

This intensity of emotional attachment and subsequent escalation of aggressive rhetoric, while much noticed by non-regional observers, is seldom put into its historical context. A full review of the various social and cultural meanings associated with the South China Sea for all, or any, of the different state claimants would be a project of such range and scale that it must fall well outside of the scope of this Article. Yet the first relevant point to be made in the context of the argument advanced here is that, for most of the many millennia

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63. See, e.g., *id.* at 69–70.

64. See, e.g., *Senators Seek US Strategy to Stop China's Maritime Reclamations*, VOICE OF AM. (Mar. 19, 2015) (reporting on the U.S. Senate’s response to China’s artificial island projects).

65. See Daniel J. Dzurek, *The Spratly Islands Dispute: Who's on First*, INT’L BOUNDARIES RESEARCH UNIT 7–22 (1996).

66. *Id.* at 15.

67. *Id.*

68. See, e.g., Beckman, *supra* note 1; Q&A: *South China Sea Dispute*, BBC NEWS (Oct. 27, 2015), <http://www.bbc.com/news/world-asia-pacific-13748349> [<https://perma.cc/V8U9-VLN7>] (archived Apr. 4, 2016) (summarizing the ongoing *Philippines v. China* case).

of the South China Sea's presence in the consciousness of regional civilizations, it was conceived in terms of various forms of affiliation or control that do not translate smoothly into the modern juridical idiom of Westphalian territorial sovereignty.<sup>69</sup>

One example of such non-Westphalian conceptions persisting until a strikingly modern date can be seen in lines written by the expatriate loyalist Chinese author and poet Yu Dafu in 1942 about his experiences fleeing British colonial Singapore in advance of the Japanese invasion.<sup>70</sup> Looking back on his recent home, he wrote: "Again, a famous city has become a war zone; / a mound of unhatched eggs, our Southern Borderlands risk being smashed to pieces."<sup>71</sup> Here, as elsewhere, Yu managed to insightfully convey key elements of his cultural milieu. While the term he used for the "Southern Borderlands," *nan jiang* (南疆),<sup>72</sup> was in fairly common use at the time to denote China's often unspecified territorial claims and affiliations in the South China Sea, Singapore per se had never been part of the territory of any Chinese state. Nonetheless, as part of the general "South Sea" territory it could easily be imagined within the general scope of *nan jiang*,<sup>73</sup> making especially explicit the expansive sensibility associated with such claims in the popular Chinese social imaginary<sup>74</sup> of the time. As the rising and falling dynasties of the Chinese polity had effectively "revealed" new national territory through a slow but inexorable process of organic expansion, so too

69. Cf. CASTELLINO, *supra* note 22.

70. See YU DAFU, MISCELLANEOUS POEMS OF CHAOS AND SEPARATION (离乱杂诗) (1942) (cited in *Xin Wenxue Shiliao* (新文学史料) 1, 33 (1978)).

71. *Id.*

72. See, e.g., S. FREDERICK STARR, XINJIANG: CHINA'S MUSLIM BORDERLAND 63 (2004). The word "borderland" or *jiang* (疆) here indicates both the vague extent and the military/security associations of China's great territorial claim to the south. In these respects, it closely resembles the contemporary claim to China's territory in Turkic Central Asia, Xinjiang (新疆), "New Borderland", which today is treated as a "core interest" of inalienable Chinese sovereignty and is basically uncontested by other states.

73. It is important to note here that this overreach of popular *conceptions* of the idea of *nan jiang* does not itself detract from the legal validity of any individual territorial claims that might be associated with the notion. This is both because actual official state proclamations tended to be far more specific, including geographical data, maps, and other such details, and because the question of the legal status of any particular piece of territory depends on the legal validity and exact definition of a state's claims to *that particular* piece of territory. Thus, the fact that modern China and Taiwan do not lay claim to sovereignty over Singapore does not, itself, affect the legal status of any other territory that has been associated with *nan jiang*. The vague scope of the popular conception is introduced here to indicate the deep historic-cultural resonance of the South China Sea in Chinese national sentiment (in a way paralleled by other claimant states).

74. See, e.g., CHARLES TAYLOR, A SECULAR AGE 171–76 (2007) (exploring the role of the 'social imaginary' in defining the extent of national membership and the boundaries of the polity); cf. BENEDICT ANDERSON, IMAGINED COMMUNITIES (1982).

could the colonial outposts of other powers eventually return to the ambit of Chinese rule.<sup>75</sup>

As Bill Hayton has written in a valuable overview of the deep historical origins of the South China Sea dispute and their implications for present day controversies, the various states, empires, and civilizations that populated the area did not define their claims in Western legal terms; rather, “it was a polyglot place of exchange and trade where questions of sovereignty were utterly different from the way they are posed today.”<sup>76</sup> Yet while this epistemic difference may justify the assertion that “[i]n no sense did any state or people ‘own the Sea,’”<sup>77</sup> today’s states fully recognize that their prior claims were not articulated in the modern Westphalian legal idiom, while nonetheless asserting that they may as autonomous sovereigns *translate* their previous territorial claims into the rights and obligations afforded by modern sovereignty.<sup>78</sup> As the example of *nan jiang* demonstrates, territorial affiliations once expressed in non-Western terms can certainly inform modern political claims. However, it is not even remotely feasible to seek to deny these sovereign states the right to pursue such claims, as some commentators suggest. As a purely normative matter, it may be reasonable to assert that the South China Sea’s “future should be a global concern.”<sup>79</sup> Yet as an issue of international law, there are no available means by which a state may be compelled to refrain from claiming legal ownership of a given territory and seeking fair adjudication of such claims.<sup>80</sup> Nor is it at all clear there should be in this case.

Vietnam, China, Taiwan, the Philippines, Malaysia, and Brunei, the South China Sea claimant states, have all articulated their

75. See, e.g., Andrew Coleman & Jackson Maogoto, ‘Westphalian’ Meets ‘Eastphalian’ Sovereignty: China in a Globalized World, 3 ASIAN J. INT’L L. 237, 249–55 (2013) (discussing the broad extent of traditional Chinese conceptions of imperial “sovereign” territory, covering under the territorial claim of *Tianxia* (天下) or “All Under Heaven” most of what we now think of as “Asia”).

76. See BILL HAYTON, THE SOUTH CHINA SEA: THE STRUGGLE FOR POWER IN ASIA 27 (2014).

77. *Id.*

78. See Adam Bray, *The Cham: Descendants of Ancient Rulers of South China Sea Watch Maritime Dispute from Sidelines*, NATIONAL GEOGRAPHIC NEWS (June 18, 2014), <http://news.nationalgeographic.com/news/2014/06/140616-south-china-sea-vietnam-china-cambodia-champal> [<https://perma.cc/FJN4-J78C>] (archived Apr. 4, 2016); John Chaffee, *Cultural Transmission by Sea: Maritime 41 Trade Routes in Yuan China*, in EURASIAN INFLUENCES ON YUAN CHINA 51 (Morris Rossabi ed., 2013). Despite Hayton’s claim that no state or people ever “owned” the territories of the South China Sea, however, states did at least *assert* ownership in various ways, and both China and Vietnam, for example, acted in and spoke about the region in ways that give them colorable claims to legal ownership starting before the twentieth century.

79. See HAYTON, *supra* note 76, at xvii (explaining the globalized nature of the South China Sea’s history).

80. See Beckman, *supra* note 1, at 54.

respective legal claims to South China Sea territory in the idiom of modern legal sovereignty. That they are able to do so, as autonomous sovereign states taken to be equals by the rest of the international community, is in each case the result of decades of anti-colonial struggle and the pursuit of legal and political recognition.<sup>81</sup> As will be developed further below, the key challenge of resolving the South China Sea dispute is to balance these states' lawful enjoyment of Westphalian sovereign rights equal to those of any other member of the international community with the separate geopolitical goal of promoting regional peace and integration, as well as the continued socialization of regional powers into international law norms and processes. Each of today's claimant states suffered to various degrees under colonialism until the mid-twentieth century and watched French and then Japanese troops seize the islands of the South China Sea in total disregard of preexisting political claims and affiliations.<sup>82</sup> None has welcomed the idea of abandoning its own hard-won claims to ownership without a legal hearing. The question, then, is how international law can provide a forum for such claims to prevent them being settled as a matter of mere *realpolitik*. Due to its limited focus, *Philippines v. China* provides no such possibility.

#### D. Potential Scope of a Final Ruling

In its submissions to the Tribunal,<sup>83</sup> the Philippine side has argued (1) that China cannot claim "historic rights" in the region different from the rights conferred under the UNCLOS regime as part of an appropriate EEZ; (2) that the U-shaped line claim is impermissibly large and is not based on appropriate territorial baselines; (3) that at least some of the maritime features that China claims as islands conferring territorial claims are, under UNCLOS, not definable as such but rather are definable merely as "rocks" that do not generate territorial ownership; (4) that China has interfered with Philippine's enjoyment of rights, such as fishing within the Philippine EEZ, that are protected under UNCLOS; and (5) that China's artificial island construction, fishing, and harvesting activities are damaging the local natural environment in contravention of UNCLOS obligations.<sup>84</sup>

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81. For various perspectives on this colonial history, see, e.g., KAPLAN, *supra* note 59; Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991); and Craig Reynolds, *Self-Cultivation and Self-Determination in Postcolonial Southeast Asia*, in SOUTHEAST ASIAN STUDIES: REORIENTATIONS 7-35 (1998).

82. See Dzurek, *supra* note 65, at 9.

83. Press Release, *supra* note 15.

84. See *id.* at 3.

A final ruling would, thus, potentially address the proper scope and method of analysis of pre-UNCLOS territorial claims to large sea territories, a question that could have broad precedential relevance to other disputes, as well as similarly impactful legal issues including a more specific delimitation of the island/rock distinction, and the way that maritime territorial claims predating UNCLOS should be interpreted and adjudicated under its arbitration regime.<sup>85</sup> With regards to the present controversy, a number of claims related to territorial sovereignty or exclusive rights would likely be either eliminated or modified based on ultimate disposition on the legal questions raised in the Philippine submission. In particular, regional powers, particularly China and Vietnam, could find it much more difficult to make arguments for EEZ-like zones based on historic rights.<sup>86</sup> Meanwhile, greater specification of the island-rock distinction could limit any potential territorial claims, made by any party. Most dramatic would be a definitive ruling (which the Philippines has requested) that certain features are *not* islands affording territorial rights; any decision to this effect by the Tribunal would both seriously compromise particular states' efforts to assert sovereignty over such features and, in all likelihood, raise questions as to the degree to which the UNCLOS Tribunal has actually taken into account sufficient evidence regarding such difficult key determinations as "habitability." The island of Itu Aba, in particular, (the largest feature in the Spratly chain, currently claimed by both Taiwan and China and occupied by the former since the 1950s) would afford a full 200 nautical mile EEZ and accompanying rights if it were found to be an "island" under UNCLOS. The Philippine request that the Tribunal rule that Itu Aba is *not* an "island" is viewed with particular concern and opposition by both Taiwan and China. As I have argued elsewhere, the understandable perception by both these claimants that the Philippines is using the UNCLOS arbitration as a "back door" to eliminate even the *possibility* of having sovereign ownership claims adjudicated (by seeking a ruling classifying the territories as "rocks" not subject to sovereignty claims) risks exacerbating the overall dispute in the direction of further politicization and militarization.<sup>87</sup>

At the same time, the ruling would leave undecided questions as to the actual ownership of any specific territories in dispute, at least with regards to any maritime features found to be "islands" under

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85. See *id.* at 5.

86. Cf. Dupuy & Dupuy, *supra* note 40, at 140–41 (indicating one potential approach that the *Philippines v. China* Tribunal or future arbitrators could take to the historic rights issue).

87. Ryan Mitchell, *Why Taiwan and China Agree on South China Sea Sovereignty*, THE DIPLOMAT, (March 29, 2016), <http://thediplomat.com/2016/03/why-taiwan-and-china-agree-on-south-china-sea-sovereignty/> [<https://perma.cc/N6CF-WVW5>] (archived May 7, 2016).

UNCLOS definitions, along with their surrounding waters. Moreover, and most significantly for the argument advanced in this Article, the UNCLOS Tribunal would leave undecided the proper *method* and *forum* for determining territorial sovereignty over the contested area. As noted, the major claimants each advance a number of alternative legal arguments, with possible claims based on either ancient presence and political administration, historical declarations of ownership and occupation, “discovery” at some specific point in time (ancient or modern) as *terra nullius*, or formal obtainment of sovereignty based on state succession, annexation, or legal transfer by mutual agreement between states.

Of course, even a highly equitable ruling concerning the precise geographical delimitation of hypothetical marine boundaries stemming from unassigned island territories would be of limited utility if, for example, war were to subsequently break out to determine who actually owns the islands. As the following Part (III) will argue, three main problems impede the prospects for the *Philippines v. China* arbitration to serve as a viable means of resolving the ultimate dispute between various South China Sea claimants, in particular but not limited to the specific parties to that arbitration. These are (1) the number, scope, and importance of unresolved territorial ownership questions necessarily left outside of the arbitration but very much at the center of the underlying geopolitical controversy; (2) the vast historical and geographic scale and extreme heuristic difficulty of ascertaining which ownership claims might be temporally prior and legally sufficient; and (3) the pernicious, and escalating, effects of sovereignty claims framed within the categories afforded by the international law concept of “discovery,” which permit exceedingly elastic criteria for the introduction of politically incendiary historical evidence, national narratives, and state behavior, and, relatedly, fail to supply legally exact criteria for the determination of territorial ownership.

### III. THE DISSENSUS OVER UNCLOS: THE LAW OF THE SEA VERSUS THE LAW OF SOVEREIGNTY

#### A. *Evaluating Chinese Jurisdictional Objections and Philippine Responses*

In the PRC Ministry of Foreign Affairs’ December 2014 Position Paper<sup>88</sup> regarding *Philippines v. China*, four key positions were advanced that, separately and together, seek to argue against Tribunal jurisdiction. These are (1) that the “essence of the subject-

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88. Position Paper, *supra* note 14.

matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea,” and that the issue of territorial sovereignty neither lies within the scope of UNCLOS nor is related to its interpretation or application; (2) that previous bilateral agreements between China and the Philippines, as well as the ASEAN Declaration on the Conduct of Parties in the South China Sea, have established a mutual obligation to pursue dispute settlement via bilateral negotiations; (3) that even if the subject-matter of *Philippines v. China* were otherwise acceptable for UNCLOS arbitration, China’s 2006 declaration of reservation from compulsory arbitration procedures over, *inter alia*, maritime delimitation issues, excuse China’s abstention from the proceedings; and (4) that based on the above and “by virtue of the freedom of every State to choose the means of dispute settlement, China’s rejection of and non-participation in the present arbitration stand on solid ground in international law.”<sup>89</sup>

Of the above objections, the greatest degree of legal and logical force attaches to the first, which characterizes the arbitration as an attempt to indirectly adjudicate issues of territorial sovereignty prohibited under UNCLOS arbitration. Issues of territorial sovereignty are indeed clearly prohibited from decision by arbitration under UNCLOS.<sup>90</sup> No attempt has been made by the Philippine side to argue that the case should still go forward should the Tribunal find that sovereignty must first be determined before other issues can be adjudicated. Indeed, in the Philippine Foreign Secretary’s Opening Statement during Tribunal hearings at The Hague in July 2015, he reiterated that, “in submitting this case, the Philippines is NOT asking the Tribunal to rule on the territorial sovereignty aspect of its disputes with China.”<sup>91</sup>

The Philippines has responded to this objection that, even if China is assumed *arguendo* to have territorial sovereignty over the maximum extent of its allowable claims under UNCLOS, its current articulation of those claims and various activities conducted in pursuance of the claims will still be found to be in violation of its treaty obligations.<sup>92</sup> More specifically, as noted, the Philippine side has advanced arguments against (1) China’s enjoyment of any “historic rights” in the region different from UNCLOS EEZ rights; (2)

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89. *Id.*

90. See MIGUEL GARCÍA GARCÍA-REVILLO, THE CONTENTIOUS AND ADVISORY JURISDICTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 90–91 (2015) (presenting a more nuanced view of this excluded subject matter in relation to UNCLOS).

91. Paterno Esmaquel II, *EXPLAINER: Philippines’ 5 Arguments vs China*, RAPPLER (July 9, 2015, 1:54 PM), <http://www.rappler.com/newsbreak/iq/98839-philippines-china-hague-arguments-explanation> [<https://perma.cc/27JL-U2WN>] (archived Mar. 3, 2016).

