SOUTH CHINA SEA DISPUTE AND CHALLENGES TO INTERNATIONAL LEGAL ORDER

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Abstract

The Permanent Court of Arbitration established in The Hague adopted the Award on July 12, 2016, ruling unanimously that the conduct of the Chinese adversaries in the South China Sea violated several provisions of the United Nations Convention on the Law of the Seas (hereinafter, UNCLOS or, the Convention). The arbitration proceedings were initiated by the Philippines in the year 2013 under the compulsory dispute resolution procedure provided for by the convention. The Philippines, inter-alia, had claimed that the maritime features and the seabed were governed by the UNCLOS regime. As a consequence of the same, the alleged claims of the Chinese of exercising sovereignty over the area encompassed by the "nine-dash line" through "historic rights" were invalid. China has refused to recognize the Tribunal's jurisdiction or accept the Award as final and binding.

The Award has set out some eminent maritime legal questions as well as the functioning of International Legal Order. The authors have attempted to delve into the impediments faced by the international law as a normative order and the international legal scholarship by using South China Sea as the paradigm through the historic developments over the years while analysing the issues of "de-territorialization" and "constitutionalization."

Keywords: South China Sea Dispute, Sovereignty, Freedom of Seas.

The Arbitration Award and Its Aftermath

The South China Sea is of extreme strategic importance. It encompasses an area of 3.5 million square kilometres, or 648,000 square nautical miles. The maritime borders of Indonesia, the Philippines, Brunei, Malaysia, Vietnam, Taiwan and China abound the South China Sea.[1] It is responsible for shipping trade worth of approximately 5 trillion USD.[2] Needless to say, the economically advantageous location has left the bordering nations fending for exercising control

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[1] John R. V. Prescott & Clive H. Schofield, The Maritime Political Boundaries of the World 429 (2d ed. 2005).

[2] C. J. Jenner & Tran Truong Thuy, Introduction, in The South China Sea, 1, 1 (C. J. Jenner & Tran Truong Thuy eds., 2016).

over the islets, reefs, atolls and sandbanks scattered throughout,[3] particularly over the Spratly and Paracel Islands. The UNCLOS demands the coastal states to submit extensive claims to territorial or archipelagic waters, EEZs and continental shelves to the Commission on the Limits of Continental Shelf. The Commission then issues recommendations which is final and binding. Vietnam and Malaysia submitted such claims to the Commission, in response to which China (PRC) invoked the nine-dash line for the first time. The nine-dash line was conceived in 1936.

The claims to the areas which have been submitted comprises of an area equal to 2 million square kilometres. It also includes the Spratly and Paracel Islands as well as Scarborough Shoal. The various rocks, islets and shoal comprised an area of around 15 square kilometres of dry land. China however, having embarked on a project of land-reclamation since 2012, has doubled the land area in the South China Sea.[4]

The Philippines disputed the legality of the extensive claims submitted by China under the nine-dash line and the land reclamation before the arbitral tribunal.[5] China refused to participate in the arbitral proceedings and marked its absence throughout. But from the very beginning, it made attempts towards making its stance officially clear by advancing the arguments on its behalf through legal scholars and published a paper on the official position with respect to the jurisdictional limitations of the arbitral tribunal. It further sent out letters to individual members of the arbitration panel through its ambassador to the Netherlands. Despite having undertaken such measures, China continued to question the credibility of the tribunal on various grounds, one of them being the "biasness" of the tribunal.[6]

With the declaration of the award, the Chinese Foreign Ministry further made allegations that the Philippines' actions in the South China Sea "grossly violated China's territorial sovereignty, fundamental principles of international law and the Charter of the United Nations." Though China has been unwilling to accept the ruling of the tribunal, , its marked absence from the proceedings is not indicative of repudiation of the UNCLOS regime.[7] In the post-ruling era, there have been overtures but its needs to be seen whether they are confrontational in nature or primarily tactical.

