The South China Sea Islands Arbitration: Making China’s Position Visible in Hostile Waters

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I. INTRODUCTION ........................................................................................................... 83
II. COMPARATIVE CONCEPTIONS OF SOVEREIGNTY IN INTERNATIONAL LAW ......................................................................................................................... 89
III. CHINA’S POSITIONS ON INTERNATIONAL LAW ..................................................... 94
   A. The Entrance of New China’s Views ................................................................. 96
   B. Sources in the Context of China’s Principles .................................................. 102
   C. The Current Joint Position of Russia and China on International Law ............ 105
IV. CHINA’S POSITION PAPER ON JURISDICTION .................................................. 107
   A. The History ........................................................................................................... 108
   B. The Claims and Counter-Claims ........................................................................ 110
   C. Threshold Issues .................................................................................................. 112
V. CONCLUSION ............................................................................................................ 118

I. INTRODUCTION

The purpose of this paper is to bring to light the likely reasoning behind China’s position on the Philippines’ South China Sea Islands arbitration. Advancing its own interests, and controlling much of the world’s corporate media, the United States issued a statement to Asian leaders in Laos on September 8, 2016 admonishing China that it should comply with the United Nations Convention of the Law of the Sea Arbitration (“UNCLOS”) of 2016, concerning disputes in the South China Sea.¹ However, on September 13, 2016, President Duterte of the Philippines announced the English named Scarborough Shoal, “we cannot win . . . we can’t beat [China].”² Thus, the object of this article is to


²Steve Mollman, The Philippines is about to Give Up the South China Sea to China, DEFENSE ONE, (Sept. 3, 2016),
present China’s speciously reported and essentially opaque side of the South China Sea Islands dispute.

In what may be a deployment of international law in denial of the realities of history, the Philippines asked the tribunal during the South China Sea Arbitration to hand down an award stating that China was entitled only to those rights provided for by the Convention.\(^3\) The Philippines argued that these rights were not supplemented or modified by any historic rights, including within the area marked by the historical ‘nine-dash line’ on Chinese maps.\(^4\)

On March 5, 2016, The Straits Times of Singapore published a commentary by His Excellency Chen Xiao Dong, the People’s Republic of China’s Ambassador to Singapore, on the South China Sea arbitration.\(^5\) On March 8, 2016, Beckman expressed in The Straits Times the following comments in response to the points made in Ambassador Chen’s exposition.\(^6\)

Ambassador Chen’s first point was that the Philippines commenced the arbitration without China’s consent, contradicting the general norm that arbitration should be only by the agreement of the


\(^3\) Award on Jurisdiction, The South China Sea Arbitration, Award of July 12, 2016 at 11 para. 28.

\(^4\) Id. at 67 para. 169. The arbitral tribunal further noted:

[T]he ‘nine-dash line’ refers to the dashed line depicted on maps accompanying the Note Verbale from the Permanent Mission of the People’s Republic of China to the United Nations to the Secretary-General of the United Nations . . . . The Tribunal’s use of the term ‘nine-dash line’ is not to be understood as recognizing any particular nomenclature or map as correct or authoritative. The Tribunal observes that different terms have been used at different times and by different entities to refer to this line. For example, China refers to “China’s dotted line in the South China Sea” . . . Viet Nam refers to the “nine-dash line” . . . Indonesia has referred to the “so called ‘nine-dotted-lines map’ . . . and some commentators have referred to it as the “Cow’s Tongue” and “U-Shaped Line.” . . . [T]he Tribunal observes that the number of dashes varies, depending on the date and version of the map consulted.

Id. at 67 para.164 note 131.


Beckman argued that the 1982 UNCLOS specifically provided that any unfinished dispute which concerned interpretation or application of the Convention could be submitted by any party to a court or tribunal without consent by the other party. This suggested the question of whether the dispute had been subjected to antecedent claims based on historic rights as to sovereignty.

Beckman agreed with Ambassador Chen that the underlying issue in the South China Sea was the competing claims of sovereignty over disputed islands and that the arbitral tribunal’s lack of jurisdiction to rule on this issue. Professor Beckman also agreed that the arbitral tribunal was without jurisdiction over China's 2002 Declaration on the Conduct of Parties in the South China Sea (“DOC”) under Article 298 of UNCLOS, including issues of maritime boundaries and military activities. China had declared as follows:

It is the Chinese government's long-standing commitment to peacefully resolve South China Sea disputes with the Philippines through negotiation and consultation. It has also been agreed and repeatedly reaffirmed by China and the Philippines, and clearly stated in the DOC. In accordance with Article 298 of UNCLOS, China excluded disputes over maritime delimitation, historic bays or titles, military and law enforcement activities and others from compulsory dispute settlement procedures in 2006. Before unilaterally initiating the arbitration in January, 2013, the Philippine government failed to have any consultation or negotiation with the Chinese side on relevant items, still less exhaust all the bilateral means for the settlement of disputes. The arbitration initiated by the Philippines falls short of UNCLOS requirement. It won't work and will lead nowhere.

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7 Id.
8 Id.
9 Id.
10 Declaration on the Conduct of Parties in the South China Sea, ASEAN-China, Nov. 4, 2002.
12 Beckman, supra note 6.
Nevertheless, the arbitral tribunal ruled that it had jurisdiction over the interpretation or application of UNCLOS provisions, without addressing issues of territorial sovereignty or delimitation of maritime boundaries. Specifically, the tribunal thought it could decide whether something was an “island” with an exclusive economic zone and its own continental shelf, merely a “rock” allowed only a territorial sea, or a “low-tide elevation,” without its own maritime zones.

Beckman expressed that UNCLOS provides that only the arbitral tribunal could decide whether the exclusions in China’s declaration applied, and if so, to what issues. The declaring state may not do so. This raises the question of how agreements between the parties could be assessed in international law regarding dispute resolution.

Ambassador Chen’s third point was that China’s determination not to participate in the arbitration was an exercise of its right under UNCLOS. Professor Beckman’s view, to the contrary, was that UNCLOS does not provide for a state's right not to participate. However, it does provide that the parties are obliged to facilitate the work of the arbitral tribunal.

Ambassador Chen’s fourth point asserted that the Philippines instituted proceedings before exhausting all bilateral negotiations. Professor Beckman argued that the tribunal had considered this objection, and held that the Philippines’ case was not premature. He added that this was not inconsistent with rulings in other international tribunals. Professor Beckman cited the land reclamation case between Malaysia and Singapore, which suggested that once a state thought negotiations would

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14 Beckman, supra note 6.
15 Id.
16 Id.
17 Id.
18 For a full exposition on correlativity between rights and obligations, in the sense of maintaining a juridical personality that might be under attack, See G. Lilienthal and N. Ahmad, Abridgment and Conferral of Juridical Personality, 28 The J. Juris. 453, 460 (2015) (explaining Ambassador Chen’s full argument).
19 Beckman, supra note 6.
20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
not succeed, a right manifested to trigger arbitration.\textsuperscript{26}

Ambassador Chen’s fifth point was that the arbitral tribunal’s award on jurisdiction derogated from the status of the DOC,\textsuperscript{27} which purported to set out a complete and agreed process for the continuation of peaceful negotiations.\textsuperscript{28} The tribunal held the DOC to be a mere political document, and therefore not legally binding as a treaty.\textsuperscript{29} Apparently, this has been why the Association of South East Asian Nations (“ASEAN”) countries\textsuperscript{30} had called on China and ASEAN to formulate a legally binding code of conduct.\textsuperscript{31} Thus, the question arises as to whether there is a political component to agreements between states.

Ambassador Chen’s final point was that the tribunal’s October 2015 award on jurisdiction represented a legal nullity for China.\textsuperscript{32} Professor Beckman argued UNCLOS provided that the tribunal’s award was final and could not be appealed,\textsuperscript{33} a moot point for China if the award were a nullity.

On these bases, it is arguable that Beckman has articulated the largely western view that states were wholly subjected to binding treaties, and must follow directives issued within arbitral awards and judicial pronouncements. As this does not seem to follow the prevailing realities, the research question is: what might be China’s view on inviolability of the terms of a binding treaty? This article will show that China’s view on dispute settlement is that the three essentials to inter-state exercises of sovereignty are long custom, just and equitable inter-state agreements, and acceptance by States parties that political norms are inherent in inter-state agreements. This infers the following three hypotheses: (1) China had displayed to the community of nations its antecedent claims to sovereignty of named island groups in the South China Sea, based on a long catalogue of its claimed historic rights attaching to its sovereignty; (2) China’s long

\textsuperscript{25} Land Reclamation by Singapore in and around the Straits of Johor (\textit{Malaysia v. Singapore}), Case No. 12, Order of Oct. 8, 2003, 12 ITLOS.

\textsuperscript{26} Beckman, \textit{supra} note 6.

\textsuperscript{27} Declaration on the Conduct of Parties in the South China Sea, ASEAN-China, Nov. 4, 2002.

\textsuperscript{28} Beckman, \textit{supra} note 6.

\textsuperscript{29} Id.

\textsuperscript{30} Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam, and the two observer nations of Papua New Guinea, and Timor-Leste.

\textsuperscript{31} Beckman, \textit{supra} note 6.

\textsuperscript{32} Id.