92. See *id.*; see also Mirski, *supra* note 30.

China's U-shaped line claim as being incompatible with UNCLOS maritime delimitations; (3) the question as to whether certain maritime features claimed by China as "islands" are instead mere "rocks" without territorial relevance; (4) alleged Chinese interference with Philippine EEZ rights; and (5) alleged harm to the regional environment arising from Chinese administrative and economic activities.<sup>93</sup>

The United States, notably, has supported the Philippines' contention that at least some of these issues are separable from the question of territorial sovereignty.<sup>94</sup> Indeed, the U.S. State Department has now formally stated that

unless China clarifies that the dashed-line claim reflects only a claim to islands within that line and any maritime zones that are generated from those land features in accordance with the international law of the sea, as reflected in the LOS Convention, its dashed-line claim does not accord with the international law of the sea.<sup>95</sup>

In the same report, the United States made clear its position that China has not demonstrated, nor could it, historic rights to all of the territories it claims in the South China Sea.<sup>96</sup> In both the U.S. Department of State report and the Philippine submission (as well as in other statements by the two governments and those who agree with them), the law of the sea is argued to effectively constrain sovereignty claims, not just as a hypothetical matter, but also as a source of prior determinations potentially giving rise to binding judicial rulings.<sup>97</sup>

Is this position tenable, either as a matter of international legal doctrine or as a viable politico-judicial approach to resolving the dispute? In order to meet both standards of evaluation, the U.S.-Philippine argument would have to satisfy at least three criteria: (1) does it accurately reflect existing legal doctrine as applicable to this matter?; (2) does it provide the parties with a fair hearing respecting all of their rights and obligations under international law, including but not limited to those created by UNCLOS?; and (3) does it promote peaceful and fair resolution of the underlying geopolitical controversy?

While these three criteria could be evaluated separately, they are in fact so closely linked together that it is most effective to analyze them in tandem, working backward from general to specific considerations. Beginning with the final criterion, it is necessary to

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93. Esmaquel II, *supra* note 91.

94. See OFFICE OF OCEAN AFFAIRS, LIMITS IN THE SEAS No. 143: CHINA, MARITIME CLAIMS IN THE SOUTH CHINA SEA 24 (2014).

95. *Id.*

96. See *id.* at 23.

97. See *id.* at 14.



view the particular Philippine-Chinese controversy in its contexts both as part of the overall contestation between all South China Sea claimants and as a representative instance of issues that frequently appear in international legal controversies. Political solutions that focus on particular details while ignoring their representative and recurring character are unlikely to foster long-term improvement. Here, the *Philippines v. China* arbitration can be justified if it tends to keep the individual parties, and other similarly situated states, engaged in the international system and in dialogue over shared “transnational legal processes”<sup>98</sup> that they view as legitimate and fair.

The third criterion, thus, depends upon the second. Although a fair and effective final resolution of all states’ claims would be the ideal outcome, more important are states’ perceptions of the fairness and legal validity of the *processes* in which they are mutually engaged. An adequate approach could simply be one resulting in states’ resolution to continue engaging by means of the institutions of international law, refraining from militarized or escalatory behavior, and continuing to participate in and be “socialized” by the norms and processes of the present international order.<sup>99</sup> This, in fact, is the ultimate justification for the Philippine-U.S. advocacy of UNCLOS arbitration: by unifying all claimant states within a shared and limited set of possibly valid territorial and behavioral boundaries, it would promote engagement in mutually legitimated legal processes.<sup>100</sup>

This argument, however, relies in turn upon the proposition that all claimant states would in fact view the resulting process as legitimate and as providing them with a fair hearing as to their most important claims. As China has already pointed out in its official statements, it does not so view the UNCLOS arbitration.<sup>101</sup> This objection, is often interpreted by foreign observers in a reductive fashion, as no more than the self-interested protest of an acquisitive state.<sup>102</sup> Yet, in fact, this particular difference of opinion goes to more fundamental differences over the nature, and especially the formation and enforcement, of international law (thus to the first criterion, above). These different views of international law determine how states view the legitimacy of specific legal processes.

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98. Cf. Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

99. *Id.* at 203.

100. See, e.g., McDevitt, *supra* note 2; Mirski, *supra* note 8.

101. Position Paper, *supra* note 14.

102. See generally Ben Saul, *China, Natural Resources, Sovereignty and International Law*, 37 ASIAN STUD. REV. 196, 201–05 (2013) (discussing such perceptions of Chinese behavior in a more general context).

The essence of the Chinese jurisdictional objection is rooted in the international legal principle *nemo dat quod non habet*, which has its origins in the Roman legal maxim *nemo plus iuris ad alium transferre potest quam ipse habet* (“One cannot transfer to another more right than one has oneself”).<sup>103</sup> Applied here, the principle would indicate that a tribunal under UNCLOS is not empowered to grant or assign rights attached to specific territory without clear delineation of their origin in the proprietary rights of some particular sovereign over that territory.<sup>104</sup> That is, as an international instrument, UNCLOS empowers only legal determinations of *specific* rights (held by a specific right-holding state), based on the consent of the states that signed up to the treaty (and also subject to those states’ reservations, like China’s 2006 reservation regarding arbitration). In this classically realist view of international law, the legitimacy of instruments, the obligations they create, and the subsequent decisions they inform are in the final analysis always based on the consent of thus-bound states.<sup>105</sup> Any binding ruling emerging from UNCLOS must be based in such consent.

Although the United States frequently espouses much the same interpretation of international law,<sup>106</sup> and indeed is itself not a party to UNCLOS largely based on exactly these concerns,<sup>107</sup> in the present instance, it has joined the Philippines to advocate a very different legal philosophy. This view does not hold that a UNCLOS tribunal can accord only legal rights that it can trace to origins in the specific territorial ownership rights of particular states, who then transfer determinations over the scope and interpretation of the rights to UNCLOS on a consensual basis as states parties. In place of that positivistic model, advocates of jurisdiction in *Philippines v. China* hold that UNCLOS and other such international legal instruments can serve as *a priori* determinations of possible rights, constraining state behavior even if the actual holders of such rights are not

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103. Ulpian, *Digests of Justinian* 50.17.54.

104. See Teh-Kuang Chang, *China’s Claim of Sovereignty over Spratly and Paracel Islands: A Historical and Legal perspective*, 23 CASE W. RES. J. INT’L L. 399 (1991); see also, e.g., Crawford, *supra* note 51 (discussing the application of the *nemo dat* principle to UNCLOS, especially in terms of its initial drafting process and the problem of “representing” excluded states).

105. See generally Anthony Carty & Fozia N. Lone, *Some New Haven International Law Reflections on China, India and Their Various Territorial Disputes*, 19 ASIA PAC. L. REV. 95, 95 (2011) (“[I]n China and India, international law and diplomacy are guided by a formalist dualism.”); cf. Sienho Yee, *The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections*, 13 CHINESE J. INT’L L. 663 (2014).

106. Cf. Harold H. Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1838–41 (1998) (discussing and rebutting extreme versions of the “state-centric” view in the U.S. context).

107. See, e.g., Jerome A. Cohen, *Friedmann Memorial Award Address*, 49 COLUM. J. TRANSNAT’L L. 17, 24 (2010).

identified.<sup>108</sup> General appellations for this view of international law have included cosmopolitanism, Grotian eclecticism, and liberal normativism.<sup>109</sup> Irrespective of the exact terminology, the essence of the distinction with the realist view is the position that legal issues can be decided in the form of generally applicable formulae or principles, defined in abstract terms, and then subsequently used to judge real-world disputes.<sup>110</sup> With regards to the *Philippines v. China* dispute, the Philippine-U.S. position is that there is indeed precisely such a formula: *nemo dat quod non habet*.<sup>111</sup>

The essence of the dispute over jurisdiction, in other words, is that of the proper interpretation of the very same legal principle. In the “cosmopolitan *a priori*” view advanced by the Philippines, the *nemo dat* rule is a general principle that operates via international instruments, such as UNCLOS, to constrain the possible legal claims made by any state party.<sup>112</sup> On the basis of determining what kind of claims *could be* validly recognized under the treaty, the Philippines seeks judgments constraining all states bound to the treaty’s terms.<sup>113</sup> Against this view lies the realist or perhaps “positivist” interpretation advanced by China, which considers *nemo dat* to be a principle constraining the possible legal validity and enforcement power of courts and tribunals—they can assign only such rights as they can identify themselves as possessing based on their own mandate and the rights that the parties submit to their jurisdiction. This basic dispute over both legal doctrine and legal *Weltanschauung* leads to the two sides’ very different views on the legitimacy of *Philippines v. China*.

It is not necessary here to ultimately resolve this disagreement in favor of one side or another. The present aim is rather to indicate the fundamental and far-reaching nature of the disagreement and to suggest that there is little indication that a favorable UNCLOS ruling on jurisdiction would convince China that its application of the *nemo dat* principle is flawed (as, indeed, the opposite result would be unlikely to change Philippine views). The Chinese view could plausibly be construed as an available interpretation of the principle

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108. Cf. Mirski, *supra* note 8.

109. See, e.g., Edward Keene, *The Reception of Hugo Grotius in International Relations Theory*, 20 GROTIANA 135, 154 (1999) (discussing different interpretations of Grotian thought on state and international order).

110. Cf. Louis B. Sohn, *Generally Accepted International Rules*, 61 WASH. L. REV. 1073 (1986).

111. Mary George, *Fisheries Protections in the Context of the Geo-Political Tensions in the South China Sea*, 43 J. MAR. L. & COM. 85, 103 (2012).

112. Cf. McDevitt, *supra* note 2, at 13 (“The UNCLOS Convention does not deal with matters of sovereignty.”).

113. *Id.* at 54.

that “the land dominates the sea” (*la terre domine la mer*),<sup>114</sup> which has been summarized as holding that “[i]t is the land which confers upon the coastal State a right to the waters off its coasts.”<sup>115</sup> That being the case, the question as to who owns the land could conceivably be legally prior to the delimitation of sea boundaries stemming from that land. To some, the Philippine-U.S. advocacy of the reverse approach seems to suggest instead that “the sea dominates the land.”

Yet the land *will* dominate, even if the arbitration goes forward: States will continue to articulate their territorial ownership claims, and the main way that they will do so, invoking the law of “discovery,” is the most dangerous side effect of UNCLOS’s inability to address sovereignty issues.

### B. *Historical Claims, Nationalism, and the Dangerous Ambiguity of “Discovery”*

In addition to the legal and political issues noted above, Philippine and U.S. objections to any Chinese articulations of claims to sovereignty that invoke the U-shaped line or the concept of historic rights do nothing to deter, or even to limit, various parties’ South China Sea claims based on a far more vague and amorphous legal category: that of “discovery.”<sup>116</sup> To the contrary, a Tribunal ruling that fully addressed the issues raised in the Philippine submission would, if anything, *promote* claimant states’ outside pursuit of territorial claims based on prior discovery and occupation. As will be explained below, this result would be likely to have deleterious affects for both the effective legal disposition of the question of territorial ownership and for the underlying political contention between the involved states. Absent additional action to clarify and unify the legal discourse surrounding the core issue of territorial sovereignty, the indirect effects of *Philippines v. China* risk deterring legal settlement, escalating tensions, and promoting unilateral foreign policy adventurism.

Discovery is just one of five traditional forms of lawful acquisition of territory, the others being cession, annexation,

114. For applications of this principle in other international adjudications, see, e.g., *Territorial and Maritime Dispute (Nicar. v. Colom.)*, Judgment, 2012 I.C.J. Rep. 1, ¶ 140 (Nov. 19); *Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.)*, 2012 ITLOS Case No. 16, ¶ 185 (Mar. 14).

115. *Anglo-Norwegian Fisheries (U.K. v. Norway)*, Judgment, 1951 I.C.J. Rep. 116, ¶¶ 128, 133; see also *Anglo-Norwegian Fisheries (U.K. v. Norway)*, Judgment, 1951 I.C.J. Rep. 116, ¶ 154 (separate opinion by Hsu Mo).

116. See ROBERT Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 97–100 (1963).

accretion, and prescription.<sup>117</sup> Of these, annexation is regarded as having been outlawed by 1948's Nuremberg Tribunal decisions regarding the crime of aggression, if not earlier.<sup>118</sup> Claims to the other forms of territorial acquisition remain legal but are quite rare. Discovery, though, is the most prevalent among them. This is in large part due to its relatively simple formal and practical requirements, originally requiring no more than being the first "civilized" power to physically discover and assert claim to a "savage" territory, as "it may be safe to say that before the eighteenth century discovery alone was sufficient to acquire a valid title to a *terra nullius*."<sup>119</sup> It is also, however, due to the inherent political logic of the concept. Any state that seeks to portray its political control of a territory as arising *ex nihilo*—without any prior owners potentially presenting their own claims or objections—is greatly incentivized to portray its acquisition as "discovery."<sup>120</sup>

It may seem to be an exceedingly counterintuitive claim that the legal framework surrounding supposedly peaceful "discovery" could be more dangerous and conflict provoking than that of aggressive territorial "annexation." Yet, as this subpart argues, that is precisely the case at least with regards to many of today's remaining territorial disputes. This problem is particularly egregious in the context of the South China Sea, because key parties' legal arguments based on pure "discovery" are ill-suited to stimulating effective resolution of the dispute. In particular, the European colonial expansionist concept of "discovery" is uniquely ill-fitted to the East Asian historical context of extremely long-term cultural affiliations with specific territories amid fluid (and cyclically rising and falling) political structures and non-Westphalian concepts of "nationhood."<sup>121</sup> Yet the legal concept of "discovery," asserting prior arrival in, laying claim to, and occupation of a *terra nullius*, is in fact the ultimate basis for the territorial claims of many modern states.<sup>122</sup>

As a result, the question of ownership over the Paracel and Spratly Islands is most often discussed in terms of alleged evidence of just this sort of "discovery,"<sup>123</sup> as indicated by either prior

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117. *Id.* at 6.

118. *Id.* at 52–53.

119. Tao Cheng, *The Sino-Japanese Dispute over the Tiao-Yu-Tai (Senkaku) Islands and the Law of Territorial Acquisition*, 14 VA. J. INT'L L. 221, 226 (1974) (citing ARTHUR S. KELLER, OLIVER J. LISSITZYN & FREDERICK J. MANN, CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS 1400–1800 (1938)).

120. *Id.* at 225.

121. *Cf.* Coleman & Maogoto, *supra* note 75.

122. *See* JENNINGS, *supra* note 116.

123. *See, e.g.*, Jianming Shen, *International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands*, 21 HASTINGS INT'L & COMP. L. REV. 1, 7–10 (1997).

presence,<sup>124</sup> prior formal declaration of legal ownership,<sup>125</sup> or continuous usage and occupation.<sup>126</sup> For states seeking to vindicate their claims, however, this approach presents five key problems: (1) it is extremely difficult for involved states to be legally certain that they will be regarded as succeeding to all of the interests of all of their relevant dynastic predecessors;<sup>127</sup> (2) likewise, it is quite challenging based on the quality of existing records to assert definitively that subjects of only one state exclusively occupied and made use of the South China Sea islands;<sup>128</sup> (3) the question as to what constitutes effective “symbolic” assertion of sovereign ownership based on discovery has never been adequately cleared up even among Western European powers,<sup>129</sup> let alone in the context of traditional East Asian political discourse, thus adding a high risk of uncertainty and arbitrariness into any ultimate court finding as to what did or did not constitute “declaration” of territorial ownership; (4) the question of when the customary requirement of “occupation” was activated, thus potentially allowing previous sovereign ownership to expire, has never been adequately settled and thus injects yet another note of uncertainty;<sup>130</sup> and (5) even if “discovery” were adequately proven by a given state, the ownership thus obtained would still be potentially subject to a finding of later dispossession via annexation by or cession to another power (if an argument could successfully be made that there was widespread legal recognition of such a transfer).<sup>131</sup> Discovery thus promotes nationalist, unequal dichotomies between the “civilized” and the “savage,” while also failing to provide any ultimate legal answers to the issue of contemporary ownership.

### C. *Abandoning the Discovery and Occupation Paradigm*

As noted above, the “discovery” paradigm of territorial acquisition is closely bound up with the distinctly European Enlightenment-era (colonial) conception of positive imposition of legal control over “savage” territory by the representatives of civilized scientific rationality.<sup>132</sup> As such, this legal framework is inseparable

124. *Id.* at 11.

125. *Id.*

126. *Id.*

127. *Cf.* James Mayall, *Nationalism, Self-Determination, and the Doctrine of Territorial Unity*, in *SETTLING SELF-DETERMINATION DISPUTES: COMPLEX POWER-SHARING IN THEORY AND PRACTICE* 8–11 (Marc Weller, Barbara Metzger & Niall Johnson eds., 2008).

128. *See, e.g.*, HAYTON, *supra* note 76.

129. *See* Cheng, *supra* note 119.