[3] BILL HAYTON, THE SOUTH CHINA SEA: THE STRUGGLE FOR POWER IN ASIA 73–78, 81–84, 103–104, 160 (2014).
[4] *Id.*, at 4.
[5] South China Sea Arbitration Award (Phil. v. China), 2013-19 (Perm. Ct. Arb. 2016).
[6] Bethany Allen-Ebrahimian, Beijing: Japanese Judge Means South China Sea Tribunal Is Biased, FOREIGN POL'Y (June 21, 2016).
[7] Ellen Tordesillas, Will China Withdraw From UNCLOS if UN Court Decides in Favour of PH? YAHOO! PHILIPPINES (Dec. 10, 2013).

China has not been on the backfoot except for making some concessions, for ex- not using the nine-dash line since, but it is still attempting to deal with the adversaries in the South China Sea through bilateral negotiations.[8] It is unlikely that the Chinese will not stay firm towards their stance.

The Philippines however, has responded in a concretised manner on having made successful claims before the tribunal. In the pre-award and post-award era, the ruling government in the Philippines changed. The succeeding President, Rodrigo Duterte welcomed the favourable decision by the tribunal and emphasized on the peaceful resolution of the matter but threatened against retaliation if Chinese were to be found infringing the Philippines' territorial borders.[9]

The Philippines' decided against publicly calling out its Chinese adversary at the East Asia Summit in Laos in September 2016. The same was apparently propelled by the US statement condemning the human rights violations in the Philippines. The President announced "drifting away" from its long-time ally while taking into account the considerations such as Chinese military superiority and also called to put an end to U.S. military assistance. Consequently, joint military manoeuvres and patrols in the South China Sea were put on hold in the month of October.[10]

The U.S. has largely refrained from expressing its stance on the individual claims or the merits of the case. Although it has reiterated opinions similar to the ruling, invalidating the Chinese nine-dash line claim, delegitimising the claims of maritime features in the EEZ and the reclamation project to be violative of Philippine rights. It emphasized on peaceful resolution of the dispute and expressed its support for following the letter of the law to its spirit and the supreme authority of the "rule of law".

The South China Sea and The International Legal Order

A. Historical and Political Contingencies of the Law of the Sea

China and the United States, as divergent countries have opposing views, yet they insist on safeguarding the 'the fundamental principles of international law.'[11] The conclusions that they have

[8] *Cf.* Ministry of Foreign Affairs, People's Republic of China, "Set Aside Dispute and Pursue Joint Development".
[9] Bullit Marquez, Duterte Toughens anti-China Rhetoric - There Will Be Blood if Philippine Territory Breached, MACAU DAILY TIMES (Aug. 26, 2016).
[10] Felipe Villamor, Philippine President Raises Doubts About U.S. Military Ties, N.Y. TIMES, Sept. 30, 2016, at 5.
[11] *Cf.* Ministry of Foreign Affairs, People's Republic of China, "Set Aside Dispute and Pursue Joint Development".

arrived at are diametrically opposed to what those principles are. As both superpowers invoke maritime law and the freedom of the seas, their claims are indicative of the fact that law has indeed, in varying contexts, served varying purposes.

The definition of *mare liberum* dates back to the pamphlet of the same name written anonymously by Hugo Grotius in 1609.[12] His polemic was directed towards Portugal and Spain, in their run for the conquest of African, Asian and American subcontinents. In the process of taking over the possession of these far-off lands, they asserted possession not only of the newly conquered territories, but also of the seas they had crossed, an argument that the Papacy repeatedly corroborated.[13]

Hugo Grotius, while writing on the behalf of the Dutch East India Company, declared on their behest that the Dutch have a right to sail through the seas to the Indians, as they are doing now.[14] But he incorporated general claims which laid down that "the occupation of the sea is impermissible in both natural order and by reasons of public utility" and as a consequence "no part of the sea can be attributed to the territorial sovereignty of a particular nation nor on the basis of prior historic explorations (*ante aliosnavigre*) and preclude other seafarers from exercising their claims of navigating the seas.[15] Hence, the seas were considered within the ambit of common spaces for common use. The westerners, having benefited from the favourable seafaring regime, might uphold Grotius' pamphlet as the flagbearer of "common benefit of mankind."[16] The fact that it equally served the trading interests of the *Staten-Generaal,* the States General of Netherlands as an economic superpower cannot be ignored.[17] Grotius' Freedom of Seas has furthered the colonial and imperialistic expansion of Western nations over the length and breadth of the geographical expanse.[18]