\textsuperscript{33} Id.
held view was that agreements between State parties could be assessed in accordance with just and equitable facets expressed in its stated Five Principles of Peaceful Coexistence (“Five Principles”); 34 (3) Sovereignty includes a State’s right to bind stable political issues to agreements between States.

This article has no intention of either litigating the South China Sea Islands arbitration, or quibbling with the arbitral tribunal’s award. Rather, this argument concentrates on developing a meta-legal analysis of China’s stated position, in the context of China’s likely characterization of the concept of sovereignty along with its views on the sources of international law.

This article begins with a comparison between western and Chinese conceptions of sovereignty in international law. It will then analyze Chinese understanding of international law through both New China’s views and China’s stated principles. After analyzing Russia and China’s joint statement on international law, the section concludes with narration of China’s Position Paper on the South China Sea Island arbitration through the lens of Chinese understandings of international law and sovereignty.

The research, in affirming all three hypotheses, will show that on the bases of China’s concepts of sovereignty and sources of international law, China would likely view that any sovereignty dispute with the Philippines would be a sovereignty dispute with a mere vassal state. China’s claims in the South China Sea were from historic claims to sovereignty in the region. 35 The Philippines denied these claims on the basis that UNCLOS, as positive law, ought to dissolve them. 36 China’s rebuttal relied on its public statements of just and equitable interpretation of UNCLOS in the context of general international law. 37 This would include its post-arbitration joint statement with the Russian Federation, declaring that UNCLOS’s purpose is to maintain the rule of law, rather than to bind positive laws by one state upon another. 38 China’s view that the United Nation instruments do not have legislative force 39 sustains this view. China could simply regard the Convention as merely advisory. Arguably, this display of the symbols of sovereignty was not justiciable in arbitration.

34 Cohen & Chiu, infra note 134.
35 See discussion infra Part III.A.
36 See discussion infra Part III.B.
37 See infra Part III.C, note 170.
38 See infra Part III.C, note 181.
39 See infra note 139.
II. COMPARATIVE CONCEPTIONS OF SOVEREIGNTY IN INTERNATIONAL LAW

There are a variety of views of sovereignty in international law. This section will provide a brief overview of the comparative conceptions, then focusing on Bodin’s cosmologically framed view of sovereignty, followed by contemporary and political legal theory and finally the Chinese theory.

Lansing posited that the whole international community was the real repository of sovereignty, rather than singular states.\(^\text{40}\) Cohen challenged this basic essence of Sovereignty.\(^\text{41}\) Similarly, Triepel strongly attacked legal positivism,\(^\text{42}\) before other international lawyers such as Willoughby\(^\text{43}\) and Foulke,\(^\text{44}\) took up the challenge by writing that the “word sovereignty is ambiguous . . . We propose to waste no time in chasing shadows, and will therefore discard the word entirely. The word ‘independence’ sufficiently indicates every idea embraced in the use of sovereignty necessary to be known in the study of international law.”\(^\text{45}\) Jellinek observed that sovereignty “in its historical origins is a political concept which later became transformed,” so to bind a juristic asset with the State’s political power.\(^\text{46}\)

Bodin considered the king as not possessing a kind of sovereignty having absolutely nothing above itself.\(^\text{47}\) According to Bodin, God was over the king, and the king’s supreme power over his subjects was under the law of God and nature.\(^\text{48}\) This hierarchy was subject to the requirements of moral order.\(^\text{49}\) As such, Bodin was at the crossroads

\(^{41}\) Hymen Ezra Cohen, *Recent Theories of Sovereignty* 82 (Univ. of Chicago Press, 1937).
\(^{42}\) See generally Heinrich Triepel, *Droit International et Droit Intérrne* (Oxford Univ. Press, 1920).
\(^{44}\) See generally Roland R. Foulke, *A Treatise on International Law* (1920).
\(^{45}\) Id. at 69.
\(^{46}\) Georg Jellinek, *Recht des Modernen Staates; Allgemeine Staatslehre* 394 (1900).
\(^{47}\) See generally Jean Bodin, *Les Six Livres De La Republique*, BOOK I (1583) (explaining the *ius gentium* of Rome, and its constitutional law of monarchy, the *leges imperii*).
\(^{48}\) See id.
\(^{49}\) Id.
between the medieval notion of the Prince, subject to the human law, and the modern notion of the Prince, completely free from any law on earth.\(^{50}\) Shepard argued that Bodin made the sovereign bound to respect the ancient *ius gentium* of Rome, and its constitutional law of monarchy, the *leges imperii*.\(^{51}\) This was because, when it came to such things as the inviolability of private property, or the precepts of *ius gentium*, expressing the basic agreement in which the power of the Prince originated, human laws and tribunals were only enforcing the *a priori* natural law.\(^{52}\) Consequent on these views their pronouncements even bound the Sovereign.\(^{53}\)

Nevertheless, the king had a certain human sovereignty.\(^{54}\) Either sovereignty meant nothing at all, or it meant supreme power, “*par dessus tous les sujets,*”\(^{55}\) ruling the whole body politic from above it.\(^{56}\) Apart from the theory of the kings’ divine right, flourishing during the reign of Louis XIV, the view prevailed that the king’s person had a natural and inalienable right to rule from above.\(^{57}\)

The Bodinian conception of sovereignty was the outcome of the French king’s struggle with the Catholic Church, the Holy Roman Emperor, and the French feudal nobility.\(^{58}\) Since the State found expression from the king’s personality and power, sovereignty began to appear as an attribute of the State.\(^{59}\) This difficulty in situating the sovereign circumscribes the early 20th century crisis in contemporary conceptions of sovereignty.\(^{60}\) Thus, as sovereignty can be conceived of only with someone capable of making and executing the highest laws, this

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\(^{51}\) See id.

\(^{52}\) See id.

\(^{53}\) See BODIN, supra note 47; Shepard, supra note 50.

\(^{54}\) See Lansing, supra note 40.

\(^{55}\) Above discussion immediately supra, Section II.

\(^{56}\) TRIPEL, supra note 42, at 215.


\(^{59}\) TRIPEL supra note 42, at 102.

\(^{60}\) JAMES W. GARNER, INTRODUCTION TO POLITICAL SCIENCE 263 (1910).
bearer must have a real human will.\textsuperscript{61} It must either be a real person or a group of real persons.\textsuperscript{62}

Such a sovereign is unknown in contemporary political and legal theory.\textsuperscript{63} According to Heinz Eulau, scholar of political behavior research, “[t]he prevailing American doctrine considers ‘the State’ as bearer of sovereignty; sovereignty appears as a quality of the State or of State-personality. The State, however, can only be conceived of as bearer of sovereignty when it is possible to regard it objectively as a unity with a real will.”\textsuperscript{64} This position has also been taken by an eminent American theorist, Willoughby, who concisely articulated the position by noting that:

[s]overeignty is the name given to the supreme will of the state which finds expression in legally binding commands. As thus conceived, sovereignty is an abstract term. It connotes the state as a volitional entity or political person and designates that faculty which this political person possesses of determining by its fiat what shall be the legal rights and legal duties which it will recognize and, if necessary, enforce; what persons it will consider subject to its authority; and over what territory it will claim jurisdiction.\textsuperscript{65}

Sovereignty, in the public international law sense, signifies the essential international legal status of a State, free from subjection within its geographical territory to a foreign State’s government or law, apart from public international law.\textsuperscript{66} Such subjection would make it a vassal state.

In the 1928 case \textit{The Island of Palmas Case (United States v. The Netherlands)}, Judge Huber declared that territorial sovereignty involved the exclusive right to display the State’s activities,\textsuperscript{67} later referred to as significations. This right had a corollary in the form of a duty to protect

\textsuperscript{61} Heinz H. F. Eulau, \textit{The Depersonalization of the Concept of Sovereignty}, 4 THE J. OF POL., 3, 8 (1942).

\textsuperscript{62} Id.

\textsuperscript{63} Id.

\textsuperscript{64} Id.

\textsuperscript{65} W. W. Willoughby, \textit{The Juristic Conception of the State}, 12 AM. POL. SCI. REV. 192, 196-97 (1918).


the rights of other States within its territory. Specifically, it meant other States’ right to inviolability in both war and peace, along with the rights States might claim for their nationals while in foreign territories.

In the 1949 Corfu Channel Case (United Kingdom v. Albania), the International Court of Justice (ICJ) considered the responsibility of Albania for mines exploded within Albanian waters. These explosions resulted in the loss of human life and damage to British ships. The Court also considered whether the United Kingdom had violated Albania’s sovereignty. The Court held Albania was obliged to notify, “for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters” and it was obliged to warn “the approaching British warships of the imminent dangers to which the minefield exposed them.” Since Albania failed to do so, the Court held Albania responsible for the damage to the British warships and the loss of British sailors’ lives. The Court referred to every State’s obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other States.”

In the 1970 case, Barcelona Traction case (Belgium v. Spain), the Court stated that such international law obligations might derive “from the outlawing of acts of aggression, and of genocide, as also from principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” A State had such obligations to the whole international community. Every other State could institute a so-called actio popularis, in protection of the international community’s interest.