130. *Id.*

131. *Cf.* JENNINGS, *supra* note 116.

132. CARL SCHMITT, *NOMOS OF THE EARTH* 126–33 (2003) (offering an exploration of the European legal concept of “discovery” along these lines).

from the concept of a *state of nature* that the “discoverer” has left behind but that the “discovered” land and its residents still inhabit. There is no reason to assume that this conception has any essential metaphysical veracity; to the contrary, as argued in this Article, the notion of “discovery” is especially ill suited to, if not invalidated, by the example of East Asian political history.

At the same time, however, the modern framework of international law does not recognize the sort of gradual accretion of territorial influence that lie at the core of traditional East Asian state-building practices.<sup>133</sup> The positivist foundations of international law, in particular, require that rights be conceptualized via the “ownership” paradigm of presumably exclusive enjoyment (except where very deliberately excepted from this paradigm).<sup>134</sup> With regards to the specific territorial disputes of the South China Sea, the pre-European lack of clearly articulated assertions of legal title in the idiom of exclusive territorial control complicates not only each individual state’s attempts to assert its “discovery” of the disputed lands as *terrae nullius*, but also impedes the prospects of *any* effective legal determination of the issue.

When today’s disputants make arguments for sovereignty based on “discovery,” they essentially put themselves in the position of colonial-era European states vis-à-vis any non-European inhabitants or potential competing claimants to the territory in question. An essential, a priori element of the concept of “discovery” is that of an unequal legal status between the “discoverer” and the “discovered.” Indeed, arguably much of the international order lies atop relationships of fundamental inequality stemming from the colonial and imperialistic appropriations of wealth and territory associated with the invention and application of this concept.<sup>135</sup>

It is unsurprising, then, that other states in the region react so vociferously when one of their competing claimants invokes arguments based on discovery of South China Sea territories—potentially at stake is their very status as a “civilized” people, at least at a given historical point. Perhaps even more importantly, however,

133. Cf. HAYTON, *supra* note 76; Coleman & Maogoto, *supra* note 75.

134. See, e.g., Treaty on Principles Governing Activities in Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, art. 4, 18 U.S.T. at 2410, 2413–14, 610 U.N.T.S. 205, 208 (The Moon and other celestial bodies are to be used by treaty parties “exclusively for peaceful purposes”); The Antarctic Treaty, Dec. 1, 1959, art. 1(1), 12 U.S.T. at 794, 795, 402 U.N.T.S. 71, 72 (“Antarctica shall be used for peaceful purposes only.”).

135. See, e.g., ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 111–14 (2007); BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* 195–96 (2003). See generally SUNDHYA PAHUJA, *DECOLONIZING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* (2011); DIPESH CHAKRABARTY, *PROVINCEALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (2009).

states react with such vehemence precisely because it is so easy to make discovery-based claims—each state has its own, incompatible with all others. Thus China and Taiwan both claim the contested South China Sea territories in part based on arguments of their “discovery” as *terra nullius* during the ancient Han Dynasty; Vietnam claims either eighteenth or nineteenth century discovery of its claimed territories or succession to French possessions based on the latter’s acts of discovery (in the early twentieth century); while the Philippines bases some of its territorial claims on the argument that the South China Sea territories became *terra nullius* after being abandoned by their occupier Japan at the end of World War II.<sup>136</sup> These claims are mutually irreconcilable and as noted, in some cases require comprehensive negative assessments of the civilizational level of other claimants.

Indeed, to a large extent, the legal and factual confusion over just what “discovery” might mean in the South China Sea context is the legacy of colonial aggression and acquisition through the postwar period. The French act of “discovery” in 1929 is a major case in point. As contemporary accounts indicate, when the French made their landing, they found Chinese already living there: “Only the little frigate *La Malicieuse* could disembark some men onto the isle of Spratly (or Tempest Isle) . . . while on Thi-Tu there were found five Chinese, and on the Twin Isles, there were seven, in sum and total.”<sup>137</sup> These prior residents had constructed on the island various accoutrements of what they undoubtedly considered as “civilized” life, including domiciles and a small temple, as well as planting various crops.<sup>138</sup> They were also visited “once per year” by a Chinese ship carrying various goods.<sup>139</sup> Despite their small number, the prior presence of these Chinese citizens potentially supports the Chinese contention that “[t]he Nansha [Spratly] Islands and nearby sea areas

136. Lee G. Cordner, *The Spratly Islands Dispute and the Law of the Sea*, 25 OCEAN DEV. & INT’L L. 61, 66–67 (1994) (“[T]he Chinese place a great deal of emphasis on the fact that the Japanese surrendered the island to the Chinese, and not to the French, who occupied some of the islands prior to their seizure by the Japanese in 1939.”).

137. See REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE (1934) (noting prior presence of Chinese inhabitants in South China Sea isles when France purported to ‘discover’ them as *terra nullius*); see also REVUE FRANCO-CHINOISE, 13–14, 323 (1932) (“Les quelques Haïnanais qui vivent dans l’îlot de Thi-tu, cerclé de lagons où d’admirables poissons colorent les eaux limpides de toute la gamme des couleurs de l’arc-en-ciel, paraissent jouir d’un bonheur sans mélange.”).

138. BOLETIM GERAL DAS COLÓNIAS, 98–102, 210 (1933) (“[S]o encontraram habitantes chinesas em Thi-tu e Twin. Os chineses tinham plantado ali coqueiros, chá e batatas.”).

139. *La Controversia entre Japón y Francia. – Guano y Fosfato. – Interpretación. – Nacionalidad que Permanece en el Misterio.*, HOY 2, 37, (1933) (“Unos pocos chinos se encontraron en Thi-Tu y las islas Gemelas. Un Junco chino les traía alimentos una vez al año.”).



have been a part of China's territories since ancient times, but some neighboring countries have long been illegally occupying some of the islands."<sup>140</sup> It would, naturally, be difficult for any court to convince China to accept that the Spratlys were terra nullius when its citizens lived there and only became "civilized" after the arrival of France.<sup>141</sup>

Like France, Japan also claimed rights as a "discoverer" of the South China Sea territories during the early twentieth century.<sup>142</sup> Though both of these colonial powers' claims drew protests from the embattled Chinese Republican government (including the first known appearances of the U-shaped line claim), they were to some extent successful in achieving international recognition.<sup>143</sup> In an ironic parallel with the situation today, at the height of the dispute between these two colonial powers, just before Japan launched its occupation forces in 1939, France offered to bring the issue of South China Sea sovereignty to international arbitration at the Permanent Court of Justice.<sup>144</sup> Japan declined, insisting that its "discovery"-based claim preceded that of France and that the latter had unlawfully occupied its territory in attempted annexation.<sup>145</sup>

As is revealed in a memorandum by U.S. President Franklin Delano Roosevelt to his Secretary of State, even the United States at one point considered making a "discovery"-based claim to the Spratlys.<sup>146</sup> The administration ultimately decided not to do so, however, partly in order to support French protests against Japan's

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140. *Don't Excessively Interpret South China Sea Drill*, CHINADAILY USA (July 26, 2015), [http://usa.chinadaily.com.cn/china/2015-07/26/content\\_21409474.htm](http://usa.chinadaily.com.cn/china/2015-07/26/content_21409474.htm) [<http://perma.cc/A98S-WBC7>] (archived Feb. 15, 2016) (citing a 2015 statement by the People's Liberation Army Navy Spokesman Liang Yang).

141. *See, e.g., China-France-Japan Trilateral Relations Concerning the South China Sea Nine Small Islands Issue*, DIPLOMACY MONTHLY (*Waijiao Yuebao*) (Aug. 1933).

142. *See id.*; *see also* Dzurek, *supra* note 65, at 9 (explaining Japanese presence on the Spratly islands since 1918 and the introduction of Japanese phosphate companies to the islands in the late 1920s).

143. *See* Dzurek, *supra* note 65, at 10 (discussing Chinese protests to French activities on the Spratly islands because "the Chinese foreign ministry publically affirmed Chinese sovereignty of the islands").

144. *Southward Advance of Japanese Expansionist Movement: Hainan and the Spratly Islands*, 3 FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS: THE FAR EAST 103, 114 (1939) ("The French note proposed the settlement of the long standing controversy over the ownership of the Islands by submission to arbitration. The Japanese note answers with the announcements that Japan has assumed jurisdiction over Spratley [sic] Islands on March 30, 1939.").

145. *See id.* ("The Japanese contested the French claim and the dispute has been carried on with a long exchange of notes each party basing its title to ownership on prior occupation.").

146. *See id.* at 16 (detailing President Roosevelt's opinion on the ownership of the Spratly Islands, the Chief of the Division of Far Eastern Affairs writes: "The Ambassador inquired whether we were going to take any action in the matter [ownership of Spratly Islands]. I replied that we still had the matter under study.").

occupation of the islands.<sup>147</sup> Britain, likewise, decided to forgo its own previously articulated discovery claims to the Spratlys in favor of France.<sup>148</sup> Nonetheless, the very same year, France suffered a regime change following invasion by Germany, and the new Vichy government decided not to continue protesting Japan's claims.<sup>149</sup> Indeed, France dropped the matter of South China Sea sovereignty during or after the war,<sup>150</sup> a stance continuing into the present day (though any eventual ruling on the arguments of today's claimant states would also likely call for courts to interpret the validity and current status of French claims).

Clearly, then, there is little current basis for common consensus on the question as to who "discovered" the South China Sea islands and when. Any effective prospects for legal resolution of the question of sovereign ownership must not commit a priori to the establishment of any date of "discovery," but should instead attempt simply to unify the various legal arguments of different claimants in a common idiom and agree on a set of shared facts and legal principles. An international Commission of Inquiry (COI) among involved states would make this possible, in particular by maintaining a narrow historical focus on the problematic legal status of former French and Japanese territorial claims. More specifically, the process of resolving this legal question could enable judicial investigators to give more concrete legal meaning (and thus limitation) to the "discovery" paradigm of sovereignty as it pertains to the region, most likely by means of analyzing both colonial powers' claims to the discovery and occupation of terra nullius and determining whether such claims were viable (in light of all other parties' protests against such claims as well as the applicable legal doctrines of territorial acquisition).

Though a modest approach, this structure would at least refocus the discourse surrounding the South China Sea from one in which the key parties are talking past each other—in large part because they mean very different things by the term "international law"<sup>151</sup>—into one where all parties concerned are engaged in the same

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147. *Id.* at 116

148. *See id.* at 116–17 (detailing Britain's condemnation of Japan under international law after Japan pronounced its ownership over the Spratly islands).

149. *See* MARWYN S. SAMUELS, CONTEST FOR THE SOUTH CHINA SEA 64–66 (2013).

150. *See id.* ("[B]y February 1943 the circle was drawn tight when, with the agreement of the Vichy government, Japanese forces occupied the French leasehold of Kuang-chou Wan and thereby effectively cut off all but the most clandestine ocean-front access to Chinese nationalist forces holding out in Szechuan Province.")

151. On the universalist normativity of international law, and the inherent tensions with its particular origins in the practices of colonial European states exploiting non-Western peoples and their polities, see, e.g., Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L. L.J. 1 (1999) (examining impact of nineteenth-century colonialism on positivism and jurisprudence under international law).

conversation, attempting to answer the same questions. In the context of complex geopolitical disputes, this positivistic clarity<sup>152</sup> is precisely what law is best situated to offer.

#### IV. BENEFITS OF AN INTERNATIONAL COMMISSION OF INQUIRY

##### A. A Modern Innovation for a Multipolar World

Regarding international law's legitimacy and enforcement dilemmas, Myres McDougal wrote that "[u]nless there is a basic acceptance of the system of public order no community exists; where no community of loyalty, belief, and faith exists, no rational process of decision can occur, since recommendations will proceed on irreconcilable assumptions."<sup>153</sup> That, as has been described in this Article, is precisely the underlying problem with regard to the *Philippines v. China* arbitration as well as the South China Sea dispute more generally. In addition to identifying the problem at this general level, McDougal also elaborated in his work a key metric for evaluating its manifestation in specific instances: the question of whether states have competing or irreconcilable hierarchies of values.<sup>154</sup>

As suggested above in Part III, China and the Philippines are advocating very different views regarding such basic international legal principles as *nemo dat* and "the land dominates the sea." While interpreting the same body of legal rules, the two sides reach different outcomes precisely due to a disagreement as to the hierarchy of values underlying the rules being interpreted. In China's case, to reiterate, the apparent highest value is the positivistic assumption that the legitimacy of legal rules is in the final instance always determined by state consent.<sup>155</sup> On the Philippine-U.S. side lies the alternative view that the highest value of international law is *a prioristic* rulemaking and the establishment of shared communal norms.<sup>156</sup>

152. Cf. Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401, 402 (2002) (interpreting "[Lassa] Oppenheim's positivist insistence that international law rules be based on consent" and arguing that "the vitality of mainstream positivist traditions in international law has been sustained by a deeply felt commitment to the ethical view that legal positivism provides the best means for international lawyers to promote realization of fundamental political and moral values.").

153. MYRES MCDUGAL, HAROLD LASSWELL, & IVAN VLASIC, *LAW AND PUBLIC ORDER IN SPACE* 1054 (1963).

154. See MYRES S. MACDOUGAL & HAROLD D. LASSWELL, *JURISPRUDENCE FOR A FREE SOCIETY* 1-6 (Martinus Nijhoff Pub., 1992).

155. See generally THE SOUTH CHINA SEA ARBITRATION, *supra* note 3.

156. See, e.g., Rosen, *supra* note 8, at 34; Mirski, *supra* note 8.

A resolution to the current dispute would be much easier, at least as a legal matter, if one side or the other was “wrong.” However, this is not the case, for “[t]here [is] no well-developed and authoritative hierarchy of values in international law.”<sup>157</sup> As a result, even more so than is already the case within domestic jurisdictions, international legal decisions can reach markedly different conclusions depending on decision makers’ valuation of different factors, such as the rights of sovereign states or the universal rights of individuals.<sup>158</sup>

To accommodate the impossibility of resolving by fiat fundamental interstate differences over hierarchies of value, McDougal and other representatives of the New Haven School of international legal theory advocated “a public order which is designed to promote the greatest production and widest sharing of all values and which in its power processes, in particular, is oriented toward a minimum of coercion and a maximum of persuasion.”<sup>159</sup> The resulting order, then, would have to be one that adopts as a basic principle the need for maximally inclusive rules and institutional mechanisms aimed at diminishing what Jacques Rancière has termed *dissensus*: the fundamental clash between incompatible collective worldviews based on different epistemologies of value.<sup>160</sup>

The chief need, then, is for a mechanism that enables states that wish to resolve their conflicts, but that bring to the table markedly different *Weltanschauungen*, to gradually work towards beneficial solutions, mutual understanding, and accommodation. As will be argued in this Part, the Commission of Inquiry (COI) mechanism is in many ways the most viable institutional tool states have available to them for these purposes. The concept of the COI was designed at the turn of the twentieth century, in a world of newly equal (and newly globalized) states, which sought to recognize their equal status while making allowances for fundamental differences over the ideal world order, stemming from different hierarchies of value.<sup>161</sup>

COIs were introduced as a potential means for resolving international disputes in the first Hague Convention of 1899, and then again endorsed and expanded in the second Hague Convention of 1907.<sup>162</sup> The idea of an independent transnational process of

157. Report of the International Law Commission, 54 U.N. GAOR Suppl. No. 10, at 240. U.N. Doc. A/ 57/10 (2002).

158. On the distinctions between these two forms of “egalitarianism” (and an analysis of their shared intellectual origins), see Jean Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 ETHICS & INT’L AFF. 1, 16–17 (2004).

159. Myres S. McDougal, *Some Basic Theoretical Concepts About International Law: A Policy-Oriented Framework of Inquiry*, 4 J. CONFLICT RESOL. 337, 343 (1960).