Not very different from other international legal instruments, the law of the seas is an exemplary example of the power structure of the respective era. It is an instrument which has protected the political dominance of the European nations and United States precisely well. While on the other hand, the non-western nations have collated experiences of the vaunted *mare liberum* acting as an

[12] HUGO GROTIUS, MARE LIBERUM, at 1609 (Robert Feenstra ed., Brill 2009).
[13] WILHELM GREWE, THE EPOCHS OF INTERNATIONAL LAW 257–58 (Michael Byers ed., trans., 2000).
[14] GROTIUS, *supra* note 2, ch.i, p. 1.
[15] *Id.* at ch. v, p. 28.
[16] *Id.* at ch. xiii, p. 66.
[17] *Cf.* Peter Borschberg, Hugo Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting Mare Liberum (1609), 29 ITINERARIO 31, 36 (2005).
[18] Martine Julia Van Ittersum, Hugo Grotius in Context: Van Heemskerck's Capture of the Santa Catarina and its Justification in De Jure Praedae (1604-1606).

instrument of gauging military and economic superiority by the westerns and intervening in their maritime zones.

Chinese worries about regulating access to the South China Sea should also be seen in this light. Beginning with the first Opium War, naval dominance was instrumental in forcing a series of unequal treaties.[19] For example, the cession of Hong Kong offered an additional trading base for their fleet to the British.[20] This background could also contribute to Chinese distrust of arbitral proceedings and their alleged sovereignty restrictions. The territorial waters were described as broadly as possible in the days of British naval Supremacy, for the advantage of British ocean control.[21] The existing maritime powers effectively resisted any expansion to their disadvantage at the Hague Conference and the Second United Nations Convention on the Law of the Seas.[22] Yet the intense debate in the Hague and the Geneva already heralded reform. Several states, particularly, newly independent ones, extended their territorial waters to twelve nautical miles. But even for the existing maritime forces, the freedom of the seas was not a matter of theory, but of convenience.

As demonstrated by the Truman Declaration of 1945, they did not hesitate to lift claims of exclusivity, if it matched their interests. In the Third UN Conference on the Law of the Seas, the aim of the developing countries was to set up exclusive economic zones to protect themselves against technologically advanced competition. Industrialized states insisted on the freedom of navigation and the free development of high-seas and deep-seabed. With the introduction of the EEZ in UNCLOS, the expansion of the territorial waters to twelve nautical miles, and the declaration of the deep seas as the "common heritage of mankind,"[23] the developing countries seemed to have won the day on the most controversial issue. The United States then called for a final session vote on the Convention, and voted against it. Several developed nations abstained too.[24] The Convention finally came into effect only after a review of UNCLOS by an agreement of 1994.[25]

[19] IMMANUEL CHUNG-YUEH HSÜ, THE RISE OF MODERN CHINA 168–220 (6th ed. 2000).
[20] STEVE TSANG, AMODERN HISTORY OF HONG KONG 20–21 (2004).
[21] Andree Kirchner, Law of the Sea, History of, MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 16–19 (2007).
[22] YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA 21 (2d ed. 2015).
[23] UNCLOS arts. 55, 3, 136.
[24] Third United Nations Conference on the Law of the Sea, 11th Sess.,182nd plen. mtg. Pg 28, U.N.Doc.A/CONF.62/SR.182 (April 30, 1982).
[25] UNCLOS entered into force on Nov. 16, 1994. 1833 U.N.T.S. 396; *cf.* Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, G.A. Res. 48/236, Annex, U.N. Doc. A/Res/48/236/Annex (July 28, 1994).

Security concerns persist. The same applies to international courts' "creeping jurisdiction"[26] which would "not have the heritage and clarity of understanding of the jurisdiction issue" relating to international disputes, leading to the risk of mandatory adjudication or arbitration.[27] This approach contrasts strongly with America's relentless emphasis on the supreme value of UNCLOS and negotiated dispute resolution for the South China Sea dispute. As noted above, the United States stresses that adherence to the rules laid down in UNCLOS and compliance with its dispute resolution procedures is essential to preserving "peace, protection and stability" in the region. Yet the United States poses concerns regarding mandatory authority that are not different from Chinese objections.