The Chinese words for “sovereignty” are 主权 (zhuquan), 统治权

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68 Id.
69 Id.
71 Id. at 14.
72 Id. at 69.
73 Id. at 2.
74 Id. at 67.
75 Id. at 72.
76 Id. at 67.
78 Id.
79 See id.
80 Note: this translates to “Popular action.”
81 Barcelona Traction, supra note 77.
(tong zhiquan) and 至高统治权 (zhigao tong zhiquan). Zhuquan can be translated simply as sovereignty, tong zhiquan as sovereignty in the sense of dominion or governance, and zhigao tong zhiquan as supreme power or sovereignty. The character common to all three terms, 权(quan), means authority, power, right or temporariness. It is unclear whether this symbolizes power as temporary, or the wielder of power in a temporary role. In any event, it appears this conception of sovereignty is one of impermanence.

The first Chinese word for sovereignty, 主权 (zhuquan) is composed of the characters 主 and 权. The character 主 (zhu) means owner, master, host, god, lord, or the verb to signify. The character 权 (quan) means authority, power, or right. Based on the character definitions, this first word for sovereignty seems to have a sense of authority or right to lordship.

The second Chinese word for sovereignty, 统治权 (tong zhiquan) is composed of the characters 统, 治, and 权. 统 (tong) means to gather, to unite, to unify or whole. 治 (zhi) means to rule, to govern, to manage, to control, to cure, treatment, to heal. Again, the character 权 (quan) means authority, power, or right. Based on the character definitions, this second word for sovereignty seems to have a sense of dominion or governance.

The third Chinese word for sovereignty, 至高统治权 (zhigao tong zhiquan), is composed of the syllable-characters 至, 高, 统, 治 and 权. The last three characters have already been discussed directly above. Thus, what of 至高 (zhigao). 至 (zhi) means most. 高 (gao) means high, tall, above average, or “your”, as used in an honorific title. Again, based on the character definitions, this final word for sovereignty seems to have a sense of significations, or, public indiciata, of the right to supreme authority and power.

Chinese society in its entirety was built into an empire that was
organized by hierarchy. Members of this empire-society understood it to be universal, or tian xia, meaning “all under heaven.” There was no independent political domain, no identifiable body politic, and no state which could be distinguished from the empire-society. Its hierarchy was concentric, rather than staged by vertical levels. The social entirety was encompassed by the gods of the official religion, which were in turn encompassed by the cosmos itself. In 1503, His Majesty the Hongzhi Emperor of China said, “[e]ven though there were additions and deletions, and continuities and changes in the statutes over the course of time - (even though) discrepancies were not avoided - the important thing is that they never violated the order of heaven in a single instance.”

To summarize, the western view of sovereignty possessed an underlying norm of independence, transformed so that laws could bind with political power. As such, the ruler’s right to rule was inalienable, meaning the ruler must either be a real person or a group of real people. This arguably would lead to the view that sovereignty meant freedom from subjection, except from international law. In other words, a State legal fiction personality suggested inevitable vassal states. Thus, judicial pronouncements added obligations of outlawing aggression and genocide, and protection from slavery and discrimination as sovereign obligations.

The Chinese view of sovereignty might be inferred from the three Chinese words used for the concept, taken together with the Chinese concept of social hierarchy. First, there is a right of lordship. Second, it includes dominion and governance. Third, there is a unique right to wield the symbols of supreme authority and power. Thus, the Chinese conception might suggest the three sovereign rights of lordship, dominion, and control of State symbols. There does not appear to be any sense of comfort here with alienation of sovereignty, or any form of outside national influence on the empire-society, a problem China is no doubt keen to avoid.

III. CHINA’S POSITIONS ON INTERNATIONAL LAW

Recent People’s Republic of China international relations practices

91 Id.
92 Id.
93 See id.
94 Id.
and statements arguably arise from China’s enhanced disquiet about current world interests and power. China's multifaceted views on international law reveal the complexity of their interests. China has maintained a strong comprehension of its own sovereignty, such as in its positions on uninterrupted sovereignty of Hong Kong and Taiwan. China rejects western human rights-based critiques, and denounces western military interventions in Iraq and the former Yugoslavia. Beijing also subscribes to its own paramount discretion in protecting Chinese sovereignty, by insisting on defining sources of international legal rights and obligations. China has significant complaints about the current western-sourced legal status quo on territorial matters. It senses it is only just gaining momentum to influence international law. It is skeptical of entrapment inside an international legal order in whose development it had little part.

Thus, according to Chinese scholar Fuchu, “the U.S. imperialists not only militarily invade Taiwan, but also support its lackeys, like the Philippines and South Vietnam, in their attempts to invade our South China Sea islands, including the Nansha Islands.”

When ASEAN was established, China also saw it as an “alliance of US stooges . . . directed specifically against China.” In addition to their


97 Id. at 273.

98 Id. The Treaty of Nanjing was a peace treaty ending the First Opium War (1842) between the Great Britain and the Qing dynasty of China. In this Treaty, the Qing Emperor ceded Hong Kong to Queen Victoria of Great Britain. See Published by Authority, Treaty between Her Majesty and the Emperor of China, signed in the English and Chinese Languages, at Nanking, August 29, 1842, LONDON GAZETTE, Nov. 7, 1843, Issue 20276, at 3597 available at https://www.thegazette.co.uk/London/issue/20276/page/3597. In the 1895 Treaty of Shimonoseki, the Qing Emperor ceded Taiwan to Japan. “China cedes to Japan in perpetuity and full sovereignty of the Pescadores group, Formosa (Taiwan) and the eastern portion of the bay of Liaodong Peninsula together with all fortifications, arsenals and public property.” Treaty of Shimonoseki, Japan-China, art. 2-3, Apr. 17, 1895. About 15 years later the Qing Dynasty fell.

99 Id.

100 Id.

101 Id. at 273-74.

102 Id.

103 Id.

104 LU FUCHU, BEI LI SHI YI WANG DI YI DAI ZHE REN: LUN YANG SHENG’AN JI QI SI XIANG 33 (Mandarin Chinese Ed.1989).

105 Round the World - Puny Counter-Revolutionary Alliance, 10 BEIJING/PEKING
subordination vis-à-vis the United States, the Asian countries of the ‘free world’ were described in 1985 on official Chinese Radio as “lackeys of Wall Street.”106

China could see a western system of vassal states within its region, and no doubt could sense the impending encroachment. Vassal states are bound by their imperial masters, regarding dicta from the imperial capital as binding and unquestionable rules for running their subjected countries.107

A. The Entrance of New China’s Views

Prior to the 1950s, western writers tended to describe international law as a body of legally binding rules, which governed international relations between what they called ‘civilized countries.’ 108 This description was formulated to exclude some states. In the 1947 sixth edition of Oppenheim's International Law, international law was defined as “the name for the body of customary and conventional rules which are considered legally binding by civilized States in their intercourse with each other.”109 Writers in the People’s Republic of China have criticized this structural limitation of international law only to ‘civilized states.’110 In their view, such a formulation excluded weak and small countries in the Orient, and some in the West, from the protection of international law, by categorizing them as ‘uncivilized states.’111

Chinese writer, Ying Tao, described this result by identifying a separate body of international law, called bourgeois international law: “In the Western capitalist world, suppression of the weak by the strong and the eating of small fish by big fish are not only tacitly condoned by bourgeois international law but also are cloaked with a mantle of legality.”112

Later, the 1955 eighth edition of Oppenheim's International Law

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106 Chinese Radio, quoted by Wiwat Mungkandi, 1985:27. (Although this source is now obscure to modern readers, the description was in such widespread public use at the time to have been broadcast on public radio in China).


109 Id.

110 See Ying Tao, Recognize the True Face of Bourgeois International Law from a Few Basic Concepts, 1 KUO-CHI WEN-t‘I YEN-CHIU [hereinafter KCWTYC] (STUDIES IN INTERNATIONAL PROBLEMS) 42, 42, 44 (1960).

111 See id.

112 Id.
omitted the adjective “civilized” before the word “states” in its definition of international law. Yet, most of the western-sponsored treatises have amended the old formula, now to include international organizations and individuals in their definition of international law. For example, the 1952 second edition of Professor Schwarzenberger's *Manual of International Law* described international law as “the body of legal rules which apply between sovereign States and such other entities as have been granted international personality.” He viewed international organizations and individuals as having been granted international personality, and as such, subjected to international law within a monarchical paradigm of subjection. To the contrary, the 1947 edition of Starke's *International Law* had accepted Hyde's definition of international law simply as a law operating among states. Hyde notes that “[t]he term international law may be fairly employed to designate the principles and rules of conduct declaratory thereof which States feel themselves bound to observe, and, therefore, do commonly observe in their relations with each other.”

Writers in China have continued to view international law as a law only among states. Writing in 1960, Kang Meng suggested that the western theory of individuals or international organizations as subjects of international law was a mere attempt to provide a “legal basis for imperialists' intervention in the internal affairs of other countries or to facilitate the establishment of the world hegemony of the United States.”