160. See generally RANCIÈRE, *supra* note 4.

161. See McDougal, *supra* note 159, at 347–49.

162. Convention for the Pacific Settlement of International Disputes (Hague Convention I) art. 9 (35), Oct. 18, 1907, 36 Stat. 2199, [http://avalon.law.yale.edu/20th\\_century/pacific.asp#art9](http://avalon.law.yale.edu/20th_century/pacific.asp#art9) [<https://perma.cc/7WRR-CPLT>] (archived Feb. 16, 2016).

establishing a group of inquirers to investigate the facts of disputed or controversial incidents was largely a new innovation, although a few international legal instruments had previously provided for inquiry processes (e.g., in order to resolve complex preexisting disputes between parties to a peace treaty.)<sup>163</sup> Yet, unlike these predecessors, the COI was conceptualized as a perpetually available tool for states to use in the context of increasingly complex global ties and, in particular, the difficult project of managing the world's ever more crowded sea lanes.<sup>164</sup>

The earliest applications of the new mechanism were thus in the so-called vessel inquiries,<sup>165</sup> which intended to facilitate the resolution of the circumstances and allocation of responsibility over occasional altercations between major sea powers. Thus, the very first Hague Convention COI was the 1905 *Dogger Bank* inquiry,<sup>166</sup> which was occasioned by a Russian naval ship's firing at UK fishing vessels after mistaking them for enemy Japanese torpedo boats in the midst of the Russo-Japanese War. The incident, which sparked a serious diplomatic altercation and was seen as potential cause for military confrontation given contemporary geopolitics, was frequently referred to in the United Kingdom as the "Russian Outrage."<sup>167</sup> *Dogger Bank* was the first opportunity for great powers to demonstrate their ability to unite, in accordance with The Hague principles, in the collective attempt to constrain and limit sources of dispute while maximizing potential areas of agreement.

The proceedings were in many ways exemplary of the originally intended role and function of the original COIs. Occurring in the context of a war between Russia and a rising Japan (allied with Britain), the underlying incident certainly had great potential for sparking further military or diplomatic conflagration. Yet the use of the COI, which had originally been proposed by the Estonian-Russian jurist Friedrich Martens,<sup>168</sup> eventually managed to unite the two parties, Britain and Russia, in common acknowledgment of the improper but partially inadvertent nature of the Russian naval actions in question. Unlike a litigation, this outcome was reached by means of an independent committee's establishment, via inquisitorial methods, of certain basic facts (in that case, specific movements of

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163. See Norman L. Hill, *International Commissions of Inquiry and Conciliation*, 15 INT'L CONCILIATION 89, 91 (1932); see also van den Herik, *supra* note 18, at 508 (discussing the transformation of international commissions of inquiry since the early 20th century).

164. See van den Herik, *supra* note 18, at 510.

165. *Id.*

166. *Id.* at 513.

167. *Id.* at 514.

168. *Id.* at 510 ("As the intellectual father of the concept, Friedrich Martens believed than an impartial establishment of the facts and circumstances surrounding international disputes would help cooling off emotions.").

ships and issuance of military commands, based on accounts by various parties present at the time), with no specific damages awarded, blame sought, or penalty imposed—though the mere establishment of key facts eventually proved enough to motivate apology and compensation by Russia to Britain over the acts of one of its officers.<sup>169</sup> The process successfully helped defuse the incident.

Various other COIs were deployed in similar maritime contexts in the years that followed. As a means of resolving contentious, potentially volatile disagreements, the new inquiry model was seen as incorporating some of the best aspects of preexisting forms of dispute settlements, serving as “a tool that married the independence of arbitration with the flexibility and *souplesse* of mediation.”<sup>170</sup> Indeed, in some of the earliest theoretical investigations of the promising role of the mechanism in helping to order the multipolar world community—a vital concern given the complex balance of power dynamics characterizing the period—it was precisely this *souplesse* (“flexibility, elasticity, or suppleness”) that served as its most valuable function.<sup>171</sup>

This mechanism, however, fell into disuse in the years leading up to World War II, as flexibility and accommodation became increasingly rare objectives in interstate relations.<sup>172</sup> During the Cold War era, as well, the period of dormancy continued, largely due to such factors as the tense international structure of competing alliances, proxy régimes, and extremely centralized military and diplomatic decision making on both sides of the ideological divide.<sup>173</sup> Important factors promoting the attempt to discover and make use of conciliatory mechanisms, such as COIs and high levels of economic integration and expanding diplomatic and commercial ties, were also largely absent from U.S.-Soviet relations. Following the collapse of the Soviet Union, however, COIs were rediscovered beginning in the 1990s and put to novel use in the context of official international inquiry into situations of possible human rights abuse or violation of similarly grave international customary norms.<sup>174</sup>

The mechanism was seen as particularly suitable for such contexts for a number of reasons, among these being (1) the relatively low amount of political and diplomatic capital required to establish them—as opposed to, official tribunals empowered to pass binding

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169. See Hill, *supra* note 163, at 13 (stating that Russia paid \$300,000 in damages to Britain); van den Herik, *supra* note 18, at 514.

170. See van den Herik, *supra* note 18, at 511 (citing N. Politis, *Les Commissions internationales d'enquête*, REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 149, 150 (1912)).

171. See *id.*

172. *Id.* at 518 (describing a more rigid application of a dispute resolution mechanism during the decade preceding World War II).

173. See *id.* at 534.

174. See *id.* at 520.

judgments as a matter of international criminal law; (2) the collaborative nature of the proceedings that meshed well with the fundamental premise of international human rights law investigation that the rights identified are “universal” norms of the entire community of nations (not particular political assertions by one or a group of states); and (3) the flexibility or *souplesse* afforded by this tool in terms of defining both the exact nature of the inquiry, particularly the highly adjustable degree to which it is conceptualized as making legal versus factual determinations, and, relatedly, the concomitant lack of any significant restrictions on the possible forms of subsequent conciliation between parties.<sup>175</sup> These factors have informed, for example, recent use of the mechanism to address human rights abuses in North Korea,<sup>176</sup> with a COI on the issue established under the UN Human Rights Council making greater progress on international consensus over the problem’s severity than any other approach (though some critique the degree to which modern human rights COIs do not aim at conciliation *per se* but rather “to condemn and provoke”).<sup>177</sup>

Indeed, it is largely for the same three qualities of moderation, collaboration, and flexibility that the COI was in its initial maritime forms regarded as itself constituting a form of *conciliation*, by means of which parties could reach a *modus vivendi* regarding potentially conflict-inducing incidents or behavior.<sup>178</sup> In the South China Sea context as well, the use of a COI to address one significant aspect of the various competing territorial claims promises the potential for a moderate, collaborative, and flexible new institution that could be used to serve as a basis for further settlement.<sup>179</sup> At the same time, a COI on the initial and current status of French and Japanese territorial claims would, whatever its findings, function as a means to unify the disparate arguments of today’s various claimants, discouraging asymmetrical rhetoric of the “discoverers” against “discovered,” or of exclusionary ethno-nationalist totalities, while

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175. As Politis wrote, the ideal outcome of a COI was in essence conciliatory: a “*calmant salutaire*.” Politis, *supra* note 170, at 172.

176. G.A. Resolution 22/13, U.N. Doc. A/HRC/RES/22/13, at 1 (April 9, 2013).

177. Nonetheless, with regards to the scope of international collaboration and consensus facilitated by the COI report, see, e.g., Donald S. Zagoria, *The Future of U.S.–Japan–China Relations*, NATIONAL COMMITTEE ON AMERICAN FOREIGN POLICY (2014), [https://www.ncafp.org/2016/wp-content/uploads/2014/12/NCAFP-US-Japan-China-Trilateral-Report\\_Tokyo-Nov-2014.pdf](https://www.ncafp.org/2016/wp-content/uploads/2014/12/NCAFP-US-Japan-China-Trilateral-Report_Tokyo-Nov-2014.pdf) [<https://perma.cc/UV2D-BZEX>] (archived Feb. 16, 2016) (“[Y]ears of international pressure on the regime over its nuclear and missile programs, its violation of its international obligations under the Nuclear Non-Proliferation Treaty, its military provocations against its neighbors, and its threats to use nuclear weapons against others have not elicited the reaction that the COI report has received from the international community.”).

178. See van den Herik, *supra* note 18, at 513.

179. See *id.* at 511–12.

providing grounds for common discourse in the idiom of formal legal equality.

The following subparts will examine the potential institutional basis, composition, mandate, and ultimate effects of a COI investigating the issue of colonial sovereignty claims in the South China Sea.

B. "*Arbitration in Disguise*"? *Law and Facts in Institutionalized Inquiry*

This subpart addresses practical steps that could be taken in order to establish a COI, as well as determine its more specific mandate in relation to the South China Sea dispute. In addition to states' independent ability to simply establish a COI based on their own multilateral initiative,<sup>180</sup> various existing international institutions could also serve as the basis for such a mechanism. These include, for example, (1) a COI established under the auspices of UNCLOS, with a status similar to the Commission on the Limits of the Continental Shelf;<sup>181</sup> or (2) one conducted under the offices of the UN Secretary General, acting either *proprio motu*<sup>182</sup> or via the recommendation of the General Assembly<sup>183</sup> or the UN Security Council; or (3) one under the independent power of investigation of the UN Security Council, acting in accordance with Article 34 of the UN Charter (allowing the Security Council to investigate "any situation or dispute whose continuation might endanger international peace and security");<sup>184</sup> or, finally, (4) one established under one of the constituent bodies within the International Court of Justice or one of the other primary UN organs, with the added caveat that the COI must be seen as falling sufficiently within the mandate of that body to be activated by its implied powers.<sup>185</sup>

Of these various options, an initiative of the Security Council would no doubt be the most authoritative and legally significant forum. Moreover, the Security Council would potentially not need to

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180. *Id.* at 517–18.

181. *Id.*

182. See U.N. Charter, Chapter XV art. 98–99 ("The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security."); see also G.A. Res. 46/59, art. II ¶ 13, Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security (Dec. 9, 1991).

183. See G.A. Res. 46/59, *supra* note 182, art. II ¶ 10 ("The General Assembly should consider the possibility of undertaking fact-finding for exercising effectively its responsibilities under the Charter for the maintenance of international peace and security.").

184. See van den Herik, *supra* note 18, at 524 (citing E.L. Kerley, *The Powers of Investigation of the United Nations Security Council*, 55 AM. J. INT'L L. 892, 898 (1961)).

185. *Id.* at 528.



either recommend the action of the Secretary General or make use of its own implied powers in order to set up a COI for the South China Sea.<sup>186</sup> Rather, a COI could be validly erected under the Article 34 competence, precisely to address the question of whether the competing territorial claims in the region are at least sufficiently determinate and susceptible to eventual legal disposition that any further political engagement by the Security Council is unnecessary. Not only would such a COI inevitably answer that question in the affirmative, but its framing would also further pacify the situation by quelling various claimants' concerns over potential future United Nations' condoning of interventionist measures by concerned foreign powers (which would be strongly discouraged by a preliminary Article 34 finding that further Security Council engagement was unnecessary). A preliminary finding of this nature would also contribute to the goal (stated by all parties) of avoiding further militarization of the dispute.

The most expedient option for setting up a COI, however, would be for states to simply make use of The Hague Convention processes to do so as a multilateral legal agreement. This would be greatly facilitated by the usage of the originally facilitated procedures specified under the Convention, which fill in general parameters such as the scope of the mandate to be expected as well as the division between factual and legal considerations.<sup>187</sup> This last point is, perhaps, the most difficult question to determine ahead of time, but as a general matter states are expected to conduct COIs in order to make factual assertions, rather than ultimate legal determinations of the sort made by arbitral tribunals. The conciliatory aspect of the COI in large part depends on parties' understanding that its essential role is that of an objective factual investigation not inherently tied to any legal regime of specified rights or obligations (though these are inevitably present in at least an implicit capacity and can lead to semi-judicial outcomes involving settlements or reparations, as in the *Dogger Bank* inquiry).

The complex balancing act involved in characterizing specific investigative determinations as being either factual or legal has led some, even in the earliest era of COIs, to characterize the mechanisms as "arbitrations in disguise."<sup>188</sup> This was, certainly, always a latent quality of the tool given the degree to which it married the flexibility of mediation with the public, procedural, and more (ideally) objective nature of arbitral decision making. Yet the "disguise," to the extent that there is one, signifies only that states may find themselves cooperating beyond the scope of the initial allocation of fact-finding authority—not that they will be compelled

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186. *See id.*

187. *See id.*

188. Politis, *supra* note 170, at 156.

to do so, or to accept any legal determinations not envisioned within the mandate of the inquiry as initially defined.

Because the COI mechanism is most useful in precisely those instances where formal legal arbitration is viewed as unfeasible due to the reluctance of one or more parties to submit to institutions that they feel may not fully represent their interests or the strength of their legal positions, it is necessary as an initial matter to carefully modulate the degree to which issues pending investigation are defined as determinations of law rather than fact. Thus, in the case of a COI for the South China Sea territorial dispute, it would be necessary to avoid an overly broad scope of inquiry such that core differences regarding the underlying conceptual dispute (or *dissensus*) between China and the Philippines would be implicated by the mechanism. As the purpose of a Commission for the South China Sea would be precisely to “conciliate and pacify,” it is imperative that it adopt the older “maritime” model of objective and transparent investigation in lieu of moralized or politically volatile investigative practices that sometimes characterize modern human rights COIs, or of addressing any issues outside of its narrow mandate.

A narrow focus on the territorial status of the South China Sea’s islands during the period of sovereignty claims by France and Japan (two then-colonial powers that now make no claims to the territory) would allow determinations of key issues regarding the potential scope of acceptable claims by currently involved states. It would, nonetheless, be able to constrain its findings within the realm of factual, rather than currently active legal issues, as its core determinations would inevitably constitute historical, or even philological, inquiry into the perceived legal requirements of discovery claims among the nations of the international community in the 1920s–1940s, and the degree to which French and Japanese claims met these requirements at the time. As noted, the legal principle of territorial acquisition by discovery would be significantly constrained (in its application to the South China Sea) regardless of the COI’s ultimate findings. Yet, while reducing the scope of possible legal claims to a more manageable number and quality, the COI would not have to make any determinations of the present rights or obligations of parties. Just as issues of sovereignty are outside of the scope of UNCLOS (which does purport to regulate the international law obligations of parties that stem from that treaty), so too would all legal rights and obligations be outside the scope of a fact finding COI on unresolved colonial claims to South China Sea territorial sovereignty.

C. Key Potential Findings: The Unavailability of Discovery and Conquest

Regardless of what findings are ultimately made by a COI on the issue of the colonial-era claims to South China Sea sovereignty, much will turn on two events that occurred in 1928: (1) the influential PCJ decision *Island of Palmas* (regarding a nearby island territorial dispute between the United States and the Netherlands),<sup>189</sup> which has significant legal repercussions for interpreting the availability and criteria for determinations of territorial acquisition via discovery; and (2) the signing of the Kellogg-Briand Treaty under the auspices of the League of Nations, by means of which states parties “outlawed war” and, concomitantly, legitimate territorial acquisition by means of annexation.<sup>190</sup>

The *Island of Palmas* arbitration concerned sovereignty over an island lying between the U.S.-occupied Philippines and Dutch possessions in Indonesia.<sup>191</sup> The two Western states each asserted competing claims based on “discovery” of the small island territory, with the United States claiming to have succeeded to Spanish rights that originated from the latter’s “discovery” of the Philippines and outlying islands<sup>192</sup> (as noted above, the United States later considered making a similar claim over the Spratly islands as well, but eventually decided not to do so). Eventually, however, the United States lost the arbitration precisely due to a ruling on the requirements of asserting effective discovery, with the panel finding that mere physical discovery without long-term use and occupation was insufficient to confer territorial sovereignty.<sup>193</sup> Long-term Dutch usage conferred upon the Netherlands a stronger claim than that available to the United States.<sup>194</sup>

The same year, the Kellogg-Briand Pact was negotiated and signed in Paris, providing that all signatories would renounce war as a means to resolve disputes or conflicts between them.<sup>195</sup> Following initial signatures by France, the United States, and Germany, it was in total adopted by sixty-two countries and officially came into effect in 1929.<sup>196</sup> One of its first and most fundamental legal effects was to

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189. See generally Philip C. Jessup, *The Palmas Island Arbitration*, 22 AM. J. INT'L L. 735 (1928) (summarizing the arbitration between the United States and the Netherlands over the ownership of the Island of Palmas, which resulted in a favorable decision for the Netherlands).

190. ROBERT H. FERRELL, PEACE IN THEIR TIME: THE ORIGINS OF THE KELLOGG-BRIAND PACT 35 (1952).

191. Jessup, *supra* note 189, at 735.

192. See *id.* at 737.

193. See *id.* at 737–39.

194. *Id.* at 744–45.

195. See, e.g., FERRELL, *supra* note 190, at 166, 240.

196. See *id.* at 258.

make legally impossible for all signatories claims to valid legal territorial acquisition through wars of conquest.<sup>197</sup> Though some dispute the legal effect of the Pact, or its binding nature (e.g., due to concerns over the lack of enforcement provisions), there is at minimum a strong case to be made for its validity as an international legal prohibition on aggressive war, binding upon all states parties (and perhaps even establishing a customary prohibition that would have effect for non-parties, as well).<sup>198</sup>

This unavailing character of claims based on territorial conquest is perhaps the most clear-cut finding that a COI could make, but in combination with the delimitation of discovery claims that this Article argues the mechanism could also effect, it would have dramatic consequences for the potential validity of French and Japanese assertions of territorial sovereignty during the period in question. Given both France's and Japan's signing of the Kellogg-Briand Pact, they could not legally acquire title to the island territories of the South China Sea by annexation at any point after that date. This would likely leave only possible claims based on discovery or official cession, given that "accretion" is not relevant to the territories in question.

