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Are the Spratly Islands an Outlying Archipelago of China? Politico-Legal Implication of Proclaiming the Spratly Islands as a China's Outlying Archipelago that International Lawyers Should Know

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**ARE THE SPRATLY ISLANDS AN OUTLYING
ARCHIPELAGO OF CHINA? POLITICO-LEGAL
IMPLICATION OF PROCLAIMING THE SPRATLY ISLANDS
AS A CHINA'S OUTLYING ARCHIPELAGO THAT
INTERNATIONAL LAWYERS SHOULD KNOW**

*Youngmin Seo**

ABSTRACT

The issue of the outlying archipelago of continental states under the UNCLOS system has become a serious point of contention among international lawyers. This article shows what rules international lawyers in states possessing outlying archipelagos may have found for their outlying archipelagos, thereby assessing the Chinese claims to the Spratly Islands as an outlying archipelago. This article also explores how a future Chinese proclamation of special baselines for the Spratly Islands as an outlying archipelago negatively influences the development of the South China Sea dispute, harming Chinese national interests as opposed to conventional wisdom in China.

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INTRODUCTION

An outlying archipelago is defined as “groups of islands situated at such a distance from the coasts of firm land as to be considered an independent whole rather than forming part or outer coastline of the mainland.”¹ In recent years, the issue of the outlying archipelago of continental states under the UN Convention on the Law of the Sea (UNCLOS) system has become a serious point of contention among international lawyers,² especially between Chinese legal scholars and the rest.³

In 2014, when the Chinese government responded to the South China Sea Arbitration initiated by the Philippines, China mentioned the outlying archipelagic status of the Spratly Islands in passing.⁴ Nonetheless, it is unclear whether the Chinese government had in mind the specific case of an outlying archipelago for the Spratly Islands at this early stage of the South China Sea Arbitration. In 2018, the Chinese Society of International Law (CSIL) published

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¹ U.N. Conference on the Law of the Sea, Certain Legal Aspects Concerning the Delimitation of Territorial Waters of Archipelagos, at 290, U.N. Doc. A/CONF.13/18 (Feb. 28, 1958), https://legal.un.org/diplomaticconferences/1958_los/docs/english/vol_1/a_conf13_18.pdf (defining, on the other hand, coastal archipelagos as “those situated so close to a mainland that they may reasonably be considered part and parcel thereof, forming more or less an outer coastline from which it is natural to measure the marginal seas”).

² For the purposes of this paper, the term “international lawyers” refers to international law academics and practitioners as being members of an “invisible college” whose members are “dispersed throughout the world” yet “engaged in a continuous process of communication and collaboration.” See Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. L. REV. 217, 217 (1977). International lawyers include international law academics who often take on significant roles as international judges and arbitrators, advocates before international courts and tribunals, and advisers to governments. See ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 4 (2017).

³ Scholars use different names for outlying archipelagos, which include “dependent archipelagos,” “mid-ocean archipelagos,” and “off-shore archipelagos.” See Yurika Ishii, *A Critique Against the Concept of Mid-Ocean Archipelago*, in IMPLEMENTATION OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: STATE PRACTICE OF CHINA AND JAPAN 133 (Dai Tamada & Keyuan Zou eds., 2021); SOPHIA KOPELA, DEPENDENT ARCHIPELAGOS IN THE LAW OF THE SEA (2013). Su divides “oceanic archipelago” into “archipelagic states” and “continental state’s outlying archipelago,” both of which are distinguished from “dependent coastal archipelago” that lies in the vicinity of the coast of a state. See Jinyuan Su, *The Unity Status of Continental States’ Outlying Archipelagos*, 35 INT’L J. MARINE & COASTAL L. 801, 802 (2020).

⁴ “The Nansha Islands comprises many maritime features. China has always enjoyed sovereignty over the Nansha Islands in its entirety, not just over some features thereof... [I]n order to determine China’s maritime entitlements based on the Nansha Islands under [UNCLOS], all maritime features comprising the Nansha Islands must be taken into account.” See *Position Paper on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, MINISTRY FOREIGN AFF. CHINA ¶ 20–21 (Dec. 7, 2014), http://www.fmprc.gov.cn/nanhai/eng/snhwtl/wj_1/t1368895.htm.

a special report on the South China Sea Arbitration (Study) in which the CSIL clarified its outlying archipelago claim for the South China Sea:

China's [South China Sea Islands as archipelagos] include...islands, reefs, shoals and cays of various numbers and sizes. China's claims to maritime entitlements have always been based on each archipelago as a unit.⁵...[the Spratly Islands]...[possess] all the characteristics of an archipelago, i.e., formed by islands, reefs, cays, banks, interconnecting waters and other natural features...By geographical characteristics, [the Spratly Islands are] fully qualified as an archipelago [forming] one economic and political entity...The archipelagic unit status of China's [Spratly Islands] is also widely acknowledged and recognized in the international community.⁶

The CSIL's claims can be regarded as an official position of the Chinese government, considering the nature of the Study.⁷

Not surprisingly, this Chinese claim is countered by many international lawyers.⁸ The opponents of the idea of an outlying archipelago of continental states suggest that UNCLOS does not acknowledge outlying archipelago due to the lack of consensus on this topic at the Third Conference on the Law of the Sea (UNCLOS III).⁹ Thus, the "concept of midocean archipelago has no place under international law."¹⁰

Admittedly, the South China Sea is a focal point for the U.S.-China rivalry insofar as China develops an extended military strategy, deploying new naval capabilities in the region.¹¹ Many political scientists observe that the South China Sea dispute may evolve into the "leading edge of a full-blown conflict

⁵ Chinese Society of International Law, *The South China Sea Arbitration Awards: A Critical Study*, 17 CHINESE J. INT'L L. 207, 254 (2018) (citation omitted) [hereinafter CSIL].

⁶ *Id.* at 499-500.

⁷ The Study reveals that the Society has collaborated for more than one year (from September 2016 to December 2017) with more than sixty experts in the fields of law, international relations, history, and geography, along with more than twenty experts of recognized competence from China, including Taiwan, Hong Kong, and Macao to produce the position of the Chinese academia of international law on the awards. *Id.* at 218. *See also* Jinghan Zeng et al., *Securing China's Core Interests: The State of the Debate in China*, 91 INT'L AFF. 245, 253 (2015) (noting that "given the often sensitive nature of debates over domestic political issues, Chinese authors are somewhat reluctant to engage in debates with their peers on, and/or to be critical of, official state policy").

⁸ *See, e.g.*, U.S. DEPT. OF STATE, BUREAU OF OCEANS & INT'L ENV'T & SIC. AFFS., LIMITS IN THE SEAS NO. 150: PEOPLE'S REPUBLIC OF CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA 22-23 (Jan. 2022).

⁹ J. Ashley Roach, *Offshore Archipelagos Enclosed by Straight Baselines: An Excessive Claim?*, 49 OCEAN DEV. & INT'L L. 176, 178 (2018).

¹⁰ Ishii, *supra* note 3, at 146.

¹¹ Leszek Buszynski, *The South China Sea: Oil, Maritime Claims, and U.S.-China Strategic Rivalry*, 35 WASH. Q. 139, 144 (2012).

over the US-led global order.”¹² From this perspective, the Chinese claim to the outlying archipelago for the Spratly and Paracel Islands may be investigated in light of Beijing’s efforts to “eject the U.S. presence from a region where America has long enjoyed preponderance.”¹³

Considering that the South China Sea dispute has both legal and political causes and impacts both legal and political aspects, a possible consequence of China drawing special baselines for the Spratly Islands as an outlying archipelago elicits an analysis from both legal and political perspectives.

The goal of this article is two-fold: First, it will show what rules (the requisite conditions) international lawyers in government may have found when their government adopted acceptable special baselines for their outlying archipelagos in an effort to seek state practice and perceived customary rules; Second, it will explore how a future Chinese proclamation of special baselines for the Spratly Islands as an outlying archipelago negatively influences Chinese national interests and the development of the South China Sea dispute.

Section II explains the current formal law on baselines and the archipelago and the history of accepting the special treatment of a group of islands (an archipelago). Sections III and IV examine the Chinese argument over the emerging customary international law for outlying archipelagos instead of, and parallel with, UNCLOS, followed by the existing counterargument thereof. Section V looks into how government lawyers of states possessing outlying archipelagos may have found acceptable rules in applying special baselines for outlying archipelagos as a recurring state practice. In Section VI, the outlying archipelago status of the Spratlys is tested against the likely requisite conditions of drawing special baselines for outlying archipelagos of continental states. Section VII explores what politico-legal implications may occur if a Chinese move to adopt special baselines for the Spratly Islands as an outlying archipelago is made.

¹² William C. Wohlforth, *Not Quite the Same as It Ever Was: Power Shifts and Contestation over the American-Led World Order*, in WILL CHINA’S RISE BE PEACEFUL? SECURITY, STABILITY, AND LEGITIMACY 57, 58 (Asle Toje ed., 2018).

¹³ Rosemary Foot, *Restraints on Conflict in the China-US Relationship: Contesting Power Transition Theory*, in WILL CHINA’S RISE BE PEACEFUL? SECURITY, STABILITY, AND LEGITIMACY 79, 81 (Asle Toje ed., 2018).

I. UNCLOS, BASELINES, AND THE ARCHIPELAGO

UNCLOS is regarded as a “Constitution of the Oceans.”¹⁴ International law experts perceive almost all of the provisions in UNCLOS either as customary international law or as persuasive evidence of customary international law.¹⁵

UNCLOS acknowledges normal and straight coastal baselines from which the seaward limits of maritime zones are measured. Coastal states should identify coastal lines (usually lower-water lines) on a sea chart by way of drawing figures in the first place. The normal baseline (the low-water line along the coast, as marked on large-scale official charts) is the rule (Article 5), and the straight baseline is the exception to the rule. Under Article 7, coastal states may employ straight baselines in “localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity.”¹⁶ Waters on the landward side of the baseline become the internal waters of the coastal state in which coastal states enjoy sovereignty (Article 2(1)); consequently, the passage of foreign vessels is not allowed therein—no innocent passage is bestowed with the exception of areas that had not previously been considered as internal waters.¹⁷

Historically, there were no exceptions to the normal (physical) baseline up until the 1950s. The concept of allowing “special” baselines to “normal” ones came along with the monumental case referred to as the 1951 *Fisheries Case* (United Kingdom v. Norway).¹⁸ In *Fisheries*, the legality of applying a different mode of baselines departing from the physical line of the coast was considered. In this case, the International Court of Justice (ICJ) acknowledges that the baseline can become “independent of the low water mark and can only be determined by means of a geometric construction” if the coast is “deeply

¹⁴ Tommy T.B. Koh, President, Third U.N. Conference on the Law of the Sea, *A Constitution for the Oceans* (December 1982), http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf.