As of 1966, writers in the People’s Republic of China appeared to accept the definition of international law set out in the Soviet standard textbook on international law, strictly limiting the subjects of international

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115 See generally id.; see also Philip Caryl Jessup, *A Modern Law of Nations: An Introduction* 20 (1948) (discussing how individuals and international organizations are subjects of international law).


law to that of States. \(^{120}\)

“[International Law is] the aggregate of rules governing relations between States in the process of their conflict and co-operation, designed to safeguard their peaceful coexistence, expressing the will of the ruling classes of these States and defended in case of need by coercion applied by States individually or collectively.”\(^{121}\)

The powerful Soviet jurist and publicist, Vyshinsky, slightly reformulated this definition by arguing that “an aggregate of standards regulating relations between states in the process of their struggle and co-operation, expressing the will of the governing classes of the states, and enforced by compulsion on the part of the states individually or collectively.”\(^{122}\)

According to the 1962 views of Triska and Slusser, however, the prevalent Soviet view was to consider international organizations as subjects of international law, albeit limited ones.\(^{123}\) There did not appear to be any contemporary writer in China advocating this new Soviet doctrine. It is unclear whether this absence of response to the new Soviet doctrine was for reasons of ignorance or disapproval.\(^{124}\) Despite the 1955 edition of Oppenheim’s International Law\(^{125}\) omitting “civilized” from its definition of international law, some China writers continued, as recently as 1960, to rely on the 1947 seventh edition,\(^{126}\) as it had been translated into Chinese, in their evaluations of the Western definition of international law.\(^{127}\)

\(^{120}\) See Hungdah Chiu, Communist China’s Attitude Toward International Law, 60 Am. J. Int’l L., No. 2, at 245, 250 (1966).


\(^{122}\) Georgi Petrovich Zadorezhiy, Peaceful Coexistence: Contemporary International Law of Peaceful Coexistence 265 (1968).


\(^{124}\) See id.

\(^{125}\) Oppenheim, supra note 113.

\(^{126}\) Id.

\(^{127}\) Tao, supra note 110, at 43. Similarly, many writers in China appeared to rely heavily on a book entitled Fundamental Principles and Problems in Modern International Law (1956), which is a collection of translations of 21 articles of Soviet writers all published before 1955.
“their [i.e., bourgeoisie] criterion for the so-called ‘civilized’ or ‘uncivilized’ is neither long history nor culture. Even though China has 5,000 years of excellent culture, she was not included in the group of ‘civilized states.’”

Despite these citations, Kang Meng interpreted the term “subjects of international law” as including nations during their struggles for independence, or while establishing new states.

The contemporary attitude of the People’s Republic of China toward various sources of international law remains unclear. It does, however, recognize treaties and customs as principal sources of international law. The People’s Republic of China consistently prefers to incorporate the Five Principles in many treaties with other countries, suggesting an emphasis on treaties as international law sources. Some writers in China consider that an ever-increasing application of the Five Principles in treaties has infused them into general international law. Others say that these principles are not novel and are widely accepted as principles of international law.

The Chinese Five Principles are:

1. Mutual respect for each other’s territorial integrity and sovereignty;
2. Mutual nonaggression;
3. Mutual noninterference in each other’s internal affairs;
4. Equality and mutual benefit; and
5. Peaceful coexistence.

Recognition of custom as a source of international law may be

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128 Tao, supra note 110.
129 MENG, supra note 119, at 49; CHIU supra note 120, at 245-67.
130 See, e.g., Ding Gu, Firmly Maintain the Five Principles of Peaceful Coexistence, 2 KCWTYC 1, 2 (1959); Zhao Yue, A Preliminary Criticism of Bourgeois International Law, 3 J. INT’L. STUD. 1, 8 (1959) (“In many important treaties concluded with . . . other countries, our country proposed a series of democratic principles which have produced great influence and become commonly observed principles among various countries.”); WEI LIANG, ON THE POST SECOND WORLD WAR INTERNATIONAL TREATIES, (International Treaty Series ed. 1953-1955) 660 (1961) (“Treaties are an important source of international law and an important form of expressing international law.”).
131 Id.
132 Id.
inferred from the reference to international custom in diplomatic notes, or in some works of Chinese writers.\(^{135}\) It remains unclear whether China recognizes judicial decisions, or the works of publicists, as subsidiary sources of international law.

Writers in China have rarely cited judicial decisions in their scholarly writings, unless specifically to critique those judicial opinions. A rare citing of the ICJ Anglo-Norwegian Fishery Case 1951 has been among the few exceptions.\(^{136}\) However, in a 1958 Beijing publication of selected documents on international law edited by the Office of Teaching and Research of International Law of the Institute of Diplomacy, the following three documents were included as sources of international law:

1. Article 38 of the Statute of the International Court of Justice;
2. Resolution of the United Nations General Assembly on Progressive Development of International Law and Its Codification (Dec. 11, 1946);
3. Resolution of the United Nations General Assembly on Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal (Dec. 11, 1946).\(^{137}\)

United Nations Resolutions have been cited, on occasion, either to prove or to disprove the existence of a rule of international law. Li Haopei, Research Fellow of the Institute of International Relations of the Chinese Academy of Sciences, cited General Assembly Resolution 626 (VII) on permanent sovereignty over natural resources, as evidence that no rule of international law required a nationalizing state to compensate foreigners.\(^{138}\)

\(^{135}\) In the Statement by the Chinese Embassy in Indonesia on the Forcible House Arrest of the Chinese Consul, May 13, 1960, it is stated that “[t]he forcible house arrest of Consul Chiang Yen, the crude encroachment upon the functions and rights, the personal safety and freedom of the consul . . . have violated the universally acknowledged international norms” 3 Beijing Review, No. 20, at 34, 35 (1960). See also Zhou Keng Sheng, The Persecution of Chinese Personnel by Brazilian Coup d ‘Etat Authority Is a Serious International Illegal Act, PEOPLE’S DAILY (April 24, 1964). Chiu argues that such a persecution is in violation of “international custom.” CHIU, supra note 120, at 258.

\(^{136}\) See generally Fu CHU, ON THE QUESTION OF THE TERRITORIAL SEA OF OUR COUNTRY (1959).


\(^{138}\) Li Hao Pei, Nationalization and International Law, 2 CFYC 10, 10 (1958).
With respect to decisions of international organizations as sources of international law, there is no indication of China accepting the stated Soviet doctrine. Professor Zhoukeng Sheng’s view illustrates, as follows:

The United Nations Organization is one form of international organization of sovereign states. Its resolutions in general have only the character of a recommendation (with the exception of Security Council decisions to maintain peace, taken under Chapter VII of the Charter). Such resolutions cannot ipso facto bind member countries. The United Nations definitely does not possess legislative power. Even the legal drafts prepared by the International Law Commission and adopted by the General Assembly must still go through the procedure of an international conference and the conclusion of a treaty before they acquire binding force.\(^{139}\)

Western writers had usually described international law as legally binding rules, governing relations between civilized countries. Many still hold this view of international law.\(^{140}\) However, its fault is that it is the view only of those who want to bind others. Thus, it derives from a vassal, or subordinate, state theory. China saw this as an insult, and apparently ignored the concept, putting down to a mere manifestation of bourgeois international law.\(^{141}\) One dissenter, Hyde, noted that international law comprises a set of rules that states felt bound to observe, and therefore did observe.\(^{142}\) Inherent in Hyde’s view was a feeling of being bound.\(^{143}\) That feeling could dissipate.

The 1966 Chinese definition of international law recognized the fact that states were in perpetual cycles of conflict and cooperation.\(^{144}\) It declared international law to be an expression of the will of the ruling classes, reflecting China’s subsisting norms of sovereignty.\(^{145}\) The definition predicted that the “will” of this ruling class would be protected by coercion.\(^{146}\) Thus, the People’s Republic of China recognized treaties

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\(^{140}\) See, e.g., *Oppenheim* supra note 108, at 4.

\(^{141}\) See Tao, *supra* note 110.

\(^{142}\) CHARLES CHENEY HYDE, *INTERNATIONAL LAW AS INTERPRETED AND APPLIED BY THE UNITED STATES*, 10 (1922).

\(^{143}\) See *id*.

\(^{144}\) See KOZHEVNICKOV, supra note 121, at 7.

\(^{145}\) *Id*.

\(^{146}\) *Id*. 
and customs as principal sources of international law, provided they met the just and equitable requirements of its Five Principles. As such, United Nations instruments represented nothing more than recommendations, and assenting to them could well be interpreted as merely agreeing to consider the recommendation.

B. Sources in the Context of China’s Principles

The People’s Republic of China practice of incorporating the Five Principles in many of its treaties suggests a belief that these principles could become international law only within a treaty. The principles were first incorporated in the preamble of the 1954 Agreement between the Republic of India and the People’s Republic of China on Trade and Intercourse between the Tibetan Region of China and India. Many Chinese writers believe that treaties may also be a source of general international law, as distinguished from bourgeois international law. They regard the abundance of treaties, incorporating the Five Principles, as having transformed these precepts into general international law. A prominent People’s Republic of China writer also expressed the same view. However, these principles are not original, and may have been already acknowledged as principles of international law.

Chinese references to international custom in diplomatic notes, or in academic writings, suggests their recognition of custom as a source of international law. It is unclear whether Chinese scholars regard judicial decisions, and the writings of publicists, as proper sources of

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147 See Gu, supra note 130; STARKE, supra note 116, at 103.


149 Gu, supra note 130, at 8; Yue, supra note 132; LIANG, supra note 130.

150 STARKE, supra note 116, at 103.

151 Gu, supra note 130, at 8; ZHENG FA YAN JIU, STUDIES IN POLITICAL SCIENCE AND LAW 37-41 (1955).

152 Hungdah Chiu, Chinese Views on the Sources of International Law, 85 OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMPORARY ASIAN STUD., No. 2, at 1, 4 (1988).