With regards to discovery claims, both the *Island of Palmas* case and other international legal decisions of the time indicate that neither France nor Japan likely undertook sufficient activities of use and occupation to assert a valid claim, even if it were assumed that the territories were indeed terra nullius before the arrival of one or both powers (a determination, again, that would be difficult to assert as a reasonable statement of fact in any objective sense). In the *Clipperton Island* arbitration of 1931,<sup>199</sup> for instance, France was the beneficiary of a ruling articulating precisely this principle, when it was granted sovereignty over an island in a dispute with Mexico.<sup>200</sup> The *Clipperton Island* ruling largely centered on the requirements of occupation and usage, which were found to favor French claims.<sup>201</sup>

Like the panel in *Island of Palmas*, the panel in *Clipperton Island* found that it was not sufficient for a state to assert sovereignty based solely on the act of physical discovery, which conferred only an "inchoate title" and the right to incorporate the island into the discovering state's possession.<sup>202</sup> In addition to the *creation* of the right to take possession, the legal claim of territorial acquisition by

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197. See *id.* at 261.

198. See *id.*

199. See Edwin D. Dickinson, *The Clipperton Island Case*, 27 AM. J. INT'L L. 130, 132-33 (1933) (analyzing the impact of the Clipperton Case, a territorial dispute between France and Mexico).

200. *Id.* at 130.

201. See *id.* at 131.

202. *Id.* at 132.

discovery was found by the panel to also require the *exercise* of the right via “the actual, and not the nominal, taking of possession . . . [by taking] steps to exercise exclusive authority there.”<sup>203</sup>

If it could be demonstrated that either France or Japan effectively discovered the South China Sea island territories as *terrae nullius*, and took legally sufficient action to occupy and take possession of them, then this might be sufficient to establish valid legal title. Yet, without the legally sufficient second step, “[t]he title of discovery . . . would . . . exist only as an inchoate title, as a claim to establish sovereignty by effective occupation . . . [, which] however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty.”<sup>204</sup> Largely due to the geopolitical exigencies of this volatile time in world history—with French forces expelled from the region by the Japanese navy, which in its turn was driven from the territories following World War II—neither state would likely be able to demonstrate effective use and occupation sufficient to confer territorial sovereignty as per *Island of Palmas* and *Clipperton Island*.<sup>205</sup>

The only plausible remaining form of territorial acquisition available to the powers would thus be *cession*: that is, mutually voluntary assignation of territory from one state to another. Given the various protests issued among France, Japan, and China throughout the pre-war period,<sup>206</sup> it would perhaps be challenging to assert that any of these powers (or today’s other claimants) could be found to have clearly *ceded* its rights to another—though of course a COI would have to diligently investigate this possibility. Moreover, “cession” has traditionally been an extremely elastic concept in international law, and could at least potentially be constructively inferred by various forms of inaction or passive recognition of a foreign state’s claims. Most significantly, a COI that eliminated “discovery” and “annexation” as available bases for sovereignty, thus forcing today’s claimants to argue in terms of “cession,” would thus privilege a more positivistic and legally determinate discourse, based on the correct interpretation of modern communications between various states, rather than on ancient history or vague, culturally specific notions of “empty” territory. If there is ever to be a mutually satisfactory determination regarding sovereignty in the South China Sea, it will have to be the outcome of some form or forms of cession; yet even before that point, simply reframing the dispute in terms of cession would also help to dissuade escalating militarization and aggression.

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203. *Id.*

204. *Id.*

205. *Cf. SAMUELS, supra note 149.*

206. *Id.*

Regardless of the COI's findings regarding cession (or, indeed discovery), it would still have the salutary effects argued for in this Article, as will be further explained below.

*D. Effects: Clarifying Claims and Reframing the Legal Discourse*

A collaborative and flexible process for determining the validity or lack thereof of colonial-era territorial claims by spatially distant powers would serve several important functions. (1) First, it would either eliminate or simplify a number of legal claims, especially those claiming discovery of terra nullius, that are extremely difficult to prove legally and face even more difficulty obtaining legitimacy in the eyes of rival claimants. (2) Secondly, its collaborative format would suggest (without imposing) the shape of further legal processes by means of which COI parties could gradually seek to arbitrate the issue of territorial sovereignty. (3) Lastly, as a referendum by regional powers on the political facts and legal status of colonial incursions into the region, it would serve the important role of a common regional recognition of what Simon Schama has referred to as (in the context of the Spanish conquest of the Netherlands) "a cut with the past which [ ] made possible the retrospective invention of a collective identity."<sup>207</sup> It would, in terms of this last function, make a modest contribution towards defining modern "Asia" as a self-constituting region whose geopolitics need not be determined by colonial political legacies.

With regards to the first function, a finding that French and Japanese territorial claims based on the discovery of terra nullius were invalid—because, for example, the territories had long been used and occupied by various East Asian states, which had at minimum "inchoate claims" to the South China Sea's various islands—would pave the way for the more general rejection of the rhetoric of discovery-based sovereignty claims in the region.<sup>208</sup> By articulating a set of normative guidelines as to when and how a claim of discovery can be successfully asserted, the COI would at best discourage claimant states from pursuing such claims (thus turning instead to alternatives with better-developed sets of legal criteria, such as claims based on formally sufficient territorial cession and the self-conscious political bargaining by interested states that accompanies such activity) or, failing that, at least apply equal

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207. SIMON SCHAMA, *THE EMBARRASSMENT OF RICHES: AN INTERPRETATION OF DUTCH CULTURE IN THE GOLDEN AGE* 113 (1987).

208. This effect would, thus, be consistent with the normative proposals outlined in HAYTON, *supra* note 76; Mirski, *supra* note 30; or Kingdon, *supra* note 13, without, however, depending upon political or diplomatic commitments by the United States, or any other outside power, to intervene in the situation by supporting or deterring adjudication of any state's legal claims. Clarification of the claims themselves could work towards a similar goal.

pressure to all states still hoping to make discovery-based claims to sovereignty to further specify and clarify<sup>209</sup> the legal and factual basis for such claims.

On the other hand, a finding that French or Japanese "discovery" claims were at one time *valid* (though this may be unlikely given the factors already noted) would also, ironically, serve the same beneficial goals of ruling out any contemporary claimants from making such discovery-based claims. Neither France nor Japan now claim the territories, and indeed both have at various times made clear indications that they no longer maintain any claim whatsoever to the territories.<sup>210</sup> As a result of a finding that one or both of them *once had* sovereignty over the territory, however, today's contestants for South China Sea territorial sovereignty would be placed in the position of arguing their own claims solely on the basis of positivistic assignments of legal rights after the date of "discovery" by one or the other colonial power.

The only exception to this elimination of discovery as a viable legal argument would be the stance that, at some specific date, France or Japan had territorial sovereignty over the disputed areas and then affirmatively renounced that ownership, without assigning a successor (a claim currently pursued by the Philippines, but in fact likely available to all powers currently occupying South China Sea territories).<sup>211</sup> While this argument would still be available, and thus the idea of a post-1945 "discovery" of the territory could still be argued in arbitration, pursuit of such a claim pointing to this later date of effectivity would be far easier to adjudicate, given the increased amount of modern sources of evidence and the well-developed record of legal and diplomatic claims and statements made by various states on the issue. This one remaining discovery-based argument would not pose the same kind of problems present when *all* claimant states have such incommensurable politico-legal claims rooted in their interpretations of ancient historical sources and cultural practices.

Relatedly, per the second function, the elimination or further specification of discovery-based claims, and the concomitant elevation of alternative claims based on territorial *cession*, would allow for

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209. This process of "clarification", of course, would be precisely what the Philippines and other states have requested of China vis-à-vis its U-shaped line claim. The UNCLOS arbitration is, however, a poor vehicle for achieving such clarification, for the reasons noted in Parts II and III of this Article. By contrast, the COI proposed in this Article would start based on the premise that *all* states have poorly defined territorial claims based on the concept of "discovery", in part based on the legal ambiguity of that concept itself. It is only by joining together to further clarify a shared basis for such claims that each individual claim can be more clearly stated—or abandoned—in favor of other, more legally developed claims.

210. Cf. SAMUELS, *supra* note 149.

211. *Id.*

states to more easily envision potential legal processes for the resolution of the dispute. By first going through the COI process in order to determine the validity of French and Japanese assertions of discovery, the currently involved states would, without risking the availability of their own ultimate claims to sovereignty, establish a shared basis for the common pursuit of an ultimate legal resolution to the dispute. At the conclusion of the COI process (in one of the two outcomes noted above), involved states would have the options of (1) seeking to collaborate further in continuing the mechanism to determine other issues; (2) seeking instead to establish an arbitration or other adjudication mechanism for determination of current sovereignty claims; or (3) withdrawing from the collaborative process.

None of these three options would negate the stabilization bonus to the region from the collective pursuit of the COI, as well as the specifying and defining effect on legal claims that would also be produced. The first two options would, indeed, allow states to pursue further specification of claims and would tend towards greater likelihood of ultimate resolution of the dispute on the basis of shared legal norms in a process viewed as fair and legitimate. Even if one or more involved states turned instead to the third option, their withdrawal would not mitigate the existing benefits of collaborative inquiry up to that point, and the corresponding degree to which they further specified and clarified their legal claims would have a salutary effect on both the geopolitical and legal dimensions of the dispute.

The third function of the COI, however, is likely the most important of all, as it most reflects the diverse politico-legal and historical meanings that would be associated with collaborative international processes of this scope and importance established at a regional level by East Asian states.<sup>212</sup> In keeping with the role of international law as a system of normative concepts and practices that promote cooperative behavior between nations, seeking to diminish self-interested competition over the acquisition of exclusive benefits, a COI enabling (some degree of) consensus and condominium on the issue of territorial sovereignty would further the goals of regional cooperation and the establishment of long-term norms for mutual recognition within the system of equal sovereign states. Yet they would also avoid compromising the coexistent (if sometimes conflicting)<sup>213</sup> development of customary international

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212. See Richard Stubbs, *ASEAN Plus Three: Emerging East Asian Regionalism?*, 42 *ASIAN SURVEY* 440 (2002).

213. Conflict between the two principles of sovereign equality and the equal cosmopolitan rights of all human individuals arises despite the closely-linked intellectual origins of both ideals. They can be normatively reconciled by reference to their shared origins in a more basic stance of "egalitarian universalism." See Cohen, *supra* note 158 ("Sovereign equality and human rights are *both* new and indispensable principles; in international relations, both are based on what Jürgen Habermas has



norms based upon the modern humanitarian ideal of equal rights for all individual people, regardless of state affiliation. A COI would not immediately realize either of these ideal legal conditions, but would promote them jointly and separately.

Building upon the North Korean human rights example, the repeated successful deployment of a COI in the East Asia regional context would be the grounds for further inquiry as to the unique benefits of this institutional mechanism for regional international relations, including potential future uses in the sphere of human rights inquiries. Arguably, COIs are institutions particularly well-adapted to collaboration among East Asian states, whose shared legal traditions and historically Confucian political and cultural practices favor inquisitorial, rather than adversarial, methods of adjudication, and where the objects of judicial inquisition were generally defined in an initially expansive, but gradually narrowing manner permitting extensive ongoing consultations among parties.<sup>214</sup>

Of course, any new institutional development related to the South China Sea will also necessarily implicate the long-term project of peaceful regional integration: as with any concrete instance of rights discourse, the articulated public reasoning of a COI for the South China Sea would also be just one "iteration" of the underlying project of international rights-based ordering as such.<sup>215</sup> To what extent can particularized legal discourse, over a highly specific legal dispute, contribute to or detract from the longer-term effort to establish a stable and ever-deepening *modus vivendi* framework among regional actors?<sup>216</sup> The following Part will explore possible approaches to this question.

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called egalitarian universalism, and they can become complementary if the attempt is made in good faith to make new distinctions and update the rules of the international legal order accordingly. As opposed to imperial universalism, which perceives the world from the centralizing perspective of its own worldview (hoping to impose its version of global right), egalitarian universalism demands that even superpowers relativize their particular interpretations of general principles vis-à-vis the interpretive perspectives of equally situated and equally entitled agents."); see also Jürgen Habermas, *Interpreting the Fall of a Monument*, 10 CONSTELLATIONS 364 (Sept. 2003).

214. Ryan Mitchell, *Collective Inquiry and the Juridical Logic of Abduction* (unpublished manuscript) (on file with author).

215. Cf. discussion of the "iteration" of rights in various concrete contexts in Seyla Benhabib, *Defending a Cosmopolitanism Without Illusions: Reply to My Critics*, 17 CRITICAL REV. INT'L SOC. & POL. PHIL. 697 (2014).

216. For a parallel discourse related to the role of international law in intra-European cooperation and integration see, e.g., STUART A. SCHEINGOLD, *THE LAW IN POLITICAL INTEGRATION: THE EVOLUTION AND INTEGRATIVE IMPLICATIONS OF REGIONAL LEGAL PROCESSES IN THE EUROPEAN COMMUNITY* (1971).

## V. COLLECTIVE INQUIRY AND THE PROJECT OF REGIONAL COOPERATION

A. *Sovereignty, Normativity, and Realism in International Law*

International legal discourse takes place by means of specific cooperative institutions, and the successful functioning of these institutions depends largely on the degree to which they are accepted by the states that compose them.<sup>217</sup> As states seemingly remain the fundamental units of international order, new projects in international law must take the theorization of the relationship between and among states, and the attempted prediction of their behavior,<sup>218</sup> as important normative referents (even where the desired goal is to change such behavior).<sup>219</sup> Yet this is not just a practical exigency of global political realities; it is key to the theoretical origins of international law as such, as well as to its *a priori* possibilities and limitations.<sup>220</sup>

The modern liberal project of international law of which UNCLOS, and the law of the sea in general, are such successful examples has in large part developed as both the *evolution* of and a *reaction* against the Westphalian system of formally equal sovereigns defined by their territorial exclusivity. This dualistic relationship was perhaps most explicitly and influentially summed up by Kant in his essay on *Perpetual Peace*, where he writes that “a state of peace, therefore, must be *established* . . . and unless this security is pledged to each by his neighbor (a thing that can occur only in a civil state),

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217. This idea is often articulated in the context of critical perspectives on international law, see, e.g., JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW*, 202 (2005) (“[International law is] a special kind of politics” which is “binding and robust, but only when it is rational for states to comply with it.”), but it is also frequently recognized as, at minimum, an important pragmatic challenge for those advocating a more “binding and robust” international legal framework. See, e.g., Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 *STAN. L. REV.* 1749 (2003).

218. Edward T. Swaine, *International Law Is, as International Relations Theory Does*, 100 *AM. J. INT’L L.* 248, 258 (2006) (citing *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* (Oona Anne Hathaway & Harold Hongju Koh eds., 2005)) (“[W]hile international legal theories might not scientifically establish valid causal relationships, they can suggest documented and plausible correlations or outcomes.”).

219. See, e.g., Thomas Nagel, *The Problem of Global Justice*, 33 *PHIL. & PUB. AFF.* 113 (2005).

220. See, e.g., Paul W. Kahn, *American Hegemony and International Law: Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 *CHI. J. INT’L L.* 1 (2000) (describing the role of popular sovereignty in delimiting the conceptual possibilities of state behavior, and arguing that it serves as an *a priori* constraint on international projects).

each may treat his neighbor, from whom he demands this security, as an enemy.”<sup>221</sup>

For Kant, the development of international law, as well as the basis of its binding force, originates in the human predilection for sociability.<sup>222</sup> The formal legal principle of exclusive territorial control, though central to the Westphalian system (and the ultimate basis of all assertions of rights and injuries under that system) that Kant affirmed, was at its very core compromised by an underlying tension with the generative propensity for seeking out new forms of social organization and interaction. The logical ideal (if perhaps asymptotic) endpoint of this ongoing process of sociability has been the achievement of “perpetual peace” in a *foedus pacificum*, or federation of free republics in a stable and law-governed international order.<sup>223</sup>

Today’s attempts to resolve or prevent international conflicts by means of treaties, conferences, arbitration, and other such multilateral institutions largely follow in this idealist tradition. The core of this tradition, with respect to international order, is a belief “in reason and the possibility of progress in interstate relationships,” wherein “[t]he individual person is the repository of moral value [and] human beings should be treated as ends, rather than means.”<sup>224</sup> As noted, Kant has been regarded as a founding figure of the modern liberal worldview due to, inter alia, his appeal to the “kingdom of ends” as a regulatory principle of all human behavior.<sup>225</sup> Yet the basic philosophical foundations, as well as real-world praxis, of the liberal project of international ordering go back considerably further.