B. Implications for maintenance of International Peace and Security

One of the main objectives of the UNCLOS was to establish "a legal order for the seas and oceans" that will promote the peaceful use of the oceans and seas.[28] The South China Sea conflict is now testing that legal order, and hence maintaining of international peace and security as provided for in Article 1, Section 1 of the Charter of the United Nations.

Repeated armed conflicts have escalated in the region. Over the past few years, some coastal states have embarked on substantial naval armaments, most notably China. The extreme disparity between the People's Republic of China's (PRC's) armed forces and their neighbours makes military conflict less likely, at least in the South China Sea, while nationalist furor (such as the stationing of a Chinese oil rig in the disputed waters)[29] could still lead to unforeseen circumstances.

If the conflict gets escalated, the consequences will have far-reaching consequences. The states have a history of projecting its naval power since the times of the voyage of "Great White Fleet" in the year 1907-1909. In an attempt to counter the alleged claims of the rising naval powers, the United States has been on a voyage to systematically conduct freedom of navigation operations. Such acts being carried out in the South China Sea has led to immediate escalation. For example, the destroyer U.S. Larsen's transit within 12 nautical miles of an artificial structure on Subi Reef. Several such operations have been carried out by the adversaries as "intervention", where China claimed it to be reciprocation initiated due to US intervention and US claimed it as part of

[26] *Id.* at 52 (Sen. Ensign).
[27] *Id.* at 53 (Sen. Sessions).
[28] UNCLOS pmbl. at 4
[29] Mike Ives, Vietnam Assails China in Sea Dispute, N.Y. TIMES (Jan. 21, 2016), at A4.

necessary assertion of "freedom of navigation in international waters", presumably at the behest of the international community.[30] More recently, China seized a U.S. underwater drone near Subic Bay on the Philippines[31] and a U.S. carrier group started patrolling the South China Sea.[32]

Following some disagreements during the Cold War, the right of innocent passage has generally been broadly constructed (and in line with U.S. demands). The right presumably includes the passage of warships through the territorial sea under the currently prevailing view.[33] On the other hand, China has put forward a much more restricted interpretation that limits any military presence not only in territorial waters but also in the EEZ. Such a narrow perception reflects the aforementioned traumatic historical experience. The U.S. position, however, reflects its need to secure navigation lanes for its carrier groups, support its allies in the Pacific region and ensure access to its military bases. U.S. carrier groups have allowed their native state for the exclusive use of such carriers for military domination globally, since the commencement of the second world war.[34] China has intervened through various means. The eventuality of carrying out such drills is to send clear signals of restricting U.S. intervention.

China does not seem deterred with the unfavourable arbitral award which raised concerns over UNCLOS provisions and international legal order. And such behaviour is not unprecedented. In Nicaragua Case, US did not participate in most of the proceedings, leave alone adhering to the final ruling of the ICJ.[35] The Chinese by invoking the Monroe doctrine which was granted precedence even under league of the Nations, aim at expansion of their area of influence which would not fall out of the line of precedents.

But there are more worrying historical parallels. The so-called Thucydides trap serves as a warning in the context of South China Sea, where the prospect of conflict between the United States and China evokes rivalries between Sparta and Athens.

However, yet another historical analogy is more relevant to the present context. Parallels to the developments preceding World War I are evident when British hegemony was challenged by the German Empires, in particular by its naval construction. The parallels relate even to the role that

[30] Office of the Press Secretary, Press Briefing by Press Secretary Josh Earnest, THE WHITE HOUSE (Oct. 21, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/10/21/press-briefingpress-secretary-josh-earnest-10212016.
[31] China Seizes an Underwater Drone and Sends a Signal to Donald Trump, ECONOMIST (Dec. 24, 2016).
[32] Xu Lushan, US Resumes Its Provocative Actions in Sea, CHINA DAILY (Feb. 22, 2017).
[33] Innocent Passage: U.S.-USSR Uniform Interpretation, 84 AM. J. INT'L. L. 239-42 (1990).
[34] Andrew F. Hart & Bruce D. Jones, How Do Rising Powers Rise?, 52 SURVIVAL 63, 79 (2010).
[35] *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