153 The Chinese note to Indonesia of November 4, 1965, which accused Indonesia of a “gross violation of the accepted principles of international law and international practice” as a result of Indonesia’s “brutal encroachment upon the proper rights and interests of the Chinese nationals and their personal safety” in Indonesia. Persecution of Chinese Nationals by Indonesian Right-Wing Forces, 8 BEIJING REVIEW, No. 48, at 20-21 (Nov. 26, 1965) reprinted in J. A. COHEN & HUNGDAH CHIU, PEOPLE’S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY 75-76 (1974).

154 Sheng, supra note 135, at 4.
international law.

One Chinese writer, Ying Tao, took a rather negative view of judicial decisions as a subsidiary foundation of international law:

[Bourgeois international law scholars] say that judicial decisions are a subsidiary source. But who made the so-called judicial decisions? The majority of decisions they invoke are those decisions rendered by the municipal courts or arbitral organs of big capitalist powers and the international judicial or arbitral organs under their manipulation. In accordance with whose will and whose legal standards were these decisions made? Everyone knows that these decisions were made in accordance with the will and demands of big capitalist powers.\(^{155}\)

Rather than “source,” as used by Ying Tao,\(^{156}\) a more appropriate metaphor for judicial decisions in the context of international law might be “scaffolding.” Furthermore, Ying Tao observed the writing of publicists by noting:

[Bourgeois international law scholars] say that teachings of publicists are also one of the subsidiary sources. The so-called ‘publicists’ refers to ‘publicists’ brought up by the bourgeoisie and in the latter’s service, and the so-called ‘teachings’ refers to those ‘teachings’ which are formulated solely to carry out the will of the bourgeoisie, to do its legal planning, and to defend it in accordance with the external practices of the bourgeoisie. The teachings of those publicists with a sense of justice and progressive ideas are excluded and are attacked and condemned. Therefore, the substance of this source is easy to understand.\(^{157}\)

Although some Chinese writers cite judicial decisions to criticize other states’ behaviors,\(^{158}\) or to justify specific Chinese positions, their


\(^{156}\) Id.

\(^{157}\) Id.

\(^{158}\) Zhou Keng Sheng, for example, cites L. OPPENHEIM, INTERNATIONAL LAW, A TREATISE, (1955), to support China’s right to protect Chinese nationals in India. See The Persecution of Chinese Nationals and Infringement of the Right of China to Protect Chinese Nationals by the Indian Government are Serious International Delinquencies,
legitimacy has not become firmly established. Shortly after the People’s Republic of China declaration of 1958 on extending its territorial sea to 12 miles and on the use of the straight baseline method to delimit China’s territorial sea, a Chinese writer referred to the decision of the ICJ in the Anglo-Norwegian Fisheries Case,\(^\text{159}\) referencing its argument to justify the Chinese position.\(^\text{160}\)

In 1981 the People’s Republic of China published its first textbook on international law, edited by Professors Wang Tianya and Wei Ming of Beijing University.\(^\text{161}\) In it, the professors took the view that treaties and custom were the two principal sources of international law.\(^\text{162}\) Although they acknowledged the view that Article 38 of the Statute of the International Court of Justice enumerated the sources of international law,\(^\text{163}\) they denied that “general principles of law” were an independent and primary source of international law.\(^\text{164}\) Article 38 states:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, [i.e. that only the parties bound by the decision in any particular case,] judicial decisions and the teachings of the most highly


\(^\text{160}\) Liu Zi Yong, A Major Step to Protect China’s Sovereign Rights, 1 BEIJING REVIEW, NO. 29, at 13 (1958).


\(^\text{162}\) Id.

\(^\text{163}\) Sheng, supra note 135, at 4.

\(^\text{164}\) Id. at 32. One Chinese writer differs with this view by adopting the prevailing western view that “general principles of law” are a principal source of international law. See Nan Hai Chang, Answers to Essential Questions of International Law, 5 Fa Biao Ping Lun [LAW REVIEW] 87 (1986).
qualified publicists of the various nations, as subsidiary means for the determination of rules of law.\textsuperscript{165}

Chinese writers took a dark view of bourgeois international law. This is unsurprising, as the bourgeois, as vassal entities, have no right to lordship. It appears from Article 38(c) that the notion of “general principles of law recognized by civilized nations” suggests that general principles of law might run afoul China’s sovereignty-based views on sources of international law.\textsuperscript{166}

C. The Current Joint Position of Russia and China on International Law

On June 25 2016, China and Russia jointly resolved that the principles of international law were reflected in the United Nations Charter, and in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States,\textsuperscript{167} in accordance with the Charter of the United Nations.\textsuperscript{168} Russia and China declared that the principles of international law were also subject to the principles expressed in the Five Principles of Peaceful Coexistence: (a) mutual respect for each other’s territorial integrity and sovereignty; (b) mutual nonaggression; (c) mutual noninterference in each other’s internal affairs; (d) equality and mutual benefit; and (e) peaceful coexistence.\textsuperscript{169} These principles of international law, as stated in this way, are the bases for just and equitable international relations.\textsuperscript{170} This suggested a Chinese view of a necessary and equitable form for principles of international law, which might be vitiated by equitable fraud, such as a vexatious procedural act.

The two nations declared further that the principle of sovereign equality is a necessary precondition for stable international relations.\textsuperscript{171} This means that states, each on an equal footing, have the right to take part in the formation, interpretation, and application of international law. They are obliged to comply with international law only in good faith, coherently and consistently.\textsuperscript{172} This suggests vassal states could not join China in

\textsuperscript{165} Statute of the International Court of Justice, art.38(1).
\textsuperscript{166} Id.
\textsuperscript{168} See Charter of the United Nations (1945).
\textsuperscript{169} COHEN & CHIU, supra note 134, at 119.
\textsuperscript{171} Id. at para. 2.
\textsuperscript{172} Id.
forming, interpreting, or applying international law.

Russia and China declared that states must neither threaten nor use force in violation of the United Nations Charter.\(^{173}\) Under the principle of non-intervention, China condemned state interference in affairs of other states, especially when done with the intent to topple legitimate regimes.\(^{174}\) China also condemned states’ extra-territorial application of their municipal law not in conformity with international law,\(^{175}\) thus delegitimizing both colonial and colonized states.

China restated the principle of peaceful settlement of disputes by consensual means, without the application of abusive practices.\(^{176}\) Good faith implementation of generally recognized principles and rules of international law excluded double standards and unilateral coercive sanctions not based on international law.\(^{177}\) China condemned all forms of terrorism.\(^{178}\) It seems that the diplomatic technique of juxtaposing good faith implementation of generally recognized principles alongside a proscription against terrorism infers a view that the two, when taken together, constituted an abusive practice in international relations.

Russia and China declared that states must always honor the international obligation of states’ immunity, including the immunity of their property and of their officials.\(^{179}\) Any breach is inconsistent with the principle of sovereign equality of States.\(^{180}\) This is arguably an allusion to a policy of encroachment.

\(^{173}\) Id. at para. 3.

\(^{174}\) Id. at para. 4.

\(^{175}\) Id.

\(^{176}\) Id. at para. 5.

\(^{177}\) Id. at para. 6.

\(^{178}\) Id. at para. 7; The legend of the Miao People recorded in the ancient Lù Xìng, (Punishments of Lù) describes the Chinese view of terrorism. It constitutes a section of the classic text the Shu ching (Document Classic). The legend sources the story to the words of a king, who reigned around 950 B.C.E. In the legend, a barbarian people, the Miao people, flourished during the reign of the legendary sage Shun, traditionally thought to be in the 23rd century B.C.E. The legend explains that the Miao people made no use of spiritual cultivation, but controlled the population by means of punishments (xing). They created the five oppressive punishments, which they called law, (the Chinese word indicating a new category or form of law). Then the text continues that the Miao executed many innocent people. They were the first to administer the civil punishments of castration, amputation of the nose or legs, etc. Shang Ti (the Lord on High), the supreme god of the ancient Chinese, but still discussed today in the modern vernacular, seeing the resulting public disorder, pitied the innocent and exterminated the Miao by a process of externally applied terrorism. See 3 JAMES LEGGE, THE CHINESE CLASSICS 591-95 (H. K. U. Press reprint ed. 1960).

\(^{179}\) Id. at para. 8.

\(^{180}\) Id.
The two nations declared that the most important purpose of the 1982 UNCLOS is to maintain the rule of law in the oceans, suggesting no room for sovereignty contests.\textsuperscript{181} The treaty is universal and must be applied consistently, so as not to impair states parties’ rights and legitimate interests, and so not to compromise the Convention’s legal regime.\textsuperscript{182} The term “consistently”\textsuperscript{183} could well have alluded to China’s long held historic claims. Also, it inferred the obligation to comply with treaties only in as much as compliance represented consistency. China and Russia were resolved to cooperate in upholding and promoting international law while establishing a just and equitable international order based on international law.\textsuperscript{184} In particular, the issue of promoting international law is reminiscent of the Chinese view of sovereignty as including a right to articulate the public acts of the state.