Despite the important prehistory of many of its key concepts in the humanistic writings of the Renaissance and late medieval era (and in the classical schools of thought informing these works),<sup>226</sup> a specifically “liberal” idealist perspective on international legal and political order is often seen as originating in the systematic writings of the “father of [modern] international law,” Hugo Grotius.<sup>227</sup> Grotius exemplifies the argument from universal practices approach to natural law characterizing the early Enlightenment.<sup>228</sup> He sought

221. IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795) <https://www.mtholyoke.edu/acad/intrel/kant/kant1.htm> [<https://perma.cc/Y8YS-8K87>] (archived Feb. 15, 2016).

222. See IMMANUEL KANT, ANTHROPOLOGY FROM A PRAGMATIC POINT OF VIEW (Cambridge Univ. Press 2006) (1798) (discussing “the highest end intended for man, namely, sociability [Geselligkeit].”).

223. KANT, *supra* note 221.

224. Swaine, *supra* note 218; see also JENS TIMMERMANN, KANT’S GROUNDWORK OF THE METAPHYSICS OF MORALS: A COMMENTARY (2007).

225. *Id.*

226. See RICHARD TUCK, THE RIGHTS OF WAR AND PEACE 1–16 (2001).

227. *Id.*

228. *Id.*

to define the applicable international law of his era as a set of customary practices, susceptible to modification by future behavior. This influentially open-ended, sociability-based model arguably inaugurated modern international law and made possible the more specifically delineated teleological visions of Kant and other subsequent theorists.<sup>229</sup>

Against this basic disposition (which can be further subdivided into such variants as classical liberalism, cosmopolitanism, utilitarianism, neoliberalism, etc.), there has often been opposed an alternate strain of reflection on international order, commonly referred to as realism. Though attempts have been made to chart a general intellectual genealogy of realist approaches to politics and international relations,<sup>230</sup> the very nature of the theoretical position to be thus studied complicates an overly historicized definition. In essence, realist approaches to international relations and to international law are characterized by skepticism as to the practical real-world relevance of ideological content, whether these are metaphysical beliefs, ethical standards, or purportedly universal legal or political norms, in comparison with concrete, particular situations.<sup>231</sup>

While advocates of the liberal (sometimes equated with or subordinated to a more generally-defined "idealist") approach can plausibly trace much of their conceptual vocabulary and practical telos to the Grotian (or, again, earlier, humanist) project of systematizing and rationalizing the international order, international realists tend to turn to Thomas Hobbes as one of the first great exponents of their own critical perspective on legal ordering of the international sphere.<sup>232</sup>

Hobbes raised, *inter alia*, the skeptical point that universal practice alone does not determine the right in particular situations, and thus cannot be independently sufficient for the full determination of the rights and obligations of states.<sup>233</sup> Based on his conception of political sovereignty, the state of nature, and the legal structure of the contract, he made consent the rational basis of all legal obligation.<sup>234</sup> His contractarian ideas, against the largely unmitigated Grotian focus on custom, became another key element of international law.<sup>235</sup> It is important to note that even avowedly

229. *Id.*

230. *See, e.g.,* Steven Forde, *Classical Realism*, in 17 *CAMBRIDGE STUDIES IN INTERNATIONAL RELATIONS: TRADITIONS OF INTERNATIONAL ETHICS* 62 (Terry Nardin & David R. Mapel eds., 1992).

231. *Id.*

232. *Id.*

233. *Id.* at 75–77.

234. *Id.*

235. *See* TUCK, *supra* note 226. In fact, Grotius also incorporated contractarian notions into his own framework, particularly in relation to the practice and

realist (or “naturalist”) followers of Hobbes, however, have extremely varying views as to the exact functioning and scope of states’ contracting power. For some, such as Samuel von Pufendorf, contractarianism can have results that look quite a bit like Grotius’ system of universal practices.<sup>236</sup>

Nonetheless, the essential liberal idealist/realist split has in significant part persisted to the present, with modern realist skeptics of international legal authority generally raising the point that only by official *action* can states clearly produce new binding obligations. One especially influential articulation of this critical perspective in the context of modern international law has been Carl Schmitt’s appeal to the traditional basis of the law of nations on relations between *magni homines*, or “great people”: the notion that states are independent entities that interact with one another as concrete personalities, as opposed to the mere accumulation of their individual citizens.<sup>237</sup>

For Schmitt, the Kantian vision of a legally institutionalized, necessarily peaceful liberal order relying on supra-state authority revealed the earlier thinker’s “greatness and humanity” but also revealed that “he was . . . closer to theologians than to jurists.”<sup>238</sup> The assertion of any moral authority binding upon states, but not based on their own express consent (at least in terms of the initial allocation of supervisory authority to the external supervisory body), would be presumptively invalid. By contrast, the great achievement of the *jus publicum Europaeum* (European public law), which was to “bracket war,” was accomplished only by means of empowering the *magni homines*/Westphalian sovereign equals to wage formally-declared legal war upon one another to vindicate perceived wrongs.<sup>239</sup> By contrast, liberal projects such as outlawing war while retaining independent sovereign equality could not succeed in an anarchic world.

It is important to note, though, that Schmitt’s criticism of Kant in this regard is articulated not as a substantive disagreement over goals, but rather as a matter of conceptual consistency. His remark that the goal of a peaceful federation banning aggressive war is a

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justifications of warfare between sovereigns. Nonetheless, his basic assumption was that contract-based conceptions of rights were, when legitimate, ultimately justifiable based on universal custom. By contrast, for followers of Hobbes, customary practices were only ultimately justifiable based on contract. Though views as to the justifiability of particular rights claims or practices might, thus, correlate, they came from fundamentally opposed basic theoretical backgrounds. Cf. Stephen C. Neff, *A Short History of International Law*, in *INTERNATIONAL LAW 2* (Malcolm Evans ed., 2nd ed. 2006) (discussing the growth and changes in international law from the middle ages to post-WWII).

236. See, e.g., Neff, *supra* note 235, at 10.

237. SCHMITT, *supra* note 132, at 143.

238. *Id.* at 170–71.

239. *Id.* at 246.

“theological” rather than a “juridical” one was based on his view that this goal was simply incompatible with the notion of *magni homines*-style, formally equal Westphalian sovereignty, upon which Kant also explicitly relied.<sup>240</sup> In the exceptional case, Schmitt argued, the sovereignty-bearing unit (i.e., the Westphalian state) would retain the ultimate veto over any external norm.<sup>241</sup>

Whereas Kant might thus be read as supporting the idea of a “universally” binding legal standard for maritime sovereignty, as embodied in UNCLOS (which has been described as a “Constitution for the Ocean”), Schmitt stands for the firmly opposed position that no “constitution” could possibly serve as an ultimate normative authority separate from that of the individual states that decide whether or not to consent to it. Rather like today’s Chinese position, Schmitt argues that the only “constitutions” that can meaningfully be legally binding are those produced by the political decision of a sovereign (popular or otherwise). For him, as for today’s China, the question of assigning sovereign control over territory is conceptually prior to any discussion of the legal norms applicable in that territory.<sup>242</sup>

Many of today’s Western international law and international relations realists do not go as far as Schmitt in the scope of their critique.<sup>243</sup> Yet for precisely this reason his far-spectrum view can serve as a valuable argumentative reference point. Indeed, his defense of a political “pluriverse” continues to draw attention in academic communities throughout the world today, in a way that more modest critical positions do not often accomplish.<sup>244</sup> Attempts to

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240. *Id.* at 147–167.

241. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL*, 35 (University of Chicago Press, 2007) (“War is still today the most extreme possibility. One can say that the exceptional case has an especially decisive meaning which exposes the core of the matter.”).

242. *Id.* at 46 (“The endeavor of a normal state consists above all in assuring total peace within the state and its territory. To create tranquility, security, and order and thereby establish the normal situation is the prerequisite for legal norms to be valid.”).

243. And, conversely, today’s liberal thinkers tend to accept some variant of the realist position of international anarchy as the baseline for their further normative agendas intended to mitigate the negative effects of that anarchic state. See, e.g., Swaine, *supra* note 218, at 254 (“Neoliberals contend that, while the interstate system does function in anarchic conditions, that situation does not, in itself, cripple opportunities for instigating durable patterns of cooperation. Such patterns can be set by creating international regimes that coordinate ways and means agreed upon to handle common transnational problems. Regimes facilitate cooperation and collaboration among governments in that they elucidate norms, universalize rules, enhance information sharing, reinforce reciprocity, and provide methods for punishing those who deviate from acceptable conduct.”).

244. Cf. Chantal Mouffe, *Carl Schmitt’s Warning on the Dangers of a Unipolar World*, in *THE INTERNATIONAL POLITICAL THOUGHT OF CARL SCHMITT: TERROR, LIBERAL WAR AND THE CRISIS OF GLOBAL ORDER* 147 (2007).

realize new “liberal” projects of international law, such as the entrenchment of the UNCLOS regime’s universalized rule apparatus in the face of competing sovereignty claims, should not ignore Schmittian, sovereignty-based criticisms, but rather fully address them.<sup>245</sup>

In the attempt to better articulate the relationship between this acknowledgment of the critical ideal of sovereignty and the specific international legal innovation proposed in this Article, it is necessary to refer to other important approaches to the explanation of international legal and political order, in addition to the basic liberal/realist antinomy. One important, “constructivist,” approach adopts core realist insights regarding international anarchy, while asserting that the self-understanding of states within that order—and the way that they subsequently interact and define their respective goals and interests—are largely “socially constructed.”<sup>246</sup> That is, states’ “conduct stems from the way in which [they] perceive the outside world. It is their expressions of those perceptions that set the course for state actions.”<sup>247</sup> Yet, as will be seen in the following subpart, one need not fully subscribe to this constructivist worldview to appreciate the relevance of its core insights to the specific theoretical dimensions of the problem and proposed solution under consideration in this Article: the establishment of a legal mechanism to facilitate the cooperative transnational discourse of the parties in dispute over the South China Sea.

### B. *Constituting Mutual Recognition in the South China Sea*

As noted in the previous subpart, the core constructivist insight into international relations is, essentially, that the way states define their interests and objectives is not predetermined, but rather arises in the discursive context of contemporary international society and is informed by various contingent factors, both domestic and external. As a result, the condition of anarchy that realists identify between independent sovereigns—the lack of an overarching governing body

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245. Of course, many important attempts have been made, at varying levels of argumentative scope and with varying argumentative strategies. See, e.g., Jürgen Habermas, *The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society*, 15 *CONSTELLATIONS* 444, 445 (2008) (“If the advocates of a constitutionalization of international law are not to write off democracy completely, they must develop at least models for an institutional arrangement that can secure a democratic legitimation for new forms of governance in transnational spaces. Even without the backing of state sovereignty, the arrangement sought for must *connect up with* the existing, though inadequate, modes of legitimation of the constitutional state, while at the same time *supplementing* them with its own contributions to legitimation.”).

246. Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 *INT’L ORG.* 391, 396 (1992).

247. Swaine, *supra* note 218, at 255; see also Wendt, *supra* note 246, at 411.

or other such authority—is ultimately largely “what states make of it.”<sup>248</sup> Redefinition of self, or mutual understandings, can similarly redefine the possibilities of state cooperation. Discourse can redefine the actors who participate in it.

This is often regarded as a very modern theoretical framework, indebted to the works of contemporary philosophers and political theorists, among others, on the discursive conditioning of subjectivity.<sup>249</sup> Yet the basic constructivist insight summarized above can also be read in a broader sense to simply stand for the open-ended nature of cooperative state behavior as mediated through the process of interaction on the trans- and international level: a concept that is arguably fully reconcilable with a “realist” emphasis on state interests. The related concept of an interest in *recognition* by and among states has increasingly emerged as an explanatory factor for state behavior,<sup>250</sup> in addition to its more widely recognized role in the non-contractarian justification of political authority on a domestic level.<sup>251</sup>

As construed in these scholarly discourses, *recognition* largely derives its conceptual content from the works of G. W. F. Hegel.<sup>252</sup> Though he was very cautious in his own explicit treatment of international law (to the extent that he has been perceived as regressive in comparison with Kant’s more hopeful approach), Hegel in fact articulated a new intellectual approach to deepen the understanding of international legal ordering. His specific comments on international law often seem to straddle the divide between Grotian liberal universalism and Hobbesian skeptical realism. As he notes in his *Philosophy of Right*, “relations between states . . . depend principally upon the customs of nations, customs being the inner universality of behavior maintained in all circumstances.”<sup>253</sup> Such an understanding seems at least initially to support the Grotian, and later Kantian, premise that states may, by altering their behavior,

248. Wendt, *supra* note 246, at 391.

249. Cf. Martha Finnemore & Kathryn Sikkink, *Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics*, 4 ANN. REV. POL. SCI. 391, 398 (2001).

250. See, e.g., Hans Agne, Jens Bartelson, Eva Erman, Thomas Lindemann, Benjamin Herborth, Oliver Kessler, Christine Chwaszcza, Mikulas Fabry, and Stephen D. Krasner, *Symposium: ‘The Politics of International Recognition’*, 5 INTERNATIONAL THEORY 1, 94–107 (2013); see also, e.g. Jost Delbrück, *Structural Changes in the International System and Its Legal Order: International Law in the Era of Globalization*, 11 SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALES UND EUROPÄISCHES RECHT 1 (2001).

251. See, e.g., ROBERT R. WILLIAMS, *HEGEL'S ETHICS OF RECOGNITION* (University of California Press, 1998); AXEL HONNETH, *THE PATHOLOGIES OF INDIVIDUAL FREEDOM: HEGEL'S SOCIAL THEORY* (Ladislaus Löb trans., 2010).

252. *Id.*

253. GEORG WILHELM FRIEDRICH HEGEL & ALLEN W. WOOD, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 371, § 339 (Cambridge University Press, 1991).



create new and even potentially unlimited legal frameworks for projects of collective ordering (perhaps even a Constitution for the Ocean). Yet, at the same time, Hegel also made clear his agreement with the opposing, Hobbesian premise that, as “[t]here is no Praetor to judge between states, at best there may be an arbitrator or a mediator, and even he exercises his functions contingently only, i.e. *in dependence on the particular wills of the disputants*.”<sup>254</sup>

The appearance of an inconsistency between the views of international law expressed in these two quotations is reconcilable only by attention to two concepts that Hegel made central to his philosophical oeuvre: “customs,” or *Sitte*, and the aforementioned *recognition*. As Erik Ringmar writes, rather than focusing on international law’s liberal ideals, or on the political struggles that complicate realization of those ideals, “Hegel would stress [that] law provides us not only with a means of adjudicating between right and wrong, but also with a way through which identities can be established, recognized, and developed.”<sup>255</sup> The role of international law in defining state-to-state relations, in other words, is largely centered on the way in which, “by our submitting our actions to the stipulations of the law, others can come to recognize us as persons, or states, of a certain kind.”<sup>256</sup>

More generally, *recognition* for Hegel was the conscious goal of intersubjectively validated status attainment, within a given community of similarly acknowledged peers.<sup>257</sup> Crucially, such a community could only be construed on the basis of some shared concept of customary and ethical life, or *Sittlichkeit*,<sup>258</sup> to replace a pre-existing state of potentially violent anarchy. Without having to subscribe to a fully constructivist interpretation of interstate relations, it is possible to see in states’ pursuit of mutual recognition a genuine (realism-consistent) “interest” that can give rise to both cooperative and competitive behavioral patterns, but which ultimately favors a state’s interest in community-building for the purposes of entrenching the recognition of its favored norms, as well as its own relative status vis-à-vis its peers. Unlike more comprehensive liberal or constructivist theories, such a Hegelian-modified realist view requires only that states’ “interest” be broadened to accommodate concerns of status and recognition—but can also imply the possibility for extensive cooperation.

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254. *Id.* at 368, § 333 (emphasis added).

255. Ringmar, *supra* note 21, at 102. Though, as Ringmar acknowledges, in most of his discussions of these subjects, Hegel refers to them in the context of social relations between individual persons, he leaves open the scope of their potential impact on interstate relations.

256. *Id.*

257. HEGEL & WOOD, *supra* note 253, at xix.

258. *Id.* at 189, § 142.