international law plays. Since the outbreak of World War I was not prevented by the international law, it is often assumed to be of marginal importance.[36] This assumption overlooks two important aspects. *First,* the pre-World War 1 period witnessed significant progress in codifying international law.[37] While international humanitarian law was particularly prominent in this regard, great progress was also made in institutionalizing the peaceful settlement of disputes. The Permanent court of Arbitration was established in 1899. It transformed into a truly permanent court with mandatory jurisdiction which failed mainly because of German opposition. It is noteworthy that Germany initially opposed any institutionalized arbitration during negotiations as incompatible with state sovereignty, presupposing Chinese refutation of any legal proceedings.[38] *Second,* and more importantly, the defense of the international legal order was also a primary reason for Britain and France's Allied Powers to enter the war in 1914. They found themselves engaged in the "protection of international law and justice"[39], affirming "the sanctity of treaties" against the "dangerous threat raised by Germany to the basic principles of public law.

The South China Sea and International Legal Scholarship

In 1914 the outbreak of World War I could not be prevented by international law. Is today's international juridical order more robust? Is the ban on the use of force sufficiently entrenched to avoid a large-scale outbreak of armed hostilities in the South China Sea, given the numerous similarities to the time preceding World War I? However, the scholarly discourse seldom touches upon such mundane issues. Rather, international law is frequently viewed as a success story. Two categories, both applicable to the South China Sea, illustrate this propensity, the policy of incremental de-territorialization, and the idea of constitutionalizing rising international law. None of these hypotheses will be thoroughly expounded and tested here. They merely juxtapose the far-reaching arguments made under those headings with the dispute of South China Sea.

A. De-territorialization

[36] Oliver Diggelmann, Beyondthe Myth of a Non-relationship: International Law and World War, 19 J. HIST. INT'L. L. 93, 93-95 (2017).
[37] Betsy Baker, Hague Peace Conferences (1899 and 1907), MPEPIL (2009).
[38] J.P.A. François, La Courpermanented'arbitrage: Son origine, sa jurisprudence, son avenir, 87 RECUEIL DES COURS 461, 470 (1955).
[39] HULL, *supra* note 55, at 1.

Scholars have considered traditional, state-centric international law along Westphalian lines to be increasingly inadequate. Such developments may well be applicable to some degree in several areas.[40]

In certain technological and economic areas, for example, a "sense of de-territorialization"[41] is discernible. The internet is not bound to the physical sphere in the way that conventional means of communication were once.[42] The liberalization of trade has also significantly reduced the role of borders in commercial law.[43]

Related arguments have been made in several other fields of international law. As a result, it is asserted that modern international law should instead "pursue a responsive, global order that, on the one hand, protects and promotes basic public services and fundamental human values, on the other hand, facilitates legislative pluralism and cultural diversity."[44] However, it is questionable whether these developments amounted to a "decline in the role of the territory as a parameter in international law" or resulted in a "territory crisis as a central concept in international law."[45] Despite the proliferation of international institutional regimes, their efficacy often remains too limited to make territoriality extra relevant. "Drawing lines on the ground may not be the "absolute solution" to the problems confronting an "ever more interdependent society." Nevertheless, the South China Sea conflict is a powerful portent that rumours of the extinction of territoriality have been somewhat exaggerated in international law.

The Third UN Conference on the Law of the Sea aimed at collectivizing and internationalizing the sea and establishing a "common heritage of humanity." Then, came the opposite. We notice an increasing "zonification," with corresponding line drawing. States are demanding hegemony or territorial rights over ever more maritime areas[46] at the detriment of the high seas, and the result is a *mare clausum* instead of a *mare liberum*. The ten-year timeframe given for extended continental shelf claims has led to a battle for underwater territory[47] rather than an "end of geography." There is a recurrence to an era when flags were once planted to mark territorial claims. This development is

[40] Daniel Bethlehem, The End of Geography: The Changing Nature of the International System and the Challenge to International Law, 25 EUR. J. INT'L. L 9 (2014).
[41] Frédéric Mégret, Globalisation, MPEPIL para. 11 (2009).
[42] Karl Zemanek, War Crimes in Modern Warfare, 24 SWISS REV. INT'L & EUR. L. 206, 225 (2014).
[43] Jean-Philippe Robé, Multinational Enterprises: The Constitution of a Pluralistic Legal Order, in GLOBAL LAW WITHOUT A STATE 46 (Gunther Teubner ed.,1997).
[44] Enrico Milano, The Deterritorialization of International Law, 2 ESIL REFLECTION (2013).
[45] *Id.,* at 84.
[46] MICHAEL BYERS & JAMES BAKER, INTERNATIONAL LAW AND THE ARCTIC 92 (2013).
[47] Georg Witschel, New Chances and New Responsibilities in the Arctic Region: An Introduction, 69 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 529, 530 (2009).