\textbf{IV. China’s Position Paper on Jurisdiction}

The following is an extended and annotated summary of the People’s Republic of China Position Paper, arguably drafted to facilitate the South China Sea Islands arbitration. On January 22, 2013, the Philippines presented a \textit{note verbale}\textsuperscript{185} to the Embassy of the People's Republic of China in the Philippines, stating that the Philippines had initiated compulsory arbitration proceedings under Article 287 and Annex VII of the United Nations Convention on the Law of the Sea (“Convention”)\textsuperscript{186} over the dispute with China over maritime jurisdiction in the South China Sea.\textsuperscript{187} On February 19, 2013, the Chinese Government rejected and gave back the Philippines' \textit{note verbale}, together with its annexures.\textsuperscript{188} The Chinese Government later stated that it would facilitate

\textsuperscript{181} Id. at para. 9.
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Id. at para. 10.
\textsuperscript{185} \textit{A note verbale} is generally referred to as a third-person note. It is written in the third person, not signed but initialed in the lower right-hand corner of the last page of the text by a duly authorized signing officer. It takes the place of a signed note and has the same value as a signed note. It is less formal than a first person note and for this reason it is the form of communication most used. \textsc{Ye V. Borisova}, \textsc{Diplomatic Correspondence,} 4 (2013).
\textsuperscript{186} Convention on the Law of the Sea, \textit{supra} note 11, at art. 287, Annex VII.
\textsuperscript{188} Id.
the arbitration.\textsuperscript{189}

\textbf{A. The History}

China began its recitation of the long history of the dispute by stating it had irrefutable sovereignty over the South China Sea Islands, named the Dongsha Islands, the Xisha Islands, the Zhongsha Islands and the Nansha Islands, along with the adjacent waters.\textsuperscript{190} China’s South China Sea activities date back more than 2,000 years.\textsuperscript{191} China was the first State to discover, name, explore and exploit South China Sea Islands’ resources.\textsuperscript{192} It was the first to exercise continuous sovereign authority over them.\textsuperscript{193} From the period of the 1930s to the 1940s, Japan had seized illegally certain areas of the South China Sea Islands, while conducting its war against China.\textsuperscript{194} After the Second World War, the Government of China recommenced exercising its sovereignty over the South China Sea Islands.\textsuperscript{195} Military staff and government officers were dispatched on naval vessels to formally celebrate resumption of authority.\textsuperscript{196} Officials erected commemorative stone markers, Chinese garrisons were stationed, and officials conducted geographical surveys.\textsuperscript{197} In 1947, China renamed the South China Sea Islands’ maritime features.\textsuperscript{198} In 1948, China published an official map, displaying a dotted line in the South China Sea.\textsuperscript{199} Since the 1949 inception of the People's Republic of China, the Government of China had maintained its sovereignty actively and consistently over the South China Sea Islands. China’s Declaration of on the Territorial Sea,\textsuperscript{200} and its Law on the Territorial Sea and Contiguous Zone,\textsuperscript{201} provide expressly that the People's Republic of China’s territory

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Id. at para. 4.
\item \textsuperscript{191} Id.
\item \textsuperscript{192} Id.
\item \textsuperscript{193} Id.
\item \textsuperscript{194} Id.
\item \textsuperscript{195} Id.
\item \textsuperscript{196} Id.
\item \textsuperscript{197} Id.
\item \textsuperscript{198} Id.
\item \textsuperscript{199} Id.
\item \textsuperscript{200} Declaration of the Government of the People's Republic of China on the Territorial Sea of 1958.
\item \textsuperscript{201} Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone of 1992.
\end{itemize}
\end{footnotesize}
includes, *inter alia*, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands and the Nansha Islands.\(^{202}\) Those acts together reaffirmed China’s South China Sea territorial sovereignty, its relevant maritime rights, and its interests.\(^{203}\)

Before the 1970s, Philippine law delimited the Philippines’ territory.\(^ {204}\) It did not include any of China’s South China Sea maritime features.\(^ {205}\) The 1935 Constitution of the Republic of the Philippines\(^ {206}\) declared:

> The Philippines comprises all the territory ceded to the United States by the Treaty of Paris concluded between the United States and Spain on the tenth day of December, eighteen hundred and ninety-eight, the limits which are set forth in Article III of said treaty, together with all the islands embraced in the treaty concluded at Washington between the United States and Spain on the seventh day of November, nineteen hundred, and the treaty concluded between the United States and Great Britain on the second day of January, nineteen hundred and thirty, and all territory over which the present Government of the Philippine Islands exercises jurisdiction.\(^ {207}\)

This provision confined the Philippines’ territory to the Philippine Islands, excluding China’s South China Sea maritime features.\(^ {208}\) A 1961 Philippine statute\(^ {209}\) confirmed the Philippines’ territorial scope to what was laid down in its 1935 Constitution.\(^ {210}\)

According to China, since the 1970s, the Philippines had illegally occupied certain maritime features of China’s Nansha Islands.\(^ {211}\) These maritime features include Mahuan Dao, Feixin Dao, Zhongye Dao, Nanyao Dao, Beizi Dao, Xiyue Dao, Shuanghuang Shazhou and Siling


\(^{203}\) *Id.*

\(^{204}\) *Id.* at para. 5.

\(^{205}\) *Id.*

\(^{206}\) CONST. (1935), art. I § 1 (Phil.).

\(^{207}\) *Id.*

\(^{208}\) Position Paper, *supra* note 189, at para. 5.

\(^{209}\) An Act Defining the Baselines of the Territorial Sea of the Philippines, 1961, Rep. Act No. 3046 (Phil.).


\(^{211}\) *Id.* at para. 6.
Jiao.\textsuperscript{212} The Philippines unlawfully designated a “Kalayaan Island Group,” encompassing some of China's Nansha Islands’ maritime features.\textsuperscript{213} It claimed sovereignty over them, along with neighboring and huge maritime expanses.\textsuperscript{214} Afterwards, it unlawfully claimed sovereignty over Huangyan Dao within China's Zhongsha Islands.\textsuperscript{215} The Philippines has also illegally explored and exploited resources both on those maritime features and within the neighboring maritime expanses.\textsuperscript{216}

These Philippine activities violated the Charter of the United Nations\textsuperscript{217} and international law.\textsuperscript{218} They represented serious encroachments on China's territorial sovereignty as well as China’s maritime rights and interests.\textsuperscript{219} Therefore, their activities were a nullity, void in law.\textsuperscript{220} The Chinese Government said it had always firmly, consistently, and continuously expressed its vehement and solemn protestations and opposition to these Philippines actions.\textsuperscript{221}

B. The Claims and Counter-Claims

The Philippines abridged its arbitration claims into three categories:

First, China's assertion of the “historic rights” to the waters, sea-bed and subsoil within the “nine-dash line” (i.e., China's dotted line in the South China Sea) beyond the limits of its entitlements under the Convention is inconsistent with the Convention.

Second, China's claim to entitlements of 200 nautical miles and more, based on certain rocks, low-tide elevations and submerged features in the South China Sea, is inconsistent with the Convention.

Third, China's assertion and exercise of rights in the South

\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} Charter of the United Nations (1945).
\textsuperscript{218} Position Paper, supra note 189, at para. 7.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id.
China Sea have unlawfully interfered with the sovereign rights, jurisdiction and rights and freedom of navigation that the Philippines enjoys and exercises under the Convention.\footnote{Id. at para. 8.}

The People’s Republic of China argued that the basis of the subject matter of these three Philippines claims was one of territorial sovereignty over several South China Sea maritime features.\footnote{Charter of the United Nations, supra note 217.} This subject matter was, first, outside the UNCLOS’s scope, and second, not a matter of the interpretation of, or application of, UNCLOS.\footnote{Position Paper, supra note 189, at para. 9.} Therefore, the Arbitral Tribunal was without arbitral jurisdiction over the Philippines claims.\footnote{Id.}

The pith of the first category of the Philippines’ claims was that China’s South China Sea maritime claims were \textit{ultra vires} the Convention. However, the threshold issue, whatever logic was to be used, was a determination of the scope of China’s territorial sovereignty in the South China Sea.\footnote{Id. at para. 10.}

The People’s Republic of China argued, in its position paper, that it was a general principle of international law that sovereignty over land was the basis for determining appendant maritime rights.\footnote{See id.} Citing several cases, the position paper states that “maritime rights derive from the coastal State’s sovereignty over the land, a principle which can be summarized as ‘the land dominates the sea’”\footnote{Id. at para. 11 (citing Maritime Delimitation and Territorial Questions (Qatar v. Bahr.), Judgment, 2001 I.C.J. Rep. 97, para. 185; cf. North Sea Continental Shelf (Fed. Republic of Germ. v. Den.), Judgment, 1969 I.C.J. Rep. 51, para. 96 (Feb. 20); Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Rep. 1978, 36, para. 86 (Dec. 19)).} and that “[i]t is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State.”\footnote{Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Honduras), Judgment, 2007 I.C.J. Rep. 696, para. 113 (Oct. 8).}

Recently the ICJ again emphasized that “[t]he title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea,” and that “the land is the legal source of the power which a State may exercise over territorial extensions
to seaward.”

Furthermore, the UNCLOS Preamble stated: “the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans.” It appeared that “due regard for the sovereignty of all States” was the threshold issue for applying UNCLOS to determine States Parties’ maritime rights.