Yet the application of this theoretical approach—or indeed, any other—is rendered difficult by the practical dynamics of the South China Sea dispute. Above all, the current situation in which states are experiencing a “dissensus” regarding the proper legal issues to consider first in addressing their conflicts—the law of sovereignty versus the law of the sea—has resulted in a situation where, at least with respect to the disputed territories, states may not even be in a relationship of “anarchy” with one another. For anarchy to exist as traditionally conceived, after all, there must at least be recognition of the potentially legitimate presence of another entity (even Kant begins his account of peaceful cooperation with the need to establish mutual trust between neighboring states). The key problem with regards to the South China Sea is that all of the claimants deny any possible right for the others to be present in what they regard as their own sovereign territory, yet, at the same time, advance solipsistic arguments in favor of their own presence that seemingly do nothing to persuade (or imply any recognition of) their fellow claimants.

To put it another way, it is premature to discuss either liberal or constructivist solutions to the sovereignty dispute at a moment when the states involved in the dispute have yet to even begin any constructive discourse on the issue. Moreover, as this Article has argued, the current international arbitration between the Philippines and China suffers from the weakness of ignoring the very issue that is at the center of the dispute. It may thus even exacerbate the lack of discourse and mutual recognition among claimants. As long as this radical lack of discourse continues to characterize the issue of sovereign ownership over the disputed territories, all claimants will remain in a state of mutual fear and epistemic uncertainty regarding the potential for their competitors to suddenly “militarize” and escalate the dispute in the service of one or another of their unheard arguments. It is in this sense that a COI refocusing ongoing international law efforts from “the law of the sea” to the “law of sovereignty” can serve to dissuade, rather than encourage, militarization or aggression.

The idea that political sovereignty, by clearing up “epistemic uncertainty” can remove incentives to violence based on mutual fear and suspicion is, in fact, at the very heart of the “realist” tradition of political theory. At the same time, the idea of a positive *project* of using sovereignty to clear up such uncertainty suggests the possibility of more liberal or constructivist evolutionary dynamics in interstate relations. David Grewal, for instance, has recently argued that certain “dimensions of Hobbes’s thought [] reveal him as . . . more [a] ‘constructivist’ than ‘realist.’”<sup>259</sup> In particular, Hobbes sought to draw a connection between the successful establishment of

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259. David Singh Grewal, *The Domestic Analogy Revisited: Hobbes on International Order*, 125 *Yale L.J.* 618 (2016).

a “well-ordered commonwealth” and a more expansive path “to achieve a pacific order among potentially bellicose modern states.”<sup>260</sup> A properly-ordered civil state, free of control by internal factions and representing the increasingly rational and globalized (commercial) interests of its constituents, would constitute an essential building block for what Grewal refers to as a “realist-utopian” world order.<sup>261</sup>

Like Hegel, Hobbes incorporates key realist insights—indeed, he is as noted regarded as the founder of this tradition in international thought—yet nonetheless suggests the possibility of increasing progress towards the ultimate goal of a peaceful, liberal international order. Ultimately, however, the subject of recognition in his view was not the state as such, but rather the state only within the scope of, and to the extent to which it had, a formally recognizable claim of right, or *ius*, that was capable of vindication in a generally recognized process of legitimate adjudication (at the time such processes included the use of war to prosecute legal claims).<sup>262</sup>

Thus, Hobbes wrote, “They say that *Justice is the constant Will of giving to every man his own*. And therefore where there is no *Own*, that is, no Propriety [property], there is no Injustice.”<sup>263</sup> Hobbes seemingly viewed the assertion of self-interested, but mutually recognizable, claims to the violation of rights (*ius*)<sup>264</sup> as the core of an effective international order.<sup>265</sup> Like Grotius and Kant, he appeared to view globalizing integration as an inherent element of gradually expanding “commercial republics.”<sup>266</sup> And yet, like Hegel, he clearly recognized the positivist point that no ultimate third-party, objective body could be wished into being to rule the community of states from above; rather, any achievements in the dimension of increasing international solidarity and peaceful integration would first have to be accomplished in the sphere of discursively constructed *Sitte*, or custom (for Hobbes, the civil sphere). The integrating, cosmopolitan telos of this sphere was not *opposed* to the Westphalian sovereign state system, but rather dependent upon and constituted by it.<sup>267</sup>

Ultimately, all of these foundational views, together and separately, support the increased mobilization of noncoercive international legal mechanisms to help establish what have been referred to in constructivist theory as “epistemic communities.”<sup>268</sup> In

260. *Id.* at 624 (citing COMMERCE AND PERPETUAL PEACE IN ENLIGHTENMENT THOUGHT (Béla Kapossy et al. eds., 2016)).

261. *Id.* at 634.

262. *See, e.g.*, TUCK, *supra* note 226, at 119.

263. THOMAS HOBBS, LEVIATHAN 110 (1660).

264. *Id.*

265. *See* TUCK, *supra* note 226, at 96, 132.

266. *See id.* at 276.

267. *Id.*

268. *See generally* Mai'a K. Davis Cross, *Rethinking Epistemic Communities Twenty Years Later*, 39 REV. INT'L STUD. 137, 137 (2013) (discussing the formation and

brief, such communities take the form of “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge,”<sup>269</sup> and they have played an important role in regional and global integration projects by, inter alia, “persuad[ing] [regional state] actors to conform to consensual (i.e., intersubjectively constructed) ideas without recourse to more material forms of power.”<sup>270</sup> At the same time, placing the core “realist” problem of allocating sovereignty (at least partially) into the hands of the transnational epistemic community of a COI would constitute *de facto* mutual recognition by participating states of the equal legal status and right to procedural fairness of their fellow claimants.

In the context of the South China Sea dispute, the current lack of mutual recognition among disputants as to the right of other states to even articulate claims over the core issue in dispute—the issue of territorial ownership—and thus the corresponding lack of recognition of other states’ legal statuses as equally-situated disputants entitled to procedural fairness (potential holders of a Hobbesian *ius*) impedes the gradual development of integrated regional institutions and a common sphere of discourse and collective practical ethics/*Sitte* to strengthen the foundations of regional cooperation.

As has been the case with Western Europe and Latin America, for example, the further development of regional institutions and norms is inseparable from adoption of and participation in mutually-accepted dispute resolution mechanisms, whether primarily legal or diplomatic in nature.<sup>271</sup> As argued in Parts III and IV of this Article, a COI for the South China Sea raises the possibility of creating a legal, and thus positivist, problem in place of what is now an essentially metaphysical one (regarding the “emptiness” of territories or the “existence” of sovereignty at given points in history). In the theoretical terms advocated by this Article, we would have to characterize as a paradigmatic shift in regional customary practice, or *Sittlichkeit*, a communal decision by interested states to replace a divisive metaphysical dispute *denying* recognition (a dispute over who

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operations of epistemic communities). Note that Grewal, *supra* note 259, at 631, asserts that Hobbes was not enough of a constructivist to believe that the creation of “epistemic communities’ would overcome the problems of anarchy among states without a transformation of domestic society.” However the argument outlined in this Article does not go that far; rather, I suggest that a “realist-utopian” agenda like that of Hobbes requires states to enter into discourse and establish “epistemic communities” simply to open up possibilities for various forms of further interaction and cooperation. In other words, as stated elsewhere in this Part, the current dynamic of mutually *ignoring* sovereignty claims while simultaneously pursuing law of the sea disputes and military escalation leaves states even worse off than they would be in a purely “Hobbesian” state of open anarchic competition.

269. Cross, *supra* note 268, at 142.

270. Anthony Zito, *Epistemic Communities, Collective Entrepreneurship and European Integration*, 8 J. EUR. PUB. POL’Y 585 (2001).

271. *See id.*

“discovered” whom) with a positive legal question *implying* recognition (the question of how diplomatic statements or legal instruments can be evaluated to determine, to whatever degree possible, which state has the most persuasive claim to ownership of particular island territories as recognized by other, equal polities).

### C. *Collective Inquiry, Epistemic Community, and Asian Order*

As noted in Part III.C., the “discovery” paradigm of territorial acquisition is closely bound up with the distinctly European, Enlightenment-era conception of positive imposition of legal control over “savage” territory by the representatives of civilized, scientific rationality. Applying this conceptual framework to the territorial disputes between today’s East Asian states only serves to exacerbate nationalist tensions and narratives of cultural primacy or superiority.<sup>272</sup> By contrast, a successful multilateral legal institution should enable the involved states to participate on an equal basis in a joint production of legal knowledge: bolstering the various states’ shared “knowledge-based network” of legal professionals.<sup>273</sup>

In place of ideologically or emotionally determined arguments regarding discovery or “sacred territory,” a COI would refocus discourse on the *technical* questions of sovereign ownership via official legal title (especially as demonstrated by potential acts or statements of cession). As developed in Part IV, this discursive transformation would, if successful, greatly increase the scope of common ground among disputants and dissuade unilateral political or even military action to enforce claims should there be no prospect of an outlet for such enforcement in international law. The network of international legal professionals that would take part in the process of establishing and executing a COI, moreover, is one that already exists. China, in particular, has experienced a rapid growth in the quantity and professionalization of its class of lawyers.<sup>274</sup> At this point, all South China Sea disputants already have robust communities of international lawyers, including many already writing voluminously about this very topic.<sup>275</sup>

Crucially, however, each disputant state’s legal community tends to write about this dispute more or less from the perspective of its

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272. See discussion *supra* Part III. C.

273. See MAI’A K. DAVIS CROSS, SECURITY INTEGRATION IN EUROPE: HOW KNOWLEDGE-BASED NETWORKS ARE TRANSFORMING THE EUROPEAN UNION 1–6 (2011).

274. See, e.g., WILLIAM P. ALFORD, WILLIAM KIRBY & KENNETH WINSTON, PROSPECTS FOR THE PROFESSIONS IN CHINA: PART I PROFESSIONS IN THE LAW (Routledge, 2010).

275. In addition to the various authors cited throughout this Article, significant amounts of writing on South China Sea issues have been produced by individual scholars, official and semi-official institutes, committees, and research groups throughout the region.

own state's articulated claims and positions. Indeed, the reality is that often knowing an author's national origin (including those from the United States or other Western countries) enables accurate prediction of the substantive conclusions reached by her or his ensuing legal analysis; in large part, as developed throughout this Article, the legal questions and body of law that authors choose to examine is often based on the decision they would like to reach, which in turn is based on perceived state interests.

If, instead, the legal communities in each disputant state were to play a more determinative role in the resolution of this international dispute—because they would be actively involved in creating and operating a mechanism to determine the basic facts about territorial sovereignty that would then be used in each state's subsequent legal arguments—this would enable the establishment of a *shared* dialogue among skilled legal professionals. Because they would not be called upon to articulate arguments as to the ultimate sovereign ownership of the disputed territory, international lawyers involved in the COI would be more free to represent their own state's interest while still fully engaging with their foreign colleagues in the *techné* of legal inquiry. Ultimately, the formation of a transnational community of inquirers<sup>276</sup> to begin addressing the aporiae of South China Sea territorial claims is a first step in redirecting conversations over territory from the politically volatile, totalizing realm of “metaphysical universalism” (e.g., ideas of ancient, sacred heritage or of discovery and territorial “emptiness”) to that of “a discursive, communicative concept of rationality.”<sup>277</sup>

The transition from modes of interaction conducted via claims based in metaphysical universalism to those based in discursive rationality is, in fact, the most urgent task facing the region as a whole. Part of the European colonial legacy in modern Asia is that a region historically characterized by a high degree of diversity, pluralism, and graduated borders has now been fully incorporated into the Westphalian paradigm of exclusive “national” affiliations and positivistically-defined rights and duties both for states and for their citizens.<sup>278</sup> In the face of these alienated conceptions of political

276. See Ashforth *supra* note 18 (advancing a related understanding of COIs).

277. SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY, AND POSTMODERNISM IN CONTEMPORARY ETHICS* 5 (1992) (“It is the discourse of the community of inquirers (Charles Sanders Peirce) which first assigns an evidential or other type of value to aspects of our consciousness or experience, and brings them into play as factors which support our claims to the veracity of our beliefs. In the continuing and potentially unending discourse of the community of inquiry there are no ‘givens,’ there only those aspects of consciousness and reality which at any point in time may enter into our deliberations as evidence and which we find cogent in backing our statements. The first step then in the formulation of a post-metaphysical universalist position is to shift from a substantialistic to a discursive, communicative concept of rationality.”).

278. For one view of this process, see Coleman & Maogoto, *supra* note 75.

identity, there is a constant threat of the development of “forms of self-enclosed nationalism or religious fundamentalism . . . founded on the exclusion of the other.”<sup>279</sup> As discussed above in Part III, the mutually compatible notions of both “discovery” and “sacred territory” are easily assimilated to precisely such nationalist and totalizing narratives. In fact, to a large extent, the rhetoric intensifying the South China Sea dispute in *all* of the claimant states has been precisely that of “communities that set themselves up as essential, mythical wholes,” in the dangerous joint effort to recapture “immanent, common essences and roots . . . posited as that which has been lost.”<sup>280</sup>

More than one state has, for example, dedicated pieces of its national cemeteries to martyred soldiers who died defending its claimed island territories.<sup>281</sup> These states see their defense of island territories as directly linked with the “sacredness” of the national territory as such.<sup>282</sup> Most of the disputing states have also organized highly patriotic media coverage, subsidized settlement programs, or even “sovereignty cruises” of their claimed territories so that their citizens can tour these far-flung corners of the notional motherland.<sup>283</sup> Worryingly, *unofficial* political discourse in such venues as online discussion forums, street demonstrations, or independent publications is often equally or more characterized by nationalist fervor than that in official media.<sup>284</sup>

Of course, the establishment of a COI for the South China Sea would not immediately replace the militarized or nationalistic dimensions of existing discourse. But in helping to develop the basic epistemic solidarity and corresponding (degree of) shared subjectivity of an influential legal community of inquiry at the very heart of what is today the region’s most divisive geopolitical controversy, it would be an important step towards deterring negative trends and promoting at least the seeds of deeper integration. As is widely acknowledged, East Asia’s “functional integration in the economy has

279. JANE HIDDLESTON, REINVENTING COMMUNITY: IDENTITY AND DIFFERENCE IN LATE TWENTIETH-CENTURY PHILOSOPHY AND LITERATURE IN FRENCH 30 (MHRA, 2005).

280. *Id.*

281. *See, e.g., The Island of Ly Son in Pictures*, VIETNAMNET (Aug. 8, 2015), <http://english.vietnamnet.vn/fms/travel/138199/the-island-of-ly-son-in-pictures.html>.

282. *Id.*

283. *See* Martin Petty, *Vietnam Launches Special ‘Sovereignty’ Cruise, Angering China*, REUTERS (June 5, 2015), <http://www.reuters.com/article/2015/06/05/us-vietnam-southchinasea-idUSKBN0OK22220150605> [<https://perma.cc/Y5N2-G2WL>] (archived Feb. 25, 2016).

284. *See* KAPLAN, *supra* note 59 (providing examples of unofficial nationalistic discourse); *see also* HAYTON, *supra* note 76 at 153 (“The fate of the ‘East Sea,’ as the Vietnamese call it, and allegations of Chinese plots to undermine the country frequently provoke online outbursts of nationalist fury.”).

developed sufficiently [while t]he problem lies in the lag or deficiency of institutional integration.”<sup>285</sup>

It is certain, moreover, that “[t]he main impediments to such a move [towards institutional integration] come from non-economic factors.”<sup>286</sup> Unlike the case in Europe, where economic and political integration have proceeded hand in hand at least to the extent of creating shared institutions,<sup>287</sup> Asian economic integration via ASEAN and other forums is exceedingly advanced, while political and diplomatic ties lag far behind.<sup>288</sup> The impact of the South China Sea dispute on the prospects for further integrating institutional development, and vice-versa, has also been widely recognized. Indeed, East Asian states must largely “vest . . . in East Asian regionalism the hope of settling in a peaceful way . . . remaining territorial disputes with neighboring countries, such as in the South China Sea, and of starting a regional security framework.”<sup>289</sup>

There are however some dissenting opinions as to the significance of the regional lag in institutions, with some scholars making, for example, the “neo-functionalist” point that “policies among states have converged and resulted in close cooperation,” even for lack of formally unified political groupings such as the European Union or Mercosur, or a regional security framework such as NATO.<sup>290</sup> Another view holds that shared cultural values and practices, especially those rooted in Confucian traditions, serve to bind regional powers together in a kind of generalized common civilizational habitus.<sup>291</sup> Yet, while accurately identifying important trends that serve to promote regional cooperation, mere policy convergence (largely on issues of economic management) or shared cultural background is unlikely to be sufficient in ensuring long-term peace and stability.

This is particularly so when, politically speaking, it is still very much the case that “an infernal tangle of alliances, frozen hostilities, superpower tensions and historical grievances sits alongside ever-deepening trade flows and shifting power plays.”<sup>292</sup> With respect to

285. JEHOON PARK, *POLITICAL ECONOMY OF NORTHEAST ASIAN REGIONALISM: POLITICAL CONFLICT AND ECONOMIC INTEGRATION*, 164 (Jehoon Park et al. eds., 2008).