¹⁵ Myron H. Nordquist & William G. Phalen, *Interpretation of UNCLOS Article 121 and Itu Aba (Taiping) in the South China Sea Arbitration Award*, in *INTERNATIONAL MARINE ECONOMY: LAW AND POLICY* 3, 7 (Myron H. Nordquist et al. eds., 2017).

¹⁶ U.N. Convention on the Law of the Sea art. 7(1), Dec. 10, 1982, 1833 U.N.T.S. 397 (“In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.”).

¹⁷ *Id.* art. 8 (“Except as provided in Part IV [Archipelagic States], waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State. 2. Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.”).

¹⁸ *Fisheries Case* (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 133 (Dec. 18).

indented and cut into” or “bordered by an archipelago.”¹⁹ Of course, ICJ puts forward certain limitations in drawing straight baselines, which include: (1) “the drawing of baselines must not depart to any appreciable extent from *the general direction of the coast*”; (2) the sea areas lying within the baselines must be “sufficiently *closely linked to the land domain* to be subject to the regime of internal waters”; and (3) “certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage” must exist.²⁰

Also, UNCLOS acknowledges archipelagic water for the benefit of “archipelagic states” that are “constituted wholly by one or more archipelagos and may include other islands.”²¹ Archipelagic states (e.g., Indonesia and the Philippines) may apply different rules to draw straight archipelagic baselines under Article 47.²² Archipelagic states measure the breadth of the territorial sea, exclusive economic zone (EEZ), and continental shelf from the archipelagic baseline;²³ thereby, the sovereignty of an archipelagic state can extend to the waters enclosed by such archipelagic baselines.²⁴

Admittedly, before *Fisheries*, the international community was reluctant to accept a special baseline system for groups of islands in the delimitation of the territorial sea. That is, learned societies and legal scholars (e.g., the International Law Association and the Harvard Law School) were reluctant to accept a special system for groups of islands in the 1920s.²⁵ Similarly, the 1930 Hague Codification Conference failed to agree on the requirements through which a group of islands could be considered an archipelagic unit.²⁶

¹⁹ *Id.* at 129.

²⁰ *Id.* at 129, 133 (emphasis added).

²¹ U.N. Convention on the Law of the Sea art. 46(b), Dec. 10, 1982, 1833 U.N.T.S. 397 (“‘Archipelago’ means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.”).

²² *Id.* art. 47(1) (“An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.”).

²³ *Id.* art. 48 (“The breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf shall be measured from archipelagic baselines drawn in accordance with article 47.”).

²⁴ *Id.* art. 49(1) (“The sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with article 47, described as archipelagic waters, regardless of their depth or distance from the coast.”).

²⁵ KOPELA, *supra* note 3, at 12 n.2.

²⁶ Tara Davenport, *The Archipelagic Regime*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 136 (Donald Rothwell et al. eds., 2015). At the 1930 Hague Conference, a requirement was proposed as “[i]n the

After *Fisheries*, the archipelagic concept received a great deal of attention from international lawyers for the delimitation of territorial waters where states' coasts were scattered or included complex geography such as archipelagos.²⁷ This trend made its way into the discussion in UNCLOS I,²⁸ in which some states (such as Indonesia, the Philippines, and Denmark) proposed the adoption of straight baselines to groups of islands, thereby enclosing waters inside such baselines as internal waters.²⁹ However, the question of archipelagos failed to gain the necessary support at UNCLOS I due in good part to the disagreement over a maximum length for the baselines joining the islands.³⁰ Nevertheless, the criteria opined in *Fisheries* were accepted by states at UNCLOS I, which appeared as Article 4 of the Convention on the Territorial Sea and the Contiguous Zone in 1958.

If we look at the negotiation history of the archipelagic concept, the issue of archipelagos needing their own special regime came along again in UNCLOS III as an emerging topic.³¹ At the second session of UNCLOS III in 1974, states (such as Fiji, Indonesia, and the Philippines) proposed a special baseline system for archipelagic states made up entirely of islands or parts of islands, whereas continental states possessing outlying archipelagos (such as Canada, Chile, New Zealand, and Norway) put forward that the archipelagic principle should also apply to outlying archipelagos.³² Yet, the negotiations during the third to

case of a group of islands which belong to a single state and at the circumference of the group are not separated from one another by more than twice the breadth of territorial waters, the belt of territorial waters shall be measured from the outermost islands of the group. Waters included within the group shall also be territorial waters." See Arif Havas Oegroseno, *Archipelagic States: From Concept to Law*, in *THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW VOLUME I: THE LAW OF THE SEA 126* (David J Attard et al. eds., 2014). The application of a straight baseline system to groups of islands elicited rejection from the majority of states. See KOPELA, *supra* note 3, at 13.

²⁷ Roberto Virzo, *Review of Book*, 27 *ITALIAN Y.B. INT'L L.* 593 (2017) (reviewing ALEXANDER PROELSS, *UNITED NATIONS ON THE LAW OF THE SEA: A COMMENTARY* (2017)); KOPELA, *supra* note 3, at 14.

²⁸ During UNCLOS I, outlying archipelagos were discussed within a proposed definition as "groups of islands situated out in the ocean at such a distance from the coasts of firm land as to be considered as an independent whole rather than forming part of or outer coastline of the mainland." An outlying archipelago may form part of a continental state (referred to as a continental state's outlying archipelago) or constitute in whole or in part the territory of an archipelagic state. See CSIL, *supra* note 5, at 479–80.

²⁹ KOPELA, *supra* note 3, at 22. See also U.N. Conference on the Law of the Sea, *First Committee (Territorial Sea and Contiguous Zone)*, ¶ 5, 26, Doc.A/CONF.13/C.1/L.98 (Vol. 3).

³⁰ See KOPELA, *supra* note 3, at 20.

³¹ ALEXANDER PROELSS, *UNITED NATIONS ON THE LAW OF THE SEA: A COMMENTARY* 356 (2017). Indeed, there existed a few claims of continental states to outlying archipelagos in the early 20th century, such as the Faroe Islands by Denmark in 1903 and the Galapagos Islands by Ecuador in 1934. See KOPELA, *supra* note 3, at 112.

³² See Myron H. Nordquist et al., *UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY VOL. II 402–403* (Satya N. Nandan et al. eds., 1993).

eleventh sessions were conducted on the premise that the archipelagic principle would be applied to only archipelagic states, excluding outlying archipelagos of continental states.³³ Eventually, the Conference ended with the provisions we have now in UNCLOS.

II. THE CHINESE CLAIM TO THE OUTLYING ARCHIPELAGO STATUS OF THE SPRATLY ISLANDS BASED ON HISTORIC RIGHTS AND CUSTOMARY RULES

The Chinese claim to the outlying archipelago status of the Spratly and Paracel Islands is germane to its historic rights argument over the South China Sea.³⁴ China seems to take advantage of a wide agreement among states that “time-and-practice-honored-conduct—pedigreed custom—has the capacity to bind states.”³⁵ China argues that it has, based on the South China Sea Islands, “internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf... [as well as] historic rights in the South China Sea.”³⁶ China claims that the formation and nature of historic rights are governed by general international law (not UNCLOS), and by extension, Articles of UNCLOS (10, 15, 51, and 298, amongst others) show respect for historic rights by intentionally avoiding to fix a relationship between historic rights and exclusive economic zone (EEZ) or continental shelf.³⁷

Moreover, China suggests that its historic rights, which have evolved in connection with its territorial sovereignty over maritime features in the South China Sea, inform maritime delimitation, having zonal implications. Its historic rights and zonal jurisdiction, as the argument goes, coexist cumulatively in some areas in the South China Sea.³⁸ Seen in this way, historic rights cannot be dealt with separately from maritime delimitation in the region.³⁹ In other words, any dispute regarding historic rights is to be excluded from the application of the

³³ PROELSS, *supra* note 31, at 345–46.

³⁴ *See* CSIL, *supra* note 5, at 500. The Study explains China’s historic rights in the South China Sea (Chapter 4) before adducing its claim to the status of the Spratly Islands as an outlying archipelago (Chapter 5). In particular, the Study stresses that “(2) Nansha Qundao historically has been regarded as one entity: 592. China’s Nansha Qundao historically has been regarded as one entity...593. Chinese people historically have regarded Nansha Qundao as one entity. A great number of China’s ancient maps clearly depict Nansha Qundao as one entity.”

³⁵ THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 189 (1990).

³⁶ CSIL, *supra* note 5, at 256.

³⁷ *Id.* at 442. *See also* Keyuan Zou, *Certain Controversial Issues in the Development of the International Law of the Sea*, in *STRESS TESTING THE LAW OF THE SEA: DISPUTE RESOLUTION, DISASTERS & EMERGING CHALLENGES* 186 (Stephen Minas & H. Jordan Diamond eds., 2018).

³⁸ *See* CSIL, *supra* note 5, at 423, 450.

³⁹ *See id.* at 421–22.

compulsory dispute settlement procedure of UNCLOS since China opted out of disputes relating to sea boundary delimitations from the compulsory mechanism by its 2006 declaration in accordance with Article 298(1)(a).⁴⁰

In China's view, the negotiating states in UNCLOS III did not intend to address the "specific regimes of historic rights including historic bay and historic title,"⁴¹ nor did they intend to "settle the relationship between historic rights and the regimes of [EEZ] and continental shelf."⁴² Rather, the status of historic waters of a state ought to be decided "on a case-by-case basis, with a focus on the jurisdiction actually exercised by the State,"⁴³ on the ground of general international law inasmuch as "the Convention is neither the whole of, nor equal to, the international law of the sea."⁴⁴

Under this assumption, Chinese scholars adduce that the Spratly Islands are an archipelago constituting one "economic and political entity" of China.⁴⁵ Hong claims that the Spratly and Paracel Islands should enjoy the status of an archipelagic regime because the Spratlys and Paracels not only meet the requirement of a political, security, and economic entity with interconnectedness but also have been governed as a single entity throughout China's history. Hong contends that a customary rule of outlying archipelagos is emerging, by which the Spratlys and Paracels are entitled to the status of outlying archipelagos.⁴⁶

On the question of the existence of customary rules on the outlying archipelago, CSIL affirms that "[t]he regime of continental States' outlying archipelagos...has been well established under customary international law."⁴⁷ Yee asserts that "the regime of continental States' outlying archipelagos as units is already established under customary international law";⁴⁸ also, Zhang contends that "there exists a customary rule that 'continental States are entitled

⁴⁰ *Id.* at 330; *see also* 1982 U.N.T.S. 298 (Chinese declaration under article 298 made on August 25, 2006).

⁴¹ CSIL, *supra* note 5, at 437.