C. Threshold Issues

Much of China’s positional argument relied on a statement of necessary threshold issues, with specificitas to how and why none of the required thresholds had been crossed. China’s view was that since the Philippines had failed the thresholds tests, it could not prevail in litigation. Wherever the term “sovereignty” appears in the China position summary, as below, it means a right of lordship. In the event the Philippines was a proven multiple case of colonization, and with a long history on alienated sovereignty, it could not suggest it had a right to lordship, or the right to articulate the symbols of sovereignty internationally.

China argued that without first determining China’s territorial sovereignty over the South China Sea maritime features, the Arbitral Tribunal could not determine China’s claims to maritime rights in the South China Sea in accordance with UNCLOS. However, the issue of territorial sovereignty is outside UNCLOS’s scope.

The People’s Republic of China argued that the Philippines knew that any arbitral tribunal established under UNCLOS had no jurisdiction over disputes of territorial sovereignty. In attempting to circumvent this

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232 Id.


234 See generally Position Paper, supra note 189.

235 Id.

236 Id.

237 Id.

238 Id. at para. 11 (citing Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Honduras), Judgment, 2007I.C.J. Rep. 696, para. 113 (Oct. 8)).

239 Id. at para. 13.

jurisdictional limitation and to confect a basis for instituting arbitral proceedings, the Philippines had contrived to conceal the basic subject matter of the arbitration — a dispute over territorial sovereignty of certain maritime features within the South China Sea.\footnote{241}

In the second category of the Philippines’ claims, China declared that the nature and maritime entitlements of South China Sea maritime features could not be considered without first considering the issue of sovereignty.\footnote{242} The People’s Republic of China argued that, without first determining the sovereignty over a maritime feature it could not be possible to decide whether maritime claims based on that maritime feature were in accordance with the Convention.\footnote{243}

Under UNCLOS, the coastal State with sovereignty over the relevant territorial land is entitled to an exclusive economic zone and a continental shelf.\footnote{244} A maritime feature not subjected to a State’s sovereignty does not grant any maritime rights or entitlements.\footnote{245} Only the State with sovereignty over the maritime feature might claim the maritime rights in respect of that feature.\footnote{246} Thus, only when State sovereignty of the maritime feature was first determined, and the State had made those maritime claims, could there be any dispute over the interpretation or the application of UNCLOS.\footnote{247} This might take place when another State questions the consistency of those claims or claimed overlapping rights.\footnote{248} If the sovereignty of a maritime feature was undetermined, there could not be any dispute for arbitration.\footnote{249}

According to China’s research, prior to the UNCLOS arbitration tribunals’ South China Sea decision, no international judicial or arbitral tribunal had determined maritime rights arising from a maritime feature

\footnote{242} Id. at para. 15.
\footnote{243} Id. at para. 16.
\footnote{244} “The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established under this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.” United Nations Convention on the Law of the Sea, 1982, part V, art. 55. One of the first unilateral assertions of exclusive jurisdiction beyond traditional territorial seas was by the United States, pursuant to the Truman Proclamation of 28th September 1945.
\footnote{245} Position Paper, supra note 189, at para. 17.
\footnote{246} Id.
\footnote{247} Id.
\footnote{248} Id.
\footnote{249} Id.
without previously settling issues of sovereignty.\textsuperscript{250} The Philippines selected only a small number of features for its Nansha Island claims for the arbitral tribunal to decide maritime entitlements.\textsuperscript{251} According to China, this constituted a Philippine attempt to deny China's sovereignty over the whole area of the Nansha Islands.\textsuperscript{252} The Nansha Islands encompassed many maritime features. China has always possessed sovereignty over the entirety of the Nansha Islands.\textsuperscript{253} In 1935, the Commission of the Chinese Government for the Review of Maps of Land and Waters published the Map of Islands in the South China Sea.\textsuperscript{254} In 1948, the Chinese Government published the Map of the Location of the South China Sea Islands.\textsuperscript{255} Both maps showed China's sovereignty over what are now known as the Nansha Islands, the Dongsha Islands, the Xisha Islands and the Zhongsha Islands.\textsuperscript{256} The 1958 Declaration of the Government of the People's Republic of China on the Territorial Sea formally declared that the People's Republic of China territory included the Nansha Islands.\textsuperscript{257} In 1983, the National Toponymy Commission of China published standard names for some of the South China Sea Islands. The list included all the Nansha Islands.\textsuperscript{258} The 1992 Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone expressly provided that the Nansha Islands constituted an integral part of the People's Republic of China land territory.\textsuperscript{259}

By \textit{note verbale}, China stated:


\textsuperscript{250} \textit{Id.} at para. 18.
\textsuperscript{251} \textit{Id.} at para. 19.
\textsuperscript{252} \textit{Id.}
\textsuperscript{253} \textit{Id.} at para. 20.
\textsuperscript{254} \textit{Id.}
\textsuperscript{255} \textit{Id.}
\textsuperscript{256} \textit{Id.}
\textsuperscript{257} \textit{Id.}
\textsuperscript{258} \textit{Id.} Often the national toponymy is the only witness to the fact that a territory belongs to a particular ethnic group . . . such place names systems typically emanate from the highest political authority in the land, designed to maintain the uniqueness and unity of the nation A. Saparov, \textit{The Alteration of Place Names and Construction of National Identity in Armenia}, 44 CAHIERS DU MONDE RUSSE, no. 1, 179, 180 (2003).
\textsuperscript{259} Position Paper, \textit{supra} note 189, at para. 20.
Economic Zone and the Continental Shelf of the People's Republic of China (1998), China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.260

Due to this note verbale, the entire scope of maritime features comprising the Nansha Islands must be considered to determine China's UNCLOS maritime entitlements appurtenant to the Nansha Islands.261

The Philippines had attempted to dissect the Nansha Islands.262 Its claim made no mention of the remainder of the Nansha Islands, including those islands the Philippines illegally seized or claimed.263 Its arbitral claims distorted the nature and scope of the South China Sea disputes between China and the Philippines.264 The Philippines also had excluded Taiping Dao (the largest island of the Nansha Islands) from the maritime features it categorized as “occupied or controlled by China.”265 Instead, the Philippines recognized the Taiwan authorities of China as controllers of Taiping Dao.266 This represented a completely unacceptable violation of the One-China Principle267 and was therefore argued to be a grave infringement of both China's sovereignty and its territorial integrity.268 This sustains the view that the Philippines' second category of claims was essentially a territorial sovereignty dispute between the two countries.269

Whether low-tide elevations could be taken over was a matter solely of territorial sovereignty.270 The Philippines claimed that some of the maritime features subject to arbitration were low-tide elevations, thus being insusceptible to appropriation as sovereign territory.271 Whatever the character of those features, the Philippines had claimed sovereignty over


262 Id. at para. 22.

263 Id.

264 Id.

265 Id.

266 Id.

267 That Taiwan has the status of a self-governing integral part of the Chinese Nation.

268 Position Paper, supra note 189, at para. 22.

269 Id.

270 Id. at para. 23.

271 Id. at para. 24.
them since the 1970s. By Philippines Presidential Decree, the Philippines disclosed its claim to sovereignty over certain Nansha Islands maritime features, together with the adjacent huge expanses of waters, subsoil, seabed, continental margin and their airspace. It created over this vast area a new municipality of the province of Palawan, and named it “Kalayaan.”

Even though Philippine Republic Act No. 9522 of March 10, 2009 provided that the maritime zones for the newly-named “Kalayaan Island Group” and “Scarborough Shoal” should be determined consistently with Article 121 of UNCLOS, this provision was calculated to adjust the Philippines' maritime claims based on its claim to those features. The Act did not alter the Philippines territorial claim to the maritime features it alleged in the arbitration to be low-tide elevations. By note verbale, the Philippines stated that: “the Kalayaan Island Group (KIG) constitutes an integral part of the Philippines. The Republic of the Philippines has sovereignty and jurisdiction over the geological features in the KIG.”

The Philippines claimed sovereignty over 40 maritime features in the Nansha Islands, among which were certain features it presently characterizes as low-tide elevations. This strongly suggested a Philippines' motive, in asserting that low-tide elevations could not be appropriated, to deny China's sovereignty over these features, so to remove them to Philippine sovereignty.

The appropriation as territory of low-tide elevations constituted a question of territorial sovereignty. It was not a matter of interpretation

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272 Id.
275 Id.
276 i.e., some maritime features of China's Nansha Islands.
277 i.e., China's Huangyan Dao.
278 i.e., the regime of islands.
280 Id.
283 Id.
284 Id.
285 Id. at para. 25.
or application of the Convention. In fact, the Convention made no mention of the issue of appropriation. In its 2001 judgment in Qatar v. Bahrain, the ICJ held: “International treaty law is silent on the question whether low-tide elevations can be considered ‘territory.’ Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations.”

The term “international treaty law” arguably included the Convention, having come into force in 1994. In the 2012 judgment in Nicaragua v. Colombia, the ICJ held that “low-tide elevations cannot be appropriated.” However, it did not explain any legal basis for this judicial opinion. Neither did the court consider the legal status of low-tide elevations when they were components of an archipelago. It did not consider long-existing sovereignty, or claims of sovereignty, over such features inside a specific maritime area. Thus, in that case, the ICJ did not apply the Convention. The appropriation of low-tide elevations thus was not a question in respect of the interpretation or application of the Convention.