especially strong in the Arctic, where in 2009 a Russian submarine planted a Russian flag on the ocean floor at the North Pole, where the seabed is being territorialized as extensions of the respective coastal states.[48]

At the moment, the US refused to accept European intervention in its hegemonic relations with Latin America. Today, China is insisting from a position of power on bilateral agreements with its South-East Asian neighbours. As a result, rather than the hoped for and prosperous future of deterritorialized and Universalist International law, we may face a return to a Schmittian world with established spheres of interest.[49]

B. Constitutionalization

The South China Sea raises similar reservations about the often-invoked "constitutionalization" of international law. Once again, this concept accurately reflects certain significant developments in international law. But has it become, rather than a realistic description of actual developments, a dogma? The revolutionary phase of constitutionalization is expected to result, or have resulted in an international system with constitutional characteristics, including, inter alia, "regulations about how conflicts should be resolved, and the kind of fundamental principles that no official behaviour may impinge."[50] Establishment and judicialization are considered to be central aspects of such a development, accompanied by a "fundamental shift" in the settlement of disputes from the traditional consensual paradigm to a new compulsory paradigm. There are numerous examples, ranging from the World Trade Organization (WTO) dispute resolution to the International Tribunal of the Law of Seas(ITLOS) and, most notably, the International Criminal Court (ICC).[51]

This qualification of sovereignty is most evident in the conceptualization of the obligation to secure, which requires the world community to intervene in the internal affairs of States "when decisive action is necessary on grounds of human protection." Under such proposals, it would potentially be the "obligation" of the Security Council to take action under Chapter VII of the UN Charter to prevent genocide.[52] Scholars also argue, however, that the protection of human rights

[48] Georg Witschel, New Chances and New Responsibilities in the Arctic Region: An Introduction, 69 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 529, 530 (2009).
[49] Jan Klabbers, Setting the Scene, The Constitutionalisation Of International Law 1, 9 (Jan Klabbers et al. eds., 2009).
[50] Jan Klabbers, Setting the Scene, THE CONSTITUTIONALISATION OF INTERNATIONAL LAW 1, 9 (Jan Klabbers et al. eds., 2009).
[51] Cesare P. R. Romano, The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent, 39 N.Y.U. J. INT'L. L. & POL'Y 791, 794-95 (2007).
[52] Anne Peters, Humanity as the A and Ω of Sovereignty, 20 EUR. J. INT'L. L. 513, 539 (2009); see also Daniel

is not only an obligation of the international community, it is a precondition to be part of that community. According to such views, gross and manifest human rights violation lead to the "suspension" of the respective State's sovereignty.[53]

Sovereignty has "a legal meaning only to the degree that it protects human rights, interests and needs," and only States that are capable and willing to protect their own people qualify as "legitimate and valued members of international society."[54] Underpinned by notions such as *jus cogens*, an "international community constitution" is established,[55] with collective interests that vary from egoistic interests.[56] Eventually, and as a vanishing point, such a community would become a nation state (Völkerstaat) or a world republic under the Kantian perspective.[57]

The Role of Legal Scholars

If advancements in the South China Sea should dampen excessively ambitious scholarly claims regarding the progress of international law, they should also serve as a reminder of the role that legal scholars play in such disputes. This tension exists not only in an interpersonal but also in an intrapersonal way, especially in international law. These roles generally include legal counsellors, lawyers, arbitrators, judges, and, mainly, academic teachers.[58] Obviously, these different roles could influence one another.