⁴² *Id.* at 439 (alteration in original).

⁴³ *Id.* at 447.

⁴⁴ *Id.* at 427.

⁴⁵ *Id.* at 499–500.

⁴⁶ Hong Nong, *The Applicability of the Archipelagic Regime in the South China Sea: A Debate on the Rights of Continental States' Outlying Archipelagos*, 32 OCEAN Y.B. 80, 105 (2018) (noting that "there is an emerging, rather than established, customary rule of applying straight archipelagic baselines to continental States' oceanic or outlying archipelagos").

⁴⁷ CSIL, *supra* note 5, at 479 (adding that "[s]ince the Convention entered into force, [the regime of outlying archipelagos] has continued to be regulated under customary international law and has been reaffirmed and reinforced by State practice.").

⁴⁸ INTERNATIONAL LAW ASSOCIATION, *BASELINES UNDER THE INTERNATIONAL LAW OF THE SEA* (2018) (Yee, S., dissenting report) [hereinafter ILA 2018].

to apply straight baselines to dependent mid-ocean archipelagos” as a *sui generis* nature.⁴⁹

Although the discontent and outcry of states possessing outlying archipelagos with the exclusion of the outlying archipelago for a special baseline system existed until the end of UNCLOS III,⁵⁰ UNCLOS ended up adopting rules that entitle only archipelagic states (defined in Article 46⁵¹) to draw special (archipelagic) baselines to enclose the waters of their archipelagos, which seemingly disentitles special archipelagic baselines to outlying archipelagos of continental states. In this regard, Chinese scholars criticize UNCLOS III for a democratic deficit insofar as states possessing outlying archipelagos were not invited to the informal meetings, which only invited maritime powers and archipelagic states.⁵²

At the same time, Chinese publicists argue that the final text of UNCLOS never excludes the development of rules concerning outlying archipelagos outside the treaty system. They emphasize that the matter of outlying archipelagos was left to be governed by general international law, as stated in paragraph 8 of the preamble to the Convention.⁵³ For instance, CSIL asserts that “the concept of archipelago as a unit is well established in international law.”⁵⁴ In addition, Chinese observers suggest that the early proposals in UNCLOS III that allowed island states and continental states possessing outlying archipelagos to adopt the special archipelagic regime best reflected state practice on archipelagos.⁵⁵

⁴⁹ Hua Zhang, *The Application of Straight Baselines to Mid-Ocean Archipelagos Belonging to Continental States: A Chinese Lawyer's Perspective*, in IMPLEMENTATION OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: STATE PRACTICE OF CHINA AND JAPAN 127 (2021).

⁵⁰ Nong, *supra* note 46, at 87. For instance, Ecuador, Portugal, Peru, Spain, and Argentina kept supporting the inclusion of outlying archipelagos in the special regime for archipelagos. See PROELSS, *supra* note 31, at 345 n.90.

⁵¹ United Nations Convention on the Law of the Sea, art. 46, Dec. 10, 1982, 1833 U.N.T.S. 397. (Use of terms: (a) “archipelagic State” means a State constituted wholly by one or more archipelagos and may include other islands; (b) “archipelago” means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.)

⁵² Su, *supra* note 3, at 815.

⁵³ United Nations Convention on the Law of the Sea, Preamble, Dec. 10, 1982, 1833 U.N.T.S. 397. (Paragraph 8 of the preamble stipulates that “[a]ffirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law...”).

⁵⁴ CSIL, *supra* note 5, at 482. See also Su, *supra* note 3, at 818 (adding that “no decision was made either to positively deny any status of continental States’ outlying archipelagos outside the LOSC, or to pre-emptively rule out the development of such rules under customary international law”).

⁵⁵ CSIL, *supra* note 5, at 482 n.34.

CSIL stresses that if outlying archipelagos are not entitled to the special baseline system, it will bring about three significant consequences. First, if an outlying archipelago is not treated as a unit, a continental state has to prove territorial title to each and every feature; meaning, China believes, that it is enough to prove the sovereignty over the principal part of an archipelago to have sovereignty over all the features in an outlying archipelago. As a result, the total size of the area under sovereignty gets wider because the sovereignty over archipelagos reaches all component features (including low-tide elevations) and the interconnecting waters.⁵⁶ Second, a continental state can claim “full maritime entitlement to a territorial sea, contiguous zone, [EEZ], and continental shelf, regardless of the status of individual features separately under the Convention” based on the concept of an archipelago as a unit.⁵⁷ Third, a continental state can claim the use of outermost features (even low-tide elevations) facing the coast of an opposite state in maritime delimitation; under this logic, rocks within an archipelago have EEZ and continental shelf, and low-tide elevations confer maritime entitlements, which is unlikely when individually characterized.⁵⁸

Furthermore, Chinese scholars claim that “low-tide elevations are land territory” that generates basepoints in certain circumstances (as with Articles 7, 13, and 47),⁵⁹ entailing a “significant effect on maritime delimitations.”⁶⁰ Low-tide elevations, as the argument goes, are subject to appropriation under a state’s sovereignty,⁶¹ and as such, “whether or not a low-tide elevation can be appropriated as territory is in itself an issue of territorial sovereignty.”⁶² With this understanding, China denounces the South China Sea Arbitration as having a detrimental effect on China’s sovereignty over low-tide elevations in the

⁵⁶ *Id.* at 476. On low-tide elevations, Article 13 of UNCLOS sets out that “[a] low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.” Low-tide elevations are not islands, thereby confers no maritime zones of their own. In practice, a coastal state can use low-tide elevations within 12 nm of any land territory to be part of the baseline from which the breadth of the territorial sea is measured. United Nations Convention on the Law of the Sea, art. 13, Dec. 10, 1982, 1833 U.N.T.S. 397.

⁵⁷ CSIL, *supra* note 5, at. 476.

⁵⁸ *Id.* at 477. On islands and rocks, Article 121(1) of UNCLOS defines an island as “a naturally formed area of land, surrounded by water, which is above water at high tide.” United Nations Convention on the Law of the Sea, art. 121(1), Dec. 10, 1982, 1833 U.N.T.S. 397. Among islands, features that cannot sustain human habitation or economic life of their own are to be subcategorized as rocks (Article 121(3)). Rocks confer no EEZ or continental shelf.

⁵⁹ CSIL, *supra* note 5, at. 519.

⁶⁰ *Id.* at 520.

⁶¹ *Id.* at 513.

⁶² *Id.* at 265 (adding that international courts or tribunals will address the issue of territorial sovereignty over low-tide elevations when they have jurisdiction over territorial sovereignty).

Spratly archipelago as the Tribunal regards low-tide elevations in the South China Sea as a submerged landmass incapable of appropriation.⁶³

Under the assumption that the Spratly Islands are a Chinese archipelago, Chinese scholars assert that “interconnecting waters within the archipelago are under China’s sovereignty.”⁶⁴ This proposition keeps in line with the argument that historic waters render the water in question internal waters.⁶⁵ Further, some Chinese writers criticize that denying special baselines for the Spratlys “will result in exaggeration of the impacts of geographic difference on individual sovereign States and will lead to a de facto punishment on a group of States. The archipelagos of continental States will be treated unfairly as ‘second class’ sovereign land.”⁶⁶

III. MAINSTREAM COUNTERARGUMENTS TO THE CHINESE CLAIMS

The West, by and large, urges China to comply with the South China Sea Award, implying that the West concurs with the Award.⁶⁷ Also, the West regards China’s interpretation of UNCLOS as trying to supplement the traditional law of the sea system with the Chinese *mare clausum* (closed sea) perspective.⁶⁸ In the same vein, the *South China Sea* Tribunal held, on the issue of historic rights, that:

Evidence that either the Philippines or China had historically made use of the islands of the South China Sea would, at most, support a claim

⁶³ See *id.* at 510. See also *The South China Sea Arbitration*, (Phil. v. China) PCA 2013-19, ¶1203.B. (Perm. Ct. Arb. 2016).

⁶⁴ CSIL, *supra* note 5, at 477. Further, the Society claims that “China has sovereignty over [South China Sea Islands] ... China has historic rights in the South China Sea. China has territorial sovereignty over [the Spratlys] and [the Macclesfield Bank], and has enjoyed maritime entitlements based upon the two archipelagos each as a unit.” See *id.* at 475.

⁶⁵ Zou, *supra* note 37, at 185.

⁶⁶ Nong Hong et al., *The Concept of Archipelagic State and the South China Sea: UNCLOS, State Practice and Implication*, 2013 CHINA OCEANS L. REV. 209, 222 n. 61 (2013) (citing Jiang Li & Zhang Jie, *A Preliminary Analysis of the Application of Archipelagic Regime and the Delimitation of the South China Sea*, 1 CHINA OCEANS L. REV. 158 (2010)).

⁶⁷ For example, in April 2017, the Joint Communiqué of the G7 Foreign Ministers’ Meeting multilaterally regarded the award as “a useful basis for further efforts to peacefully resolve disputes in the South China Sea.” See G7 FOREIGN MINISTERS’ MEETING JOINT COMMUNIQUÉ, LUCCA 10–11 (2017), www.esteri.it/mae/resource/doc/2017/04/g7_-_joint_communicu_final.pdf.

⁶⁸ Anisa Heritage & Pak K. Lee, *The Sino-American confrontation in the South China Sea: Insights from an International Order Perspective*, 33 CAMBRIDGE REV. INT’L AFFS 145 (2020). For the debate and historical background of *Mare Liberum* and *Mare Clausum* between Hugo Grotius (the Latinised Version of Huig de Groot) & John Selden, See BILL HAYTON, *THE SOUTH CHINA SEA: THE STRUGGLE FOR POWER IN ASIA* 38–47 (2014).

to historic rights to those islands. Evidence of use giving rise to historic rights with respect to the islands, however, would not establish historic rights to the waters beyond the territorial sea.⁶⁹

The Tribunal opines that the Chinese claim to historic right over the South China Sea based on the nine-dash line, which was advanced in May 2009 with China's Note Verbale, has been under severe objection by other states, ascertaining that "there is no acquiescence."⁷⁰ This proposition seems to pertain to a theory that protests hinder practice from becoming customary rules—" [w]hat is not protested at all is often taken as accepted in State Practice [emerging] into customary international law."⁷¹

In the view of the Tribunal, no evidence has been found that China historically made use of South China Sea islands and waters thereof beyond the territorial sea.⁷² Also, the Tribunal rules that by the Chinese accession to UNCLOS, "any historic rights that China may have had to the living and nonliving resources within the 'nine-dash line' were superseded."⁷³ In short, the West, by supporting the verdict of the Tribunal, seems to perceive that the Chinese claim to historic waters in the South China Sea (under the nine-dash line) is fundamentally flawed at variant with the doctrine "the land dominates the sea."⁷⁴

In this view, many Western legal scholars suspect the existence of customary rules that enable states to draw straight baselines around outlying archipelagos.⁷⁵

⁶⁹ Phil. v. China, 2013-19, ¶ 266. The Society refutes that (1) China's activities in the South China Sea (SCS) have a greater scope, (2) the Tribunal disregarded that SCS Islands and waters thereof are within China's domain as evidence by the fact that SCS has been used by Chinese people in navigation, trade and fishing, (3) some of China's historical activities at sea were misconstrued by the Tribunal. See CSIL, *supra* note 5 at 468–69.