286. *Id.*

287. *See generally* FINN LAURSEN ET AL., *COMPARATIVE REGIONAL INTEGRATION: EUROPE AND BEYOND* (Finn Laursen ed., 2010).

288. *See id.* at 215–25.

289. *Id.* at 232; *see also* Hong Nong, *Maritime Trade Development in Asia: A Need for Regional Maritime Security Cooperation in the South China Sea*, in *MARITIME SECURITY IN THE SOUTH CHINA SEA: REGIONAL IMPLICATIONS AND INTERNATIONAL COOPERATION* 35, 35 (Shicun Wu & Keyuan Zou eds., 2013).

290. Sorpong Peou, *Perspectives in Asia-Pacific Security Studies*, in *ROUTLEDGE HANDBOOK OF ASIAN REGIONALISM* 275 (Mark Beeson & Richard Stubbs eds., 2012).

291. *See id.* at 61–66.

292. Kelsey Munro, *Park Geun-Hye's Diplomatic Dance with Xi Jinping Has Heads Spinning in Asia*, *SYDNEY MORNING HERALD* (Sept. 12, 2015).



long-running and frequently militarized and polemicized disputes such as the South China Sea issue, in particular, economic and cultural trends have potentially moderated but not altered the underlying potential for dangerous confrontation.<sup>293</sup> The role of the United States as an increasingly involved outside power, moreover, has likely contributed to the volatility of confrontational rhetoric and to the risk of a more widespread conflagration.<sup>294</sup>

What, then, are the prospects that a COI might help mitigate these dangers, stem the tides of exclusionary nationalist discourse, and contribute to the process of building a space for mutual recognition, the gradual development of shared *Sitte* or ethical life, and further development of the institutional foundations of long term regional peace and sociability? There are several reasons to believe that the establishment of the COI would represent meaningful progress towards these goals.

First, the mechanism would serve the functions noted in Part IV of this Article, helping to transition the South China Sea dispute from a dangerously confrontational and emotional political discourse into a technical process of communal inquiry and transnational, professional legal work. While this would not necessarily take the form of a definite resolution to the issue of ultimate ownership, the deterrence of ethno-nationalist historical narratives and promotion of a technical idiom of judicially-determined ownership would constrain subsequent debate within the formal conceptual categories of a positivist juridical *Weltanschauung*.<sup>295</sup> The progressive incorporation of regional powers into judicial transnational legal processes would, in turn, greatly aid in their process of state socialization into the existing international system. Constituting both a prerequisite sociological foundation for and potential beneficiary of this process, the development of the legal profession has been an important element of both state-led modernization plans and the phenomena of burgeoning civil society throughout East Asia.<sup>296</sup> To the extent that the further socialization of Asia-Pacific states into international norms and governance regimes relies upon the “prospects for the professions” within these states,<sup>297</sup> the establishment of a COI and its corresponding empowerment of legal professionals would play a valuable role in promoting this long-term socio-political trend across the region.

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293. Cf. Avery Goldstein, *First Things First: The Pressing Danger of Crisis Instability in US-China Relations*, 37 INT'L SEC. 49 (2013).

294. See Quansheng Zhao, *US-China Relations and a New Dual Leadership Structure in the Asia-Pacific*, in CHINA'S RISE AND REGIONAL INTEGRATION IN EAST ASIA: HEGEMONY OR COMMUNITY? 17, 32 (Yong Wook Lee & Key-young Son eds., 2014).

295. Cf. Kingsbury, *supra* note 152, at 431.

296. See generally CIVIL SOCIETY IN ASIA (David C. Schak & Wayne Hudson eds.) (Ashgate, 2003).

297. Alford et al., *supra* note 274.

Secondly, the COI would be an important step towards giving concrete meaning to aspirations for a more fully institutionalized regional political and economic framework resembling that of the European Union. The idea of an Asia-Pacific Union<sup>298</sup> has long been mooted in the effort to ensure regional peace, stability, and prosperity,<sup>299</sup> but movement in this direction is impeded in part precisely by thorny politico-legal disputes, such as the South China Sea territorial controversy. By contrast, a COI for the issue would create a joint legal framework for the (gradual) decision of difficult sovereignty disputes; the forum would thus operate as a (very) partial substitute for such powerfully integrating juridical institutions as the European Court of Justice (ECJ).<sup>300</sup> It is important not to “underestimate the stabilizing effect of legal standards and procedures—the so called *acquis communautaire*,” which, via such institutions as the ECJ, have “contributed to the creation of a solid body of European law.”<sup>301</sup> If far less ambitious than the ECJ, the COI would nonetheless necessarily take as its basic premise the possibility of gradually developing a parallel “Asian *acquis*,” or “body of Asia-Pacific law.”<sup>302</sup>

Finally, even failing progress towards subsequent supranational institution building, the mechanism’s geopolitical focus and scope of membership would nonetheless make it a *de facto* contribution to ongoing processes of regional bloc formation occurring in different areas throughout the world that have been seen as promoting the spread of universal values of individual rights and autonomy. Some international theorists even argue that “[t]he future lies with new forms of political and social order that take us below and beyond the sovereign nation state, to regional and global blocs regulated by a

298. See, e.g., John Ravenhill, *The Growth of Intergovernmental Collaboration in the Asia-Pacific Region*, in ASIA-PACIFIC IN THE NEW WORLD ORDER 266–67 (Christopher Brook & Anthony McGrew eds., 2013); see also FRANK FROST, DEPARTMENT OF PARLIAMENTARY SERVICES, AUSTRALIA’S PROPOSAL FOR AN ‘ASIA PACIFIC COMMUNITY’: ISSUES AND PROSPECTS, Research Paper No. 12 (2009); Fariborz Moshirian, *Can an Asia Pacific Community, Similar to the European Community, Emerge?*, 33 J. BANKING & FIN. 1, 2–8 (2009).

299. Such proposals go back at least as far as the late nineteenth century process of Japanese and Chinese reform movements seeking integration and accommodation into the Western-dominated international legal and political order. See, e.g., 楊際開, “章太炎的東亞聯邦構想 (東アジアの思想と構造),” 東アジア文化交渉研究, 8 J. E. ASIAN CULTURAL INTERACTION STUD. 259 (2015).

300. Cf. Jaime Pastor, *European Integration and the Future of the Nation State*, in GLOBALIZATION AND REGIONAL INTEGRATION IN EUROPE AND ASIA 21–23 (Nam-Kook Kim ed., 2013).

301. Frank Delmartino, *The Experience of European Integration in an Historical Perspective*, in REGIONAL INTEGRATION: EUROPE AND ASIA COMPARED 9, 13 (Woosik Moon & Bernadette Andreosso-O’Callaghan eds., 2005).

302. Philomena Murray, *Should Asia Emulate Europe?*, in REGIONAL INTEGRATION: EUROPE AND ASIA COMPARED 197, 204, 207 (Woosik Moon & Bernadette Andreosso-O’Callaghan eds., 2005).

cosmopolitan legal system based on individual human rights.”<sup>303</sup> Certainly, the communitarian vision of autonomous ethno-national (or linguistic)<sup>304</sup> communities remains extremely influential in the Asia-Pacific region, both as a normative ideal and a political reality. Yet the continued presence of strong community affiliations does not in itself preclude progress in a cosmopolitan process of cooperation and integration. Indeed, as the European example serves to indicate, it is entirely possible to view even today’s furthest developed integrationist experiments as “a complex mixture of the subnational, national, and supranational . . . characterized by numerous subsystems each governed by its own rules and practices.”<sup>305</sup> The further development of an epistemic and technically autonomous—and increasingly transnational—legal community would thus at minimum serve to promote the “rules and practices” of modern legalized statecraft and international relations, contributing to mutual recognition, interstate engagement, and common discursive resources for cooperative political settlements.

In the final analysis, the capacity for states in the region to develop lasting patterns of cooperative behavior and to engage in “liberal” regional ordering projects may depend upon the degree to which those states have been able to assert their own autonomy in a common legal idiom that binds them as a community of equals,<sup>306</sup> even while dividing them<sup>307</sup> as formal holders of rights “good against the world.”<sup>308</sup> The establishment of states as formally equal sovereigns prone to recognizing each other’s rights under international law occurred in the North Atlantic world over the course of centuries. The principle of widely recognized formal legal equality between autonomous states in East and Southeast Asia, on

303. Richard Bellamy & Dario Castiglione, *Building the Union: The Nature of Sovereignty in the Political Architecture of Europe*, in CONSTRUCTING LEGAL SYSTEMS: “EUROPEAN UNION” IN LEGAL THEORY 91 (Neil MacCormick ed., 1997).

304. See generally *id.*

305. *Id.* at 92.

306. For further reading on the intellectual origins and continued relevance of the international legal principle of sovereign equality, see generally ROBERT A. KLEIN, SOVEREIGN EQUALITY AMONG STATES: THE HISTORY OF AN IDEA (1974); JEAN L. COHEN, GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY AND CONSTITUTIONALISM (2012).

307. As Jean-Luc Nancy writes, “l’origine est le tracé des bords sur lesquels, ou le long desquels s’exposent les êtres singuliers” [“the origin is the tracing of boundaries upon which, or along which, individual entities reveal themselves”]. JEAN-LUC NANCY, LA COMMUNAUTÉ DÉSOEUVRÉE, 83 (Christian Bourgois, 2011).

308. On the “good against the world” quality of *in rem* rights in Roman law, see ALAN RYAN, ON POLITICS: A HISTORY OF POLITICAL THOUGHT: FROM HERODOTUS TO THE PRESENT 209 (2012); cf. Kenneth Ayotte & Patrick Bolton, *The Role of Property Rights in Chinese Economic Transition*, in LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS 238–39 (David Kennedy & Joseph Stiglitz eds., 2013). On the role of Roman law in establishing modern political conceptions of state (and then individual) legal autonomy and rights-bearing status, see HEGEL, *supra* note 253.

the other hand, dates at earliest to the 1960s. Bolstering the principle of sovereign equality through the creation of a voluntary COI, and using this forum to definitively turn the page on the asymmetrical (inegalitarian) colonial concept of “discovery” in relation to a major interstate dispute, could ultimately help to promote the Enlightenment principle of “egalitarian universalism”<sup>309</sup> more generally in the intellectual, political, and diplomatic cultures of regional states.

## VI. CONCLUSION

Can jointly asking questions form the basis of a lasting community? Though this Article has not argued that it is *sufficient* to do so, its *necessity* appears to be a much stronger proposition. In the context of the ever-deepening transnational intercourse that binds together specific regional communities, seemingly un-decidable legal aporiae are quite frequently encountered.<sup>310</sup> Yet in the construction of communities, “the aporia is not a paralyzing structure, something that simply blocks the way with a simple negative effect”; rather, “[t]he aporia is the experience of responsibility.”<sup>311</sup> To accept that different states may reasonably advance profoundly different understandings of international legal obligation—on one side focusing on the equality of Westphalian sovereigns and on the other side focusing on states’ capacity to generate new binding norms—is to enter the space of responsibility for reconciliation of these values.<sup>312</sup>

As Reinhart Koselleck has pointed out, the basic “methodological aporia” of all historical inquiry is that particular events are inherently distinct from, but can only be understood in terms derived

309. Cohen, *supra* note 158.

310. See, e.g., MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 66 (1989) (identifying inconsistent premises in the very normative foundations of international law, both to bind state behavior and to claim the consent of all states so bound, and arguing that particular international legal disputes are similarly aporic). *But see* Ulrich Fastenrath, *Relative Normativity in International Law*, 4 EUR. J. INT’L L. 305, 338 (1993) (“Where . . . contentions are contradictory they might paralyse each other. But even this result need not lead to the legal aporia so impressively described by M. Koskenniemi. Instead, it will give rise to a struggle of rivaling legal contentions for dominance. Contrary to the epistemological approach of M. Koskenniemi, the authority of such contentions, and thus their strength and their capacity to assert themselves, need not be equal.”).

311. JACQUES DERRIDA, ON COSMOPOLITANISM AND FORGIVENESS 28 (2001) (emphasis added).

312. The call for a study of “comparative international law” also suggests the need for such projects of discursive engagement. See, e.g. Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, BROOK. J. INT’L L. 36.2 (2011); Martti Koskenniemi, *The Case for Comparative International Law*, FINNISH Y.B. OF INT’L L. 20, 1 (2009).

from, larger conceptual systems.<sup>313</sup> While transnational disputes tend to have a material basis in effects upon people, land, or capital, they enter historical memory, and thus the domain of political and legal precedent, only by means of language. The justice and legitimacy of their outcomes, likewise, is an element of this linguistic production.<sup>314</sup> Though no such event can thus ever be “explained” (or justified) in its totality, the process of explanation and justification is precisely the *positive* project of developing shared conceptual systems and ways of “being with oneself in another.”<sup>315</sup>

Only by joining together to confront epistemic gaps in an open environment of rational discourse can communities peacefully develop new conceptions of shared subjectivity. Or, to put it another way, “legal aporia is ineradicable and it is precisely because of this that international law has managed to retain its importance in modern politics.”<sup>316</sup> In transnational controversies where no legal solution (or, as here and even more problematically, no predetermined legal process) is immediately compelling, international law can and should fulfill its most basic role as a sphere of rationalizing and *potentially* (if never truly) universal justifying discourse, or *ius gentium*.<sup>317</sup> It is precisely because a dispute initially lacks an absolutely determinate legal answer that a community of responsible parties can form around that dispute to *decide* upon its further systematic juridification, for a “decision that did not go through the ordeal of the undecidable would not be a free decision, it would only be the programmable application or unfolding of a calculable process.”<sup>318</sup>

Against the common realist critique that states retain the *capacity* to withdraw from the forms of engagement inherent in transnational legal processes and to reassert Westphalian sovereign supremacy and absolute autonomy,<sup>319</sup> it is necessary to recall the more comprehensive theoretical realism underlying the development of modern international law. If the “state” is itself accurately recognized as an artificial construct, rather than a preexisting metaphysical *res*, it becomes possible to view it as in large part both

313. See discussion in Akbar Rasulov, *New Approaches to International Law: Images of a Genealogy*, in *NEW APPROACHES TO INTERNATIONAL LAW: THE EUROPEAN AND THE AMERICAN EXPERIENCES* 168 (José María Beneyto & David Kennedy eds., 2013).

314. See HONNETH, *supra* note 251, at 39.

315. See *id.* at 26.

316. Akbar Rasulov, *International Law and the Poststructuralist Challenge*, 19 *LEIDEN J. INT'L L.* 799, 799 (2006).

317. Cf. Jeremy Waldron, *The Supreme Court, 2004 Term-Comment: Foreign Law and the Modern Ius Gentium*, 119 *HARV. L. REV.* 129, 134 (2005).

318. Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority”*, 11 *CARDOZO L. REV.* 919, 963 (1990).

319. See, e.g., GOLDSMITH & POSNER, *supra* note 217.

constituting and constituted by its transnational self-justifications.<sup>320</sup> The form that such self-justifications take, more than the substantive aims they pursue or results they procure, may then determine the political self-understandings and behavioral assumptions that animate future interactions between these *magni homines* or their successors. A properly “realist” state must, then, effectively take into account its systemic role as an intersubjective actor helping to order the community of discourse in which it is situated.<sup>321</sup>

As Vattel phrased the problem in his comments on high seas territorial claims, “pretensions to empire are respected as long as the nation that makes them is able to assert them by force; but they vanish of course on the decline of her power.”<sup>322</sup> The Chinese Warring States Era Legalist philosopher Han Fei, in a related vein, wrote that “no state is eternally powerful, and no state is eternally weak.”<sup>323</sup> All the more reason, then, for today’s *magni homines* to adopt a more realistic approach to their long-term interests, and to establish a discourse of mutual recognition based on the principles of formal sovereign equality and cooperative, open-ended inquiry.

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320. Cf. Wendt, *supra* note 246, at 424–25.

321. I also explore this theme in the context of U.S.–China relations in Ryan Mitchell, *Redefining Pragmatic Engagement: The ‘New Model’ of US–China Relations and the Opportunity of Shared Consequences*, 23 *INT’L AFF. REV.* 105 (2015).

322. EMER. DE VATTEL, *THE LAW OF NATIONS*, 289 (B Kaposy & R. Whatmore eds.) (T Nugent trans.) (Liberty Fund, 2008) (1758).

323. 孙学峰 和 杨子潇, 韩非子的国家间政治思想, *国际政治科学* 2, 5 (2008); cf. HAN FEIZI: *BASIC WRITINGS* (Burton Watson trans.) (Columbia University Press, 1964).

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