In the third category of the Philippines’ claims, it maintained that the legality of China’s actions in the waters around the Nansha Islands and Huangyan Dao arose from both the Philippines claimed sovereignty over certain maritime features and the maritime rights derived from those features. The People’s Republic of China argued that the premise for this claim must be that the physical extent of the Philippines’ maritime jurisdiction was both defined and undisputed, and that China’s actions had encroached upon these defined and undisputed areas. However, China

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286 Id.
287 Id.
289 Id.
290 Id. (citing Territorial and Maritime Dispute, (Nicar. v. Colom.), Judgement, 2012 I.C.J. Rep. 641, para. 26 (Nov. 19)).
291 Id.
292 Id.
293 Id.
294 Id.
295 Id.
296 Id. at para. 26.
297 Id. at para. 27.
and the Philippines had not delimited the maritime space that lies between them. Until maritime delimitation was completed, this third category of the Philippines claims could not be decided. Apparently affirming its adherence to the international force of long custom, the People’s Republic of China argued it had always respected the freedom of navigation and overflight exercised by all States in the South China Sea pursuant to international law.

V. CONCLUSION

This article began by asking what might be China’s view on the inviolability of the terms of a binding treaty? It tried to show that China’s international agreements required recognition of its stated long-held public customs, its political norms, and its stated Five Principles of justice and equity in international agreements. This article set forth three hypotheses:

(1) China had displayed to the community of nations its antecedent claims to sovereignty of named island groups in the South China Sea, based on a long catalogue of its claimed historic rights attaching to its sovereignty;

(2) China’s long held view was that agreements between State parties could be assessed in accordance with just and equitable facets expressed in its stated Five Principles of Peaceful Coexistence (“Five Principles”);

(3) Sovereignty includes a State’s right to bind stable political issues to agreements between States. All three of the stated hypotheses are essentially proven as China has shown no interest in alienating its sovereignty.

The western view of sovereignty has been able to bind together its own legal pronouncements with its norms of political power. This made for an international form of declaration the will of the western ruler intertwined with executable western legal rules. The western ruler’s right to rule was inalienable, requiring the ruler to be a real person, or a group of real people. If this sovereign were a corporate entity, the inevitable hierarchy between the corporation and the people who actually ran the

298 *Id.*

299 *Id.*

300 *Id.* at para. 28.

301 COHEN & CHIU, *supra* note 134.

302 *Id.*
state would suggest a similar hierarchy among nations, with the western country at the hierarchy’s apex, and the ruling technicians acting as a middle class. The American doctrine on sovereignty was more a corporate one, leading to a western paradoxical view that sovereignty inferred freedom from outside subjection, except subjection from international law. Thus, a State legal fiction personality implied inevitable subjected, or vassal, states. Western judicial pronouncements tended to add, to this body of international law, the protective obligations on other countries of outlawing aggression and genocide, and protecting human subjects from slavery and discrimination. However, as these were obligations on the sovereign, they made sovereignty alienable in the cases of subordinate states.

The Chinese view of sovereignty might be inferred from the three Chinese words used for the concept, taken together with a historic understanding of the hierarchy between the Chinese leadership and the Chinese people. First, there was always a right of lordship. Second, it included dominion and governance. Third, there was a unique right to wield the symbols of supreme authority and power. These symbols were cosmological forms of signs to other nations of Chinese sovereignty. Thus, the Chinese conception of the three sovereign rights of lordship, dominion and control of State symbols, implied a rejection of any form of subjection of the Chinese nation, and impliedly demanded outside recognition. Taken together with the ancient cosmological view of Chinese social hierarchy, there does not appear to be any sense of comfort here with any Chinese alienation of sovereignty.

China could see a western system of vassal states within its region, such as the Philippines and the other ASEAN nations. With the inevitably expanding hierarchy of vassals that necessitated, they would no doubt interpret it as encroachment or containment by dutiful vassals, acting for their western imperial masters, and derogating from recognition of Chinese society.

China expressed its disdain for this conception of how international law operated, and saw it as an insult. It apparently ignored the concept of binding international positive law in practice, putting it down to a mere manifestation of what it called bourgeois international law. One western theoretician, Hyde, dissented from the standard western view and noted that international law was constituted by rules that states felt bound to observe, and therefore did observe them. Inherent in Hyde’s view was a feeling of being bound. Of course, that binding

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303 Taylor, supra note 90.

304 See generally HYDE, supra note 117.

305 Id.
could dissipate when it had outlived its practical purposes, or became inconsistent with Chinese society.\(^{306}\)

The 1966 Chinese definition of international law recognized the fact that states were in perpetual cycles of conflict and cooperation.\(^{307}\) It accepted that international law was the summation of agreed upon rules for the relations between States, during their alternate conflicts and co-operations.\(^{308}\) It viewed the purpose of international law as safeguarding nations’ peaceful coexistence, articulating the political will of the States’ ruling classes.\(^{309}\) It knew that international law would have to be defended by coercion applied by individual States, or alternately, collectively by interest groups of States.\(^{310}\)

Thus, the People’s Republic of China recognized treaties and customs as principal sources of international law, provided they met the requirements for justice and equity stated in its Five Principles of Peaceful Coexistence. Therefore, United Nations instruments represented mere recommendations.\(^{311}\) Ratifying them could be interpreted as merely agreeing to consider their advice.

Chinese writers took a dark view of bourgeois, or middle class, international law. This is unsurprising, as the bourgeoisie had, by definition as vassal entities, no right to lordship.\(^{312}\) Therefore, according to Chinese thinking, there could be no bourgeois sovereignty.\(^{313}\) It appears from Article 38(c) of the Statute of the International Court of Justice, that the notion of “general principles of law recognized by civilized nations” might run afoul of China’s views on sources of international law.\(^{314}\) There was repeated evidence the west had not regarded China as a member of its cohort of civilized nations.\(^{315}\) Thus, the way Article 38(c) of the Statute of the International Court of Justice was drafted could well have exempted China from any subjection to the idea of international law as positive and binding law.

The 2016 declaration by Russia and China on issues of

\(^{306}\) Id.

\(^{307}\) CHIU, supra note 120.

\(^{308}\) Id.

\(^{309}\) See KOZHEVNIKOV, supra note 121.

\(^{310}\) See id. at 7.

\(^{311}\) See, e.g., Gu, supra note 130; Yue, supra note 130.

\(^{312}\) Id.

\(^{313}\) Id.

\(^{314}\) Sheng, supra note 135, at 32.

\(^{315}\) See Tao, supra note 110.
international law inferred a Chinese view of a necessary and equitable form for principles of international law, which might be vitiated by equitable fraud, such as for example, a vexatious procedural act. China claimed that the Philippines’ arbitral litigation was procedurally vexatious, with the Philippines being a vassal state. It would be like litigation emanating from a tributary state, complaining about the natural order. The declaration by Russia and China implied that vassal states could not join with China to form, interpret or apply international law.

The 2016 declaration by Russia and China stated that the principle of non-intervention proscribed States’ extra-territorial application of their municipal law. It held this practice to be not in conformity with international law, thus delegitimizing both colonial and colonized States, and their international law activities. In the 2016 Declaration, juxtaposing a declaration about good faith implementation of generally recognized principles, with a proscription against terrorism, although not in conformance with positivist legal reasoning views, certainly suggested a prevailing view that the two, when taken together, were an abusive practice in international relations. This is arguably an allusion, based on Chinese traditional legend about terrorism, to China’s likely apprehension of an inherent policy of encroachment by nearby vassal states. In the light of this, it should hardly be a surprise that China would see the need to expand the geographical scope of its preventative measures against encroachment and containment.

The 2016 declaration by Russia and China referred to UNCLOS as meant for maintaining the rule of law in the oceans, by applying it consistently, suggesting there was no room in it for oceanic sovereignty contests. They declared an essential preference for maintenance of the rule of law, not the execution of binding laws by one state upon another. The term “consistently” could well have been a veiled allusion to China’s long held historic claims, inferring an obligation to comply with

317 See id. at para. 1.
318 See id.
319 See id. at para. 3.
320 See id.
321 See LEGGE, supra note 178.
323 Id.
324 Id.
treaties only in so far as compliance represented consistency and equity. The final Russia and China joint declaration of promoting international law was consistent with the Chinese view of sovereignty as including a right to articulate its public acts and symbols of state.

On the basis of its concepts of sovereignty and sources of international law, China would likely form the view that any sovereignty dispute with the Philippines would be with a historically proven vassal state, outside China’s permitted realm of concentric hierarchy. The real audience for China’s expression of its symbols of sovereignty would have to be the world community of nations, not a hierarchy of vassal states representing an imperial power bent on containment and encroachment.

The Philippines pleaded its arbitral claims by denying China’s assertion of historic rights, by saying that some of China’s claims were inconsistent with the Convention, and by raising a sovereignty issue. It appears that each of these pleadings failed to bind the will of China’s rulers. According to China’s conception of the sources of international law, and its Five Principles, if the Tribunal upheld these three Philippines claims, they could not be statements of international law.

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325 Award on Jurisdiction, *The South China Sea Arbitration*, Award of July 12, 2016 at 67 para. 169.