⁷⁰ Phil. v. China, 2013-19, ¶ 275. On this point, the Society repudiates that "China always emphasizes its longstanding practice or its conduct in the long course of history." See CSIL, *supra* note 5 at 470.

⁷¹ Nordquist & Phalen, *supra* note 15, at 35.

⁷² Phil. v. China, 2013-19, ¶ 266.

⁷³ *Id.* at ¶¶ 262, 1203.B.(2).

⁷⁴ CONGRESSIONAL RESEARCH SERVICE, U.S.-CHINA STRATEGIC COMPETITION IN SOUTH AND EAST CHINA SEAS: BACKGROUND AND ISSUES FOR CONGRESS, 16 (Feb. 18, 2021). The maxim "the land dominates the sea" denotes that maritime zones are generated only from the land territory; which was approved by international courts and tribunals. See Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. Rep. 140 (Nov. 19); See Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. Rep. 185 (Mar. 16) (stating 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'").

⁷⁵ Roach, *supra* note 9, at 178–90. As Chinese scholars frequently cite, Churchill and Lowe understood that denying outlying archipelago "seems an unnecessary and unreasonable restriction," and cautiously anticipate that the practice of outlying archipelago and other states' recognition of such practice may bring about

The United States debunks China's argument: "there are no customary international rules that provide a different, and more permissive, legal framework for establishing baselines pertaining to outlying island groups."⁷⁶

Western lawyers point out that it was only after World War II that the international community began discussing whether it was necessary to confer special treatment for archipelagos by adopting different baselines.⁷⁷ They note that after *Fisheries*, the International Law Commission (ILC) tried to elaborate particular numerical conditions to circumvent ambiguities in which states could adopt a special baseline system for their archipelagos but to no avail.⁷⁸ As a corollary, the 1958 Geneva Convention on the Law of the Sea is silent on outlying archipelagos.⁷⁹

Of course, the negotiation history of UNCLOS III did reveal that there were outcries of states possessing outlying archipelagos over the use of a special baseline system for outlying archipelagos. For instance, during the discussions, countries like Ecuador, Greece, Spain, India, China, Argentina, Portugal, France, Canada, and Australia demanded the extension of the archipelago regime to the archipelago, forming part of a continental state.⁸⁰ At some point, such an attempt did come into (temporary) fruition. That is, in 1975, the Informal Single Negotiating Text (ISNT) contained two formulations: section 1 for "Archipelagic States" (Articles 117-130) and section 2 for "Oceanic Archipelagos Belonging to Continental States" (Article 131).⁸¹ The debate between Western and Chinese scholars revolves around the meaning of this

a relevant principle of customary international law. See R. R. CHURCHILL & A. V. LOWE, *THE LAW OF THE SEA*, 120 (3d. ed. 1999).

⁷⁶ U.S. Dep't of State, Bureau of Oceans & Int'l Env't and Sci. Affs, Limits in the Seas: People's Republic of China: Maritime Claims in the South China Sea Report 150, 23 (2022).

⁷⁷ Arif Havas Oegroseno, *5 Archipelagic States: From Concept to Law*, in *THE MLI MANUAL ON INTERNATIONAL MARITIME LAW: VOLUME I: THE LAW OF THE SEA* 125 (David Joseph Attard et al., eds. 2014). Indeed, in 1957 for the first time, Indonesia claimed all waters within the archipelago as part of its internal waters (the 1957 Djuanda Declaration). See *id.* at 128. See also *319th Meeting*, [1955] 1 Y.B. Int'l L. Comm'n 66. Kopela notes that the issue of outlying archipelagos was radically developing in the 1970s. See KOPELA, *supra* note 3, at 25.

⁷⁸ The Special Rapporteur's proposal, that incorporated numerical conditions enabling states to adopt the method of straight baselines, was deleted by 10 to 2 abstentions. See KOPELA, *supra* note 3, at 16-17 (citing *First Report of Special Rapporteur*, 2 Y.B. Int'l L. Comm'n 32-33, U.N. Doc. A/CN.4/53 32-33 (original in French)).

⁷⁹ Oegroseno, *supra* note 77, at 127.

⁸⁰ U.N. Conference on the Law of the Sea, *Summary Records of Meetings of the First, Second and Third Committees, Second Session*, 260-73 A/CONF.62/C.2/SR.37 (Vol. 2) (1958).

⁸¹ Third United Nations Convention on the Law of the Sea, A/CONF.62/WP.8/Part II, Informal single negotiating text, part II, 152-68.

short-lived Article 131, which stated that “[t]he provisions of [Archipelagic States] are without prejudice to the status of oceanic archipelagos forming an integral part of the territory of a continental state.”⁸²

Western international lawyers either assess that the meaning of Article 131 of ISNT is vague, ambiguous, and unclear⁸³ or that it was intended to exclude groups of islands belonging to continental states from special treatment;⁸⁴ in contrast, Chinese international lawyers understand that Article 131 of ISNT acknowledges the development of outlying archipelagos outside the UNCLOS.⁸⁵ Regardless, what can be sure for both sides is that the deletion of Article 131 of ISNT is the result of the lack of consensus of the international community that a special baseline regime could be applied to archipelagos belonging to continental states.⁸⁶

In brief, scholars who oppose the Chinese interpretation of UNCLOS concerning outlying archipelagos and legal status of the Spratly Islands assert that UNCLOS has no lacuna in regulating the regime of outlying archipelagos inasmuch as the international community deliberately omitted the issue of outlying archipelagos from UNCLOS due to the absence of resolute necessity on this issue.⁸⁷ In this sense, many Western scholars seem to agree with Odom in observing that “China appears to be pursuing amending UNCLOS while using rhetoric designed to allow China to retain the benefits of the provisions it likes, yet repudiating those it does not...China argues that the text of UNCLOS is flawed.”⁸⁸

⁸² At the fourth session in 1976, the Revised Single Negotiating Text (RSNT) omitted the provision applying the archipelagic regime to offshore archipelagos, leaving Chapter VII (Archipelagic States) containing Articles 118–127. See A/CONF.62/WP.8/Rev.1/Part II, Revised single negotiating text (part II), 170–72.

⁸³ See, e.g., KOPELA, *supra* note 3, at 36; John R. Stevenson & Bernard Oxman, *The Third United Nations Conference on the Law of the Sea: the 1975 Geneva Session*, 69 AM. J. INT’L L. 785 (1975).

⁸⁴ KOPELA, *supra* note 3, at 35 n. 133 (citing Patricia Elaine Joan Rodgers, *Midocean Archipelagos and International Law: A Study in the Progressive Development of International Law* 178, 225 (1981)).

⁸⁵ Su, *supra* note 3, at 815.

⁸⁶ Nordquist et al., *supra* note 32, at 403. In contrast, a few Western lawyers perceive Article 131 of ISNT as giving the archipelagic principle to states possessing outlying archipelagos. See, e.g., GARY KNIGHT & HUNGDAH CHIU, *THE INTERNATIONAL LAW OF THE SEA: CASES, DOCUMENTS AND READINGS* 97 (1991).

⁸⁷ Alina Miron, *The Archipelagic Status Reconsidered in light of the South China Sea and Düzgit Integrity Awards*, 15 INDON. J. INT’L L. 306, 314 (2018); Roach, *supra* note 9, at 178; THE OXFORD HANDBOOK OF THE LAW OF THE SEA 157 (Donald Rothwell et al. eds., 2015) [hereinafter THE OXFORD HANDBOOK]; Ishii, *supra* note 3, at 146. Kopela notes that states possessing outlying archipelagos did not form a coalition for the better advancement of their interest, even without presenting a common draft proposal putting forward the necessity of a special regime for dependent archipelagos. See KOPELA, *supra* note 3, at 31–32.

⁸⁸ Jonathan G. Odom, *A China in the Bull Shop? Comparing the Rhetoric of a Rising China with the Reality of the International Law of the Sea*, 17 OCEAN & COASTAL L.J. 201, 219–20 (2012). Odom further notes that

Notably, in *South China Sea*, the Tribunal denies, although having recognized some state practice on outlying archipelagos, “the formation of a new rule of customary international law that would permit a departure from the express provisions of the Convention.”⁸⁹ Similarly, in 2018, the International Law Association (ILA) confirmed that there is no agreed single interpretation of Article 7 of UNCLOS and “there is no new rule of customary international law on straight baselines.”⁹⁰

Nonetheless, state practice on outlying archipelagos since the conclusion of UNCLOS is not consistent.⁹¹ For instance, the United Kingdom adopted straight baselines for the Falklands/Las Malvinas in 1989 (Argentina did it in 1991), China for the Paracels in 1996, and Diaoyu Dao/Senkaku Islands in 2012, and France for Guadeloupe in 1999 and the Loyalty Islands in 2002.⁹² With this background, some international lawyers denounce the Convention’s attitude to outlying archipelagos as lacking justification and advocate the need to properly appreciate the interests of the states (especially developing countries) possessing outlying archipelagos on the one hand.⁹³ On the other hand, some emphasize that the archipelagic concept was accepted by negotiating states (especially maritime powers) on the premise that “its application was limited and precisely defined and the rights of navigation and overflight were not impeded,”⁹⁴ implying that outlying archipelagos, where appropriate, are to be applied under strict conditions.

In this sense, it is worth paying attention to the legal analysis of the dispositive indicators of availing states of using special baselines for a group of islands. Suffice it to say that distant islands or small islands that are extremely scattered (say, beyond 9:1 of the water-to-land ratio) are hard to be entitled to

“China does not accept the prevailing rules of the international law of the sea, instead China seeks to rewrite them.” *See id.* at 244.

⁸⁹ *Phil. v. China*, 2013-19, ¶ 573–76.

⁹⁰ International Law Association, Committee on Baselines under the International Law of the Sea, Resolution 1/2018, Annex, Sydney Conclusions on Baselines under the International Law of the Sea, ¶ 1. In addition, Roach explains that the US is of the view that there can be no rule of customary international law to the effect of using straight baselines to enclose the whole of an outlying archipelago. *See* Roach, *supra* note 9, at 188.

⁹¹ Roach, *supra* note 9, at 190.