The clear partisanship of commentators has been a notable aspect of the academic fall-out of the Hague arbitral award. As for the Chinese side, this is particularly obvious. It's been suggested that the boycott of the proceedings in The Hague could have been partly due to a lack of trust in China's autochthonous legal expertise and use legal methods to safeguard the interests of our

Moeckli&Raffael N. Fasel, A Duty to Give Reasons in the Security Council, 14 INT'L. ORG. L. REV. 1, 44 (2017).
[53] INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT para. 5.26 (2001).
[54] Francis Mading Deng, From'Sovereignty as Responsibility' to the 'Responsibility to Protect', 2 GLOBAL RESPOSIBILITY TO PROTECT 353, 354 (2010).
[55] CHRISTIAN TOMUSCHAT, INTERNATIONAL LAW: ENSURING THE SURVIVAL OF MANKIND ON THE EVE OF A NEW CENTURY 87 (Recueil des Cours vol. 281, 1999).
[56] Bruno Simma& Andreas L. Paulus, The 'International Community': Facing the Challenge of Globalization, 9 EUR. J. INT'L. L. 266, 266–77 (1998).
[57] Immanuel Kant, Zumewigen Frieden, Ein philosophischerEntwurf, in Kant's GesammelteSchriften, 341, 360 (1795).
[58] TilmannAltwicker& Oliver Diggelmann, How is Progress Constructed in International Legal Scholarship? 25 EUR. J. INT'L. L.425at 427(2014).

country in terms of sovereignty and security."[59] This relates to government strategy, but it also includes academic discourse."[60] However, it is increasingly expected that the younger generation of Chinese foreign lawyers will "develop distinctly Chinese theories of international law."

Conclusion

It is a long way from South China Sea to Times Square. It reveals that when confronted by a major power the international legal system still fails to assert itself. The South China Sea Arbitration Award has prompted strong reactions from China, and it is unlikely to be implemented soon.

However, if considered from a meta-perspective, arbitration gives important insights on the state of both the law of the sea and more generally international law. A brief analysis of Chinese and U.S. reactions reveals that both powers invoke international law to reinforce their mutually exclusive positions. Traditionally, since Grotius's *mare liberum*, the Western sea-faring nations have pushed for a liberal sea regime, but just as that seminal text was intended to further Dutch trade interests, so has the concept of freedom of high seas primarily served its western proponents. By comparison, there was a proliferation of sovereign rights over certain areas of the sea in the second half of the 20th century, and extensive state claims to these zones. As a result, Asia-Pacific region is experiencing increasing political and military tensions.

Historical parallels have been drawn up beforehand between the early 20th century and China's rise and its challenge to the hegemonic position of the United States. Those comparisons, however, are not limited to political or military aspects. The pre-World War I period saw significant progress in codifying international law and in the institutionalization of dispute resolution. And yet war erupted. When it did, the Western Powers named the protection of international law as one of their key combat objectives. Today, the arbitral proceedings provided for by UNCLOS have not resulted in a peaceful settlement, and the United States is similarly insisting that its presence in the South China Sea aims to protect maritime freedom, and more broadly, international law. Such innovations will provide pause for the scholarly community. That, society has interpreted the development of international law as steady progress towards an increasingly institutionalized and

[59] Sonya Sceats, China's Fury Over South China Sea Belies Its Legal Insecurities, CHATHAM HOUSE, (July 4, 2016), https://www.chathamhouse.org/expert/comment/chinas-fury-over-southchina-sea-belies-its-legal-insecurities.
[60] Bill Hayton, Rod Wye & Wim Mueller, China's Changing Approach to International Law (Chatham House, Podcast, Mar. 30, 2017), https://www.chathamhouse.org/file/china-s-changingapproach-international-law.

judicialized normative order with constitutional features, in which once-omnipresent territoriality considerations are slightly demoded. Such a grand narrative is an important part of international legal academy. A mere qualitative study of a somewhat sombre present does not support a peaceful international community, which is the goal to be served by international law. However, this goal is not furthered by disregarding the significant challenges posed by trouble spots such as the South China Sea, or by considering such challenges merely as temporary distractions from a near-perfect republic of the world. The so-called "Chinese curse" is intended to warn its victims to "work in interesting times." Yes, today's foreign lawyers are living in interesting times. Transnational legal systems are expanding and international law is influencing more and more facets of our individual lives. The fundamental principles of international law, its binding nature, its ability to protect peace and enable basic rights to be enjoyed remain in question. It poses a challenge that needs to be recognized and accepted.