⁹² *Id.* at 179.

⁹³ *See, e.g.,* KOPELA, *supra* note 3, at 5 (citing V.S. Mani, *National Jurisdiction: Islands and Archipelagos*, in *LAW OF THE SEA: CARACAS AND BEYOND* 82, 103 (Ram Prakash Anand ed., 1980)); *see also* Shekhar Ghosh, *Changing Law in a Changing World: Case of Mid-Ocean Archipelagos*, 22 *ECON. & POL. WKLY.* 902, 907 (1987).

⁹⁴ ASHLEY J. ROACH, *EXCESSIVE MARITIME CLAIMS* 203 (2012).

be enclosed by straight baselines.⁹⁵ Similarly, the archipelagic concept inevitably necessitates an archipelago containing the main islands.⁹⁶ Now, this comment will shift to the likely reasoning of continental states in finding applicable rules (in avoiding negative responses from states) when they adopt acceptable straight baselines for their outlying archipelagos.

IV. CONTINENTAL STATES' (PROBABLE) RULE-FINDING FOR THEIR OUTLYING ARCHIPELAGOS

International treaties and customary international law are the sources of international law.⁹⁷ In searching for customary international law, international lawyers benefit from international courts' authoritative statements of the existence and content of customary international law.⁹⁸ Otherwise, those who seek "international custom, as evidenced of a general practice accepted as law" (i.e., state practice and *opinion juris*) may well have trouble doing it.⁹⁹ In practice, state practice of "states whose interests are specially affected"¹⁰⁰ receives a great deal of attention. Indeed, those continental states possessing outlying archipelagos are better at influencing the creation of customary international law by publicizing their actions and related legal opinions.¹⁰¹ As we shall see, the process of the identification of custom invariably includes a weighing of supporting and opposing particular state practice.¹⁰²

⁹⁵ See Tullio Scovazzi, *The Establishment of Straight Baselines Systems: The Rules and Practice*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 445, 447 (Davor Vidas & Willy Østreng eds., 1999); see also Oegroseno, *supra* note 77, at 130.

⁹⁶ See INTERNATIONAL LAW ASSOCIATION, BASELINES UNDER THE INTERNATIONAL LAW OF THE SEA (2014) [hereinafter ILA 2014], https://cil.nus.edu.sg/wp-content/uploads/2015/10/baselines_under_international_law_of_the_sea_report.pdf. (noting that this requirement was intended to prevent "attempts to enclose small separate clusters of islands that do not include one of the main islands of the archipelago").

⁹⁷ See Statute and Rules of Court, 1940 I.C.J. Acts & Docs. 22.

⁹⁸ See Michael Wood (Special Rapporteur on Identification of Customary International Law) Int'l Law Comm'n, Third Rep. on Identification of Customary International Law, U.N. Doc. A/CN.4/682 (Mar. 27, 2015).

⁹⁹ KOPELA, *supra* note 3, at 159.

¹⁰⁰ North Sea Continental Shelf (West Ger. v. Den.; West Ger. v. Neth.), Judgment, 1969 I.C.J. 4, 43 (Feb. 20).

¹⁰¹ ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 96, 97 (1971).

¹⁰² No formal customary international law-making procedures exist. See MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 5, 151–57 (1999); Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 387, 387 (2005).

A. *The Epistemic Journey of Government Lawyers*

States have been compelled to explain and justify their action in legal terms.¹⁰³ In other words, states make the most of international law in arguing about, bolstering, and contending particular decisions against concrete settings by employing international lawyers.¹⁰⁴ The role of practicing international lawyers is to conduct an in-depth investigation into what the law is and which measures are acceptable or excessive;¹⁰⁵ in the process, government attorneys sometimes persuade their government to do a particular activity.

With this qualification, it is reasonable to infer that continental states possessing outlying archipelagos have mandated their government lawyers to work on the legality or acceptable boundaries in drawing straight baselines surrounding their outlying archipelagos.¹⁰⁶ In searching for acceptable standards or a *modus vivendi*, or in determining the existence and content of customary rules with specific situations of a group of islands in mind, government attorneys must have followed a particular pathway of looking at the case law, UNCLOS and its negotiation history, and referable precedent. This Section deals with the continental states' probable rule-finding endeavors for their outlying archipelagos with the understanding that this process of rule-finding either reflects hitherto state practice and *opinio juris* or impacts on the development of customary rules on this issue.

Two caveats are necessary before proceeding. First, ascertaining the existence of customary rules is not easy for international lawyers;¹⁰⁷ however, a

¹⁰³ Heath Pickering, *Why Do States Mostly Obey International Law?*, E-INTERNATIONAL RELATIONS (Feb. 4, 2014) <https://www.e-ir.info/2014/02/04/why-do-states-mostly-obey-international-law/>; Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, in REGIME THEORY AND INTERNATIONAL RELATIONS 59 (Volker Rittberger & Peter Mayer eds., 1993).

¹⁰⁴ Monica Hakimi, *Why Should We Care About International Law?*, MICH. L. REV. 1283, 1306 (2020); See also RADHIKA WITHANA, POWER, POLITICS, LAW: INTERNATIONAL LAW AND STATE BEHAVIOUR DURING INTERNATIONAL CRISES 1–2 (2008) (noting that “[g]overnments invest much time, energy and political capital to present international legal arguments in support of their foreign policy behavior”); see also JAMES R. CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 15 (2012) (Brownlie notes that “[a]ll normal governments employ experts to provide routine and other advice on matters of international law and constantly define their relations with other States in terms of international law”).

¹⁰⁵ William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT’L L.J. 1, 2 (2015).

¹⁰⁶ In particular, after the adoption of UNCLOS in 1982, states could get a sense of lawfulness on the acceptable baseline system and recognized conditions on the archipelagic regime; therefore, during the decision-making process within government, government attorneys at the relevant governmental bodies, such as the Ministry of Foreign Affairs, may be involved to provide a legal view to political decision-makers.

¹⁰⁷ In the *Nicaragua Case*, ICJ explained *opinio juris* that “for a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice,’ but they must be accompanied by *opinio juris sive*

state practice that has been protested would be perceived as an unacceptable anecdote or untenable state practice¹⁰⁸—they must have removed a precedent one by one if it would seem incongruous. Second, states (as the subject of international law) are of the dual self-perception: a “rule-follower” and a “rule-maker.” The rule-maker aspect of self-awareness is bound up with the rule-breaker side within the international legal system, which is one of the special features of international law: “violations of law can lead to the formation of new law.”¹⁰⁹ Moir elucidates this attribute of international law that “[c]onduct which may have been difficult to reconcile with a pre-existing body of rules, when allied with a favourable response on the part of the international community to such conduct, and to the legal justifications advanced for it, can serve to modify the content of existing law.”¹¹⁰ In this sense, it cannot be ruled out that government attorneys in continental states possessing outlying archipelagos have evaluated applicable legal boundaries in taking a special baseline system with the probability of making new rules.

Suppose that the issue of outlying archipelagos remains to be governed by the rules and principles of general international law.¹¹¹ Under this assumption, one should follow in the footsteps of the probable rule-finding steps (emerging customary rules or, at least, acceptable precedents) of others that have already adopted straight baselines for outlying archipelagos. Considering the critical importance of baselines in measuring maritime zones in light of maritime jurisdiction and maritime boundary delimitation,¹¹² it would make little sense to

necessitatis.” See *Military and Paramilitary Activities in and Against Nicaragua*, (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶ 207 (June 27). In addition, in the *North Sea Continental Shelf* cases, ICJ pronounced that the states should have the “belief that this practice is rendered obligatory by the existence of a rule of law requiring it” and that the “states concerned must...feel that they are conforming to what amounts to a legal obligation.” See *W. Ger. v. Den.*; *W. Ger. v. Neth.*, 1969 I.C.J. at 43.

¹⁰⁸ See Nordquist & Phalen, *supra* note 15, at 35.

¹⁰⁹ ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 19 (1994).

¹¹⁰ LINDSAY MOIR, *REAPPRAISING THE RESORT TO FORCE: INTERNATIONAL LAW, JUS AD BELLUM AND THE WAR ON TERROR* 4 (2010). Moreover, Schachter examines that “A relatively powerful state may pursue its perceived interest in violation of its international obligations; it may do so with impunity or pay a price. Moreover, it may by its very violation shape the future law.” See Oscar Schachter, *The Role of Power in International Law*, 93 AM. SOC’Y INT’L L. 200, 205 (1999).

¹¹¹ See Chris Whomersley, *The Award on the Merits in the Case Brought by the Philippines Against China Relating to the South China Sea: A Critique*, 16 CHINESE J. INT’L L. 387, 404–05 (2017); Su, *supra* note 3, at 818. Meanwhile, Kopela assesses that silence of the majority of states during and after UNCLOS III on drawing straight baselines for outlying archipelagos, though because of the lack of interests, may amount to acquiescence, thereby entailing that “states are not hostile to the emergence of a customary law permitting states to apply straight baselines to groups of islands.” KOPELA, *supra* note 3, at 179–81.

¹¹² Keyuan Zou, *Certain Controversial Issues in the Development of the International Law of the Sea*, in *STRESS TESTING THE LAW OF THE SEA: DISPUTE RESOLUTION, DISASTERS & EMERGING CHALLENGES* 173 (Stephen Minas & H. Jordan Diamond eds., 2018); *THE OXFORD HANDBOOK*, *supra* note 87, at 906. Also, an

infer that states possessing outlying archipelagos have adopted seemingly illegal straight baselines without conducting thorough legal analyses of the hitherto baseline practice.¹¹³

For instance, Chinese international lawyers analyze, in developing a theory to justify outlying archipelagos, that: (1) continental states possessing outlying archipelagos have used similar measures contained in Part IV (Archipelagic States) of UNCLOS,¹¹⁴ and (2) state practice that has adopted straight baselines for outlying archipelagos seem to have been justified by a liberal interpretation of Article 7 of the Convention.¹¹⁵ Meanwhile, Jiang and Zhang argue that the general principles of UNCLOS should be applied to outlying archipelagos.¹¹⁶ What will be the “general principles of UNCLOS” for outlying archipelagos? Hua Zhang explains that “some common principles enshrined in [Articles 7 or 47] can be extracted and become the guidelines for continental States to draw their dependent archipelagic baselines.”¹¹⁷

This intellectual flow of Chinese international lawyers epitomizes the epistemic journey of government lawyers of states possessing outlying archipelagos. In other words, there is ample room to believe that continental states of outlying archipelagos have elicited applicable criteria for adopting their straight baselines based on Articles 7 and 47 of UNCLOS.¹¹⁸ In addition,

UN report emphasizes that straight baselines should be drawn “when the normal baseline...would produce a complex pattern of territorial seas and when those complexities can be eliminated by the use of a system of straight baselines. It is not the purpose of straight baselines to increase the territorial sea unduly.” See U.N. OFF. FOR OCEAN AFFS. AND THE L. OF THE SEA, *THE LAW OF THE SEA BASELINES: AN EXAMINATION OF THE RELEVANT PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA* at 21, U.N. Sales No. E.88 V.5 (1989).

¹¹³ Even under the clearly enumerated UNCLOS archipelagic states regime, state practice on drawing archipelagic baselines do not go unchallenged or uncorrected. For instance, Indonesia corrected its archipelagic baselines in March 2009 in the face of protest and objection. Similarly, the Philippines amended its archipelagic baselines to conform more with UNCLOS in 2009. See Oegroseno, *supra* note 77, at 125, 131–32.

¹¹⁴ See Hong, *supra* note 46, at 90.

¹¹⁵ See Su, *supra* note 3, at 818, 824–29 (noting that the use of straight baselines for the Kerguelen Islands (France), the Sjaelland Islands and the Laesø Islands (Denmark), the Furneaux Group (Australia), Guadeloupe (France), and the Malvinas Islands (Argentina) has not been protested by any parties to UNCLOS). In the same vein, Hong introduces that China had investigated the case law (the Anglo-Norwegian Fisheries Case), the Draft Articles on the Law of the Sea, the Geneva Convention on the Territorial Sea and the Contiguous Zone, and the referable state practice before issuing a declaration on China’s territorial sea, announcing the extension of its territorial sea to 12 miles and the adoption of the straight baseline method for delimiting the territorial sea boundary in September 1958. See Hong, *supra* note 46, at 113.

¹¹⁶ Hong, *supra* note 46, at 80 n.53 (citing L. Jiang & J. Zhang, *The Application of Archipelagic Principles and Delimitation of the South China Sea*, 11 CHINA OCEANS L. REV. 158 (2010)).

¹¹⁷ Zhang, *supra* note 49, at 125.

¹¹⁸ Provisions concerning straight baselines of UNCLOS, including Article 7, is a direct result of the decision of the 1951 Fisheries Case of ICJ. In other words, it may be enough to analyze Article 7 because this

government attorneys in each state may have hoped that their memo and state practice thereupon would contribute to developing relevant rules and principles of “general international law.”¹¹⁹

B. Article 7 and Outlying Archipelagos

Many international lawyers point out that Article 7¹²⁰ can be applied to outlying archipelagos.¹²¹ Some argue that the “deeply indented and cut into” part of Article 7(1) is to be applied to outlying archipelagos,¹²² whereas others suggest that “if there is a fringe of islands along the coast in its immediate vicinity” part (instead of “deeply indented and cut into”) of Article 7(1) is to be used.¹²³

Admittedly, there is no definition, unified interpretation, or state practice on the elements of Article 7.¹²⁴ Nevertheless, it is not difficult to assume that government lawyers may have paid attention to some influential interpretation or precedent concerning the meaning of “deeply indented” or “a fringe of island” to evade diplomatic protest against upcoming proposed baselines.

To begin with, the United States advances three conditions for “deeply indented”: (1) the existence of three deep indentations, (2) close proximity among them, and (3) the depth of penetration of each deep indentation from the proposed straight baseline enclosing the indentation at its entrance to the sea being greater than half the length of that baseline segment.¹²⁵ In addition, ILA

provision reflects on criteria for straight baselines that were discovered in the case law before UNCLOS III. *See* PROLESS, *supra* note 31, at 67–68.

¹¹⁹ Indeed, “[i]nternational law is based on what states say and what states do, and it is true that apparent abrogation from its rules can result in the evolution of new rules.” *See* LINDSAY MOIR, *REAPPRAISING THE RESORT TO FORCE: INTERNATIONAL LAW, JUS AD BELLUM AND THE WAR ON TERROR* 114–15 (2010). Of course, there should be consistent state practice by consequential states that follow suit for a new rule to appear as customary international law. *See* Tom J. Farer, *The Prospect for International Law and Order in the Wake of Iraq*, 97 AM. J. INT’L L. 621, 623 (2003).

¹²⁰ Article 7(1): In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1832, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

¹²¹ ILA 2014, *supra* note 96, ¶ 89 (noting that “Straight baselines around and between islands that comprise offshore coastal archipelagos are permissible provided that, mutatis mutandis, the geographical circumstances of those islands allow for the application of Article 7 and other related provisions”).

¹²² *See* Whomersley, *supra* note 111, at 406.

¹²³ Su, *supra* note 3, at 827; Davenport, *supra* note 26, at 154–55.

¹²⁴ Ishii, *supra* note 3, at 134.

¹²⁵ J. ASHLEY ROACH & ROBERT W. SMITH, *EXCESSIVE MARITIME CLAIMS*, 61–62 (3d ed. 2012).

notes that “deeply indented and cut into” has to be understood in the context of “all the geographical factors involved,”¹²⁶ which may involve a “proportionality test.”¹²⁷

For a “fringe of island,” which wording has been developed relatively independent of *Fisheries*,¹²⁸ continental states of outlying archipelagos may have viewed a “fringe of island” of Article 7 in connection with the “main islands” of Article 47; it may well be that they have strived to elicit something about the straight baseline system from Article 7, and other things about the archipelagic system from Article 47. If these two elements are taken together, a “fringe of islands” in the immediate vicinity of the “main islands” appears to provide states with a criterion for adopting outlying archipelagic/straight baselines. Governments may have given heed to the proposition that each island consisting of a “fringe of islands” is to meet the criteria set by Article 121¹²⁹ and the distance between a “fringe of islands” and the “main islands” to be close enough to meet the element of “in its immediate vicinity.”¹³⁰

There remains the question of how big the dominating main islands vis-à-vis others should be and what characteristics the islands have to get.¹³¹ In this respect, “main islands” can be viewed as “the larger geographic islands, the more heavily populated islands, and the more economically significant islands.”¹³²

C. Articles 46-7 and Outlying Archipelagos

Not surprisingly, provisions on the archipelagic regime of UNCLOS (especially Articles 46-7) must have been scrutinized by government attorneys.¹³³ As a matter of fact, in *Fisheries*, ICJ seemed to elicit principles of how to draw straight baselines based not on the distinction between outlying and

¹²⁶ U.K. v. Nor., Reports, 951 I.C.J. at 141.

¹²⁷ ILA 2018, *supra* note 48, at 162.

¹²⁸ Proelss, *supra* note 28, at 74.

¹²⁹ ILA 2018, *supra* note 48, at 118.

¹³⁰ Int'l L. Ass'n, Committee on Baselines Under the International Law of the Sea, *Resolution 1/2018, Annex, Sydney Conclusions on Baselines under the International Law of the Sea*, ¶ 1, 3; ILA 2018, *supra* note 48, at 71. An UN report examines that a fringe of islands is likely to exist where islands forms a “unity with the main island.” See U.N. OFF. FOR OCEAN AFFS. AND THE L. OF THE SEA, *THE LAW OF THE SEA BASELINES: AN EXAMINATION OF THE RELEVANT PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA*, ¶ 44 U.N. Sales No. E.88 V.5 (1989).

¹³¹ Su, *supra* note 3, at 828.

¹³² ILA 2018, *supra* note 48, at 123. See also Davenport, *supra* note 26, at 145 n. 78.

¹³³ Many international lawyers argue that the archipelagic baseline regime may be applicable to mid-ocean archipelagic states. See Ishii, *supra* note 3, at 140 n. 29 (citing JIANJUN GAO, *CHINA AND INTERNATIONAL LAW OF THE SEA* 138 (2004)).

coastal archipelagos but on the assumption that groups of islands and coastal archipelagos had no significant difference.¹³⁴

The importance lies in the interpretation of the phrases of a “group of islands” and “so closely interrelated” in Article 46, and of the “main islands,” the water-to-land ratio not exceeding 9:1, and the “general configuration of the archipelago” in Article 47. In essence, a “group of islands” is designed to prevent remote islands from being used as baseline points under cover of forming an integral part of the archipelago.¹³⁵ As is the case with its interpretation of a “fringe of island,” the conditions of islands under Article 121 seem to be seriously considered in the likely process of legal consideration for a group of “islands.”¹³⁶

Under Article 46,¹³⁷ archipelagos have been understood to have to pass either the “entity/unity test” (an intrinsic geographical, economic, and political unity) or the “historic title test.”¹³⁸ If a group of islands cannot pass either of these tests, such a group cannot be ascertained as a lawful archipelago, no matter whether it fulfills other requirements (such as maximum length and land-to-water ratio) under Article 47.¹³⁹ As is clear from Su’s analysis, many continental states of outlying archipelagos have widely applied “archipelagic unity” to their outlying archipelagos, subsequently implementing straight baselines for the archipelago that has passed the unity test.¹⁴⁰ Hence, it should be stressed that government lawyers of continental states possessing outlying archipelagos may have tried to thrust proof of passing the “entity/unity test” or the “historic title test” before, during, and after drawing straight baselines for their outlying archipelagos.

Although “entity” or “unity” is an elusive notion, each archipelago’s facts must be selected, scrutinized, and determined as a first step inasmuch as the law must apply to the facts.¹⁴¹ A relationship between islands needs to be examined

¹³⁴ U.K. v. Nor., 1951 I.C.J. at 131 (opining that “the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagos to conditions analogous to the limitations concerning bays...have not got beyond the stage of proposals”).

¹³⁵ Proelss, *supra* note 31, at 349.

¹³⁶ Davenport, *supra* note 48, at 142.

¹³⁷ Convention on the Law of Seas art. 46(2), *opened for signature* Dec. 10, 1982, 1933 U.N.T.S. 3. Article 46(2): “archipelago” means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

¹³⁸ L.L. Herman, *The Modern Concept of the Off-Lying Archipelago in International Law*, 23 CAN. Y.B. INT’L L. 172, 186 (1985); KOPELA, *supra* note 3, at 39.

¹³⁹ Herman, *supra* note 138, at 186.

¹⁴⁰ Su, *supra* note 3, at 819.

¹⁴¹ Herman, *supra* note 138, at 178–81.

as a factual element to see if “a situation exists which is analogous to that of a complex coast of a continental country”: hence, “a group of islands cannot be an archipelago without a centripetal emphasis.”¹⁴² One practical way of evaluating the satisfaction of the unity test in the case of an outlying archipelago is to bear in mind the statement of the delegate of Indonesia at UNCLOS III: “isolated islands in the middle of nowhere could not be regarded as forming an archipelago with other isolated island...the component islands must form an ‘intrinsic geographical entity.’”¹⁴³

It is implausible to assume that government lawyers have entirely ignored a number of numerical conditions stipulated in Article 47, under which some over 20 states have proclaimed their archipelagos:¹⁴⁴ such conditions include (1) the baseline segments cannot, for the most part, be longer than 100 nautical miles, (2) the water-to-land ratio enclosed by the baselines cannot exceed 9:1, and (3) lines shall not depart from the general configuration of the archipelago. What appears cogent reasoning is that government lawyers have reviewed the precedents of archipelagic states in light of numerical conditions to evade protest by neighboring states and maritime powers.

It has been understood that the purpose of Article 47 is to “gauge the reasonableness of the unitized enclosure” of an archipelago in terms of monitoring whether baselines only enclose “relatively compact oceanic groups.”¹⁴⁵ Despite the significance of the “shared understanding” of reasonable criteria in international law,¹⁴⁶ “‘reasonableness’ will create less predictability and more uncertainty over the line between legal and illegal conduct.”¹⁴⁷ This is exactly why paragraphs 1 and 2 of Article 47 take the mathematical approach.¹⁴⁸

It is also important to remember that Article 47(3) requires baselines not to depart from the general configuration of the archipelago. The assessment of

¹⁴² D. P. O’Connell, *Mid-Ocean Archipelagos in International Law*, 45 BRIT. Y.B. INT’L L. 1, 15 (1971).

¹⁴³ H. P. Rajan, *The Legal Regime of Archipelagos*, 29 GERMAN Y.B. INT’L L. 137, 145–46.

¹⁴⁴ These states include Antigua & Barbuda, Bahamas, Cape Verde, Comoros, Dominican Republic, Fiji, Grenada, Indonesia, Jamaica, Kiribati, Maldives, Marshall Islands, Mauritius, Papua New Guinea, Philippines, St Vincent & Grenadines, Sao Tome & Principe, Seychelles, Solomon Island, Trinidad and Tobago, Tuvalu and Vanuatu. See KOPELA, *supra* note 3, at 41.

¹⁴⁵ PROELSS, *supra* note 31, at 259.

¹⁴⁶ BYERS, *supra* note 102, at 209.

¹⁴⁷ JOHN YOO, POINT OF ATTACK: PREVENTIVE WAR, INTERNATIONAL LAW, AND GLOBAL WARFARE 94 (2014).

¹⁴⁸ The purpose of the “maximum length” principle of Article 47(2) is to confine archipelagic waters to reasonable limits and thereby to “ensure that widely dispersed islands would not be included in a single unitary archipelagic claim.” See PROELSS, *supra* note 31, at 265.

baselines departing from the “general configuration of the archipelago” involves the subjective domain stipulated in the phrase “to any appreciable extent.”¹⁴⁹ Government lawyers of continental states possessing outlying archipelagos may have felt that they are demanded to adduce the reason as to why their outlying archipelagic/straight baselines are not departing “to any appreciable extent” from the general configuration of the archipelago. It means that states drawing outlying archipelagic/straight baselines should regard themselves as having the onus of proof for that matter; that is, the government of outlying archipelagos is under the burden of proving that “islets and features which are too peripheral” have been “omitted from the main set of unitary lines.”¹⁵⁰

It should not be neglected that “technical complexities” were the main reason states could not reach a consensus on the inclusion of outlying archipelagos (along with coastal archipelagos) into a special baseline system during the law of the sea negotiations.¹⁵¹ In this sense, it would seem incongruous to assume that states (especially maritime powers) do not care about technical, mathematical aspects of how outlying archipelagos are enclosed; logically, it means that the objective and subjective criteria in Article 47 must have been applied by government lawyers of states possessing outlying archipelagos.

Echoing this understanding, Hua Zhang emphasizes the necessity of states possessing outlying archipelagos to “self-consciously follow certain requirements when applying the straight baselines to mid-ocean archipelagos.”¹⁵² On this basis, Zhang advances four criteria for straight baselines of outlying archipelagos: (1) the straight baseline shall contain main islands and follow the general configuration of the archipelago; (2) the length of such baselines shall not exceed 100 nautical miles; (3) the application of straight baselines shall not cause a cut-off effect to the territorial sea of another State; and (4) existing rights and legitimate interests of neighboring states shall continue and be respected.¹⁵³

¹⁴⁹ Herman, *supra* note 138, at 187.

¹⁵⁰ PROELSS, *supra* note 31, at 161.

¹⁵¹ The United Kingdom pointed out that the problem of technical complexities were even more serious in the case of oceanic archipelagos, “some of which were compact groups of islands with overlapping territorial seas, while others were widely scattered.” See U.N. Conference on the Law of the Sea, *Extract from the Official Records on its Fifty-Second Meeting*, 162–64 U.N. Doc. A/CONF.13/39 (Vol. 3) (1958). Furthermore, states were reluctant to accept any form of curtailment of their rights in parts of the high seas. See U.N. Conference on the Law of the Sea, *Extract from the Official Records First Committee on Territorial Sea and Contiguous Zone*, 25, U.N. Doc. A/CONF.13/C.A/SR.6-10 (1958).

¹⁵² Zhang, *supra* note 49, at 129–30.

¹⁵³ *Id.* at 126.

There seemed to be a strong conviction in the international community that several criteria were necessary for a state to apply straight baselines to outlying archipelagos even before UNCLOS, which requirements can be traced back to the jurisprudence in *Fisheries*. For instance, in 1958, Evensen put forward four requirements for outlying archipelagos: (1) close dependence of the territorial sea upon the land domain of the archipelago; (2) no departure to any appreciable extent from the general direction of the coast of the archipelago viewed as a whole; (3) no exorbitantly long baselines closing vast areas of sea to free navigation and fishing; (4) no hindrance to the strait used for international navigation in enclosed waters.¹⁵⁴ In short, government lawyers of continent states possessing outlying archipelagos must have looked at certain criteria, focusing on the mathematical requirements stipulated in Article 47 in drawing outlying archipelagic/straight baselines since the adoption of UNCLOS.

D. Sovereignty Issues and Outlying Archipelagos

Finally, “it goes without saying that a connecting basepoint for [an archipelago] must be on territory within the claimant State’s own sovereignty.”¹⁵⁵ For one thing, this is particularly so given that straight baselines may not cut off another state’s territorial sea from the high seas or an exclusive economic zone (Article 7(6)). For another, the concept of “political entity” in the context of a group of islands as an archipelago (Article 46(b)) would entail the premise that “all islands in the archipelago belong to the same country.”¹⁵⁶ Davenport points out that early proposals on the political criterion “had required that the archipelago belong to a single State.”¹⁵⁷ In practice, sovereignty disputes elicit protest by disputants to the claimed archipelagos containing a disputed feature.¹⁵⁸ In this sense, government lawyers of states possessing outlying archipelagos may have avoided unnecessary conflicts by excluding maritime features in dispute from being used as baseline points of outlying archipelagos.

¹⁵⁴ U.N. Conference on the Law of the Sea, *Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos*, 302, U.N. Doc. A/CONF.13/18(Vol. 1) (1958).

¹⁵⁵ PROELSS, *supra* note 31, at 161 (explaining that “it is for this reason that the Philippines has refrained from claiming archipelagic baselines around the Spratly Islands in its 2009 archipelagic legislation”).

¹⁵⁶ Hong, *supra* note 46, at 108 (adding that “[s]everal States in the South China Sea are currently involved in disputes over the sovereignty of the Nansha Islands”). See also Alina Miron, *The Archipelagic Status Reconsidered in light of the South China Sea and Düzgit Integrity Awards*, 15 *INDONESIAN J. INT’L L.* 319, 319 (2018).

¹⁵⁷ Davenport, *supra* note 26, at 143.

¹⁵⁸ Su, *supra* note 3, at 25.

Nothing said so far invites the conclusion that all the outlying archipelagos are to be justified because the issue is governed by general international law instead of UNCLOS. Rather, as this Section shows, it is reasonable to infer that each outlying archipelago has undergone the unity/entity test, parallel with or instead of the historic title test, along with the proportionality test, in light of all the geographical factors involved. In other words, each case of outlying archipelagic/straight baselines is to be subject to scrutinized analysis to examine the lawfulness of outlying archipelagos as such. Now, this comment will shift to the stage of putting the said criteria for outlying archipelagos into the case of the Spratly Islands.

V. THE SPRATLY ISLANDS AS AN OUTLYING ARCHIPELAGO OF CHINA?

As detailed in Section 1, the Chinese position on the South China Sea Islands (Nanhai Zhudao) is that the Spratly and Paracel Islands are archipelagos constituting one economic and political entity of China.¹⁵⁹ In this view, China's legislation heralds that it will use straight baselines to draw the baselines of the territorial sea adjacent to the Spratly Islands.¹⁶⁰

In practice, both baselines of outlying archipelagos and archipelagic states did not go unchallenged. Davenport assesses that the archipelagos of nineteen states, out of the twenty-two which have claimed archipelagic status, are consistent with UNCLOS.¹⁶¹ Further, Indonesia and the Philippines have amended their baselines to conform more closely to the UNCLOS criteria in the wake of protests from other states.¹⁶² Also, archipelagic states (such as Fiji, Tonga, and Vanuatu) adopted straight baselines for only some of their islands to abide by the maximum water-to-land ratio.¹⁶³

In the meantime, Spain (which encloses its Canary Islands with straight baselines as an outlying archipelago) filed a protest against Ecuador's (re)enclosing the Galapagos with straight baselines as an outlying archipelago

¹⁵⁹ CSIL, *supra* note 5, at 499–500; Hong, *supra* note 46, at 108.

¹⁶⁰ Davenport, *supra* note 26, at 155–56.

¹⁶¹ *Id.* at 146.

¹⁶² Oegroseno, *supra* note 77, at 131–32. In addition, Sao Tome and Principe corrected its longest segments to 99.53 and 85.89 nm, and Cape Verde amended two straight baselines that had exceeded 121 nm. See PROELSS, *supra* note 31, at 367.

¹⁶³ PROELSS, *supra* note 31, at 337. See also Oegroseno, *supra* note 77, at 130 (noting that “the use of archipelagic baselines is optional, [and thereby] an archipelagic State can combine the use of a normal baseline and an archipelagic baseline”).

in 2012.¹⁶⁴ In addition, some continental states possessing outlying archipelagos (such as the United States, Russia, France, and New Zealand) have not applied any special baselines to their outlying archipelagos.¹⁶⁵ It is worth observing that the state practice of protesting outlying archipelagos is selective.¹⁶⁶ This selective approach supports the assumption that states have had certain normative criteria in mind in drawing (or not drawing), amending, or protesting straight baselines of outlying archipelagos.¹⁶⁷ In other words, states' selective protest against outlying archipelagos may pertain to the "views of states regarding the limits of the rules regulating the application of straight baseline systems to groups of islands."¹⁶⁸

The Spratly Islands are 650 nm wide and 550 nm long, covering approximately 820,000 square kilometers, including more than 11 major islands (such as Itu Aba and Spratly Island), 230 islets, reefs, shoals, and cays.¹⁶⁹ Despite its pronouncement on employing straight baselines for the Spratly, China "has not published the detailed basepoints or baselines with finality."¹⁷⁰ Some Chinese scholars admit the enclosure of the Spratlys by straight baselines is a "relatively tough mission," but, at the same time, they note that China exercises self-restraint in not drawing the lines to avoid the aggravation of the dispute.¹⁷¹

Apart from politico-strategic reasons, it seems a really tough task for Chinese international lawyers to advance convincing reasons as to by what specific measurement the Spratly Islands pass the entity/unity test and/or the historic title test, both of which seem inevitably bound up with geographical factors.¹⁷² Considering that continental states possessing outlying archipelagos usually present maps showing the factors that likely meet the mathematical or ideational

¹⁶⁴ Roach, *supra* note 9, at 179.

¹⁶⁵ KOPELA, *supra* note 3, at 140.

¹⁶⁶ Su, *supra* note 3, at 24. Whomersley adduces that "[o]f the fifteen instances where straight baselines have been drawn, there were seven objections from other states." See Whomersley, *supra* note 111, at 204–05.

¹⁶⁷ Crawford explains that the motive (psychological element, i.e., *opinio juris*) for states to abide by the general practice is not out of comity, but of normativity. See CRAWFORD, *supra* note 104, at 22–25.

¹⁶⁸ KOPELA, *supra* note 3, at 140; See also Su, *supra* note 3, at 24 (noting that "States usually would not protest the applications of straight baselines to archipelagos that may be justifiable by a liberal interpretation of Article 7(1)").

¹⁶⁹ Hong, *supra* note 46, at 107–08.

¹⁷⁰ CSIL, *supra* note 5, at 507.

¹⁷¹ Zhang, *supra* note 49, at 129.

¹⁷² CSIL also acknowledges the need of proving the "jurisdiction actually exercised by the State" for the legal status of historic waters on a case-by-case basis, "taking into account relevant State practice and historical and geographical circumstances of relevant areas." See CSIL, *supra* note 5, at 447.

principles deriving from Articles 7 and 46-7 of UNCLOS,¹⁷³ the international community (especially neighboring states of the South China Sea) may seek China to put forward more explanations down the road.

Admittedly, there exists a maritime delimitation situation in the South China Sea,¹⁷⁴ and thus, the “validity of the delimitation with regard to other States depends upon international law,” not on “the will of the coastal State as expressed in its municipal law.”¹⁷⁵ Herman suggests, focusing on the historic title test, that:

[T]he historic status of an off-lying archipelago is fundamentally a matter of international law and hence dependent upon the attitudes of other states, not simply a matter of unilateral determination. Consequently, whether a group of islands can be shown to be historically “regarded” as an archipelago under Article 46...requires the testing of the argument on grounds of public international law and cannot rest purely on the views of the claimant state alone.¹⁷⁶

Similarly, some technical aspects of the concept of “archipelagos” will be scrutinized by international lawyers in assessing the outlying archipelagic/straight baselines if China employs such lines for the Spratly Islands.¹⁷⁷ Indeed, some projections of possible scenarios of enclosing the Spratly Islands by straight baselines as an outlying archipelago. According to the Asia Maritime Transparency Initiative (AMTI) of the Center for Strategic and International Studies (CSIS), if China encloses the entire Spratly Islands using the outermost submerged features¹⁷⁸ but avoiding any baseline segments

¹⁷³ See KOPELA, *supra* note 3, at 265–89.

¹⁷⁴ Sam Bateman, *Maritime Boundary Delimitation, Excessive Claims and Effective Regime Building in the South China Sea*, in *LAW AND POLICY ISSUES IN THE SOUTH CHINA SEA: EUROPEAN AND AMERICAN PERSPECTIVES* 123–24 (Yann-huei Song & Keyuan Zou eds., 2014) (showing Figure 6.2. Notional Equidistance Lines in the South China Sea ignoring the Islands and Figure 6.3. Notional Equidistance Lines in the South China Sea including the Islands).

¹⁷⁵ *U.K. v. Nor.*, 951 I.C.J. at 132.

¹⁷⁶ Herman, *supra* note 138, at 182–83. Herman, by extension, argues that the historic status claim should partake of the claim to effective occupation based on legal grounds. *See id.* at 185.

¹⁷⁷ The South China Sea Arbitration categorically shows how the international audience will react to a possible scenario of enclosing the Spratly Islands. *See Phil. v. China*, 2013-19, at 237 (opining that “[t]he ratio of water to land in the Spratly Islands would greatly exceed 9:1 under any conceivable system of baselines”).

¹⁷⁸ Hua Zhang argues that “if a group of islands belonging to certain continental States bear the nature of unity...it is appropriate to treat such mid-ocean archipelagos as a whole for the demarcation of territorial sea and draw straight baselines from the outermost points of the archipelago.” *See Zhang*, *supra* note 49, at 126. In *South China Sea*, the Tribunal found that Hughes Reef (Dongmen Jiao), Gaven Reef (South) (Nanxun Jiao (the southern part)), Subi Reef (Zhubi Jiao), Mischief Reef (Meiji Jiao) and Second Thomas Shoal (Ren'ai Jiao) as low-tide elevations, incapable of generating entitlements to a territorial sea, EEZ, or continental shelf, while acknowledging that Subi Reef (Zhubi Jiao), Gaven Reef (South) (Nanxun Jiao (the southern part)), and Hughes

of more than 100 n.m., the water-to-land ratio will be 12,038:1, thereby enclosing 208,259 square kilometers of ocean.¹⁷⁹ If baselines are drawn only around closely-grouped high-tide features, six groups of baselines will enclose 1,923.41 square kilometers of water and 6.99 square kilometers of land for a ratio of 275:1.¹⁸⁰

It is understood that permanently submerged features or fixed points on the sea cannot be used as baselines, while low-tide elevations within the territorial sea distance of an island can be qualified as an archipelagic basepoint.¹⁸¹ In this respect, if future basepoints of the Spratly archipelago include submerged features and the water-to-land ratio exceeds those of any other acceptable precedents (not necessarily 9:1), international lawyers will continually raise the question of the legality of such baselines.¹⁸²

More importantly, it seems that the question of whether there exist main islands will arise in the Spratly Islands in light of “a fringe of islands,” “a complex coast of a continental country,” and “relatively compact oceanic groups.”¹⁸³ Nordquist and Phalen assess that “Itu Aba/Taiping objectively meets all reasonably conceivable requirements for the definition of an ‘island’ both

Reef (Dongmen Jiao) might be used as the baseline for measuring the breadth of the territorial sea of the relevant high-tide features. *See* *Phil. v. China*, 2013-19, ¶ 1203.B.(3)–(7).

¹⁷⁹ *Reading Between the Lines: The Next Spratly Legal Dispute*, ASIA MARITIME TRANSPARENCY INITIATIVE (Mar. 21, 2019), <https://amti.csis.org/reading-between-lines-next-spratly-dispute/>. If the Zhongsha Qundao is also enclosed as an outlying archipelago, the enclosed ocean area might be about 230,769 square kilometers, rendering the water-to-land ratio to 13,339:1. *See id.*

¹⁸⁰ Specifically, the water-to-land ratios within these hypothetical baselines could vary from 1,838:1 for Loaita Bank (with 146.92 square kilometers of ocean to just 0.08 square kilometers of land) to 28:1 for Thitu/Subi Reefs (with 142.79 square kilometers of ocean to 5.21 square kilometers of land). *See id.* Another project anticipates that if China encloses the Spratlys as a whole with straight baselines, the water-to-land ratio would be approximately 950:1. U.S. DEPT. OF STATE, *supra* note 8, at 23–24.

¹⁸¹ PROELSS, *supra* note 31, at 367; *See also* Herman, *supra* note 138, at 199 (noting that “it should not be assumed that every offshore feature, regardless of size and configuration, and regardless of its geographic relationship to the island group as a whole, can legally be brought within the archipelagic system”).

¹⁸² Similarly, Kopela assesses that “[t]he only states which have applied straight baseline systems in broadly scattered archipelagos are China and India. The straight baselines applied in the Paracel, and the Lakshweed Islands do not conform to the conditions stipulated in article 47(2) with regard to the water-to-land ratio as the islands of the both archipelagos are very small and they are sparsely scattered in a broad maritime space.” *See* KOPELA, *supra* note 3, at 1184. Meanwhile, Chinese international lawyers criticize the *South China Sea* Tribunal’s decision on the application of the water-to-land ratio of 9:1 rule of archipelagic states to the Spratly Islands. However, CSIL has not revealed the reason why the 9:1 criterion cannot be applied to outlying archipelagos, or what other criteria may exist in terms of the water-to-land ratio in the case of outlying archipelagos. *See* CSIL, *supra* note 5, at 507.

¹⁸³ In this context, Zhang supports the employment of straight baselines for the Paracel Islands on the basis that “Paracel Islands contains the main islands and follows the general configuration of the archipelago.” *See* Zhang, *supra* note 49, at 128.

with respect to interpretation and application of Article 121(3) of the Convention.”¹⁸⁴ Considering the practical concept of main islands,¹⁸⁵ Itu Aba/Taiping can be categorized as a “main” island in the interest of forming an archipelago. In this respect, how China perceives which islands, along with Itu Aba (if any), can be grouped into the same archipelago and how many archipelago groups exist in the Spratlys needs to be elaborated in the future.¹⁸⁶ Otherwise, international lawyers may keep raising the acceptability issue of the would-be Spratly archipelago from the viewpoint of the lack of a group of “islands” for the possible archipelago claim.¹⁸⁷

In a fundamental sense, the sovereignty title issue over some features in the Spratly Islands will impose a hindrance to China’s implementation of the archipelago plan. Chinese scholars do not regard the sovereignty issue as hampering its position on enclosing the Spratly Islands as a Chinese archipelago.¹⁸⁸ Nevertheless, international lawyers may observe that the future Chinese enclosure of the Spratlys by straight baselines as an outlying archipelago would be problematic because it includes disputed features;¹⁸⁹

¹⁸⁴ Nordquist & Phalen, *supra* note 15, at 66.

¹⁸⁵ Main islands could mean “the largest islands, the most populous islands, the most economically productive islands or the islands which are pre-eminent in an historical or cultural sense.” See THE OXFORD HANDBOOK, *supra* note 87, at 145 n. 78.

¹⁸⁶ In this regard, Hong argues that “[t]here is no criterion on the numbers of islands in defining an archipelago. Two islands alone can be viewed as constituting an archipelago.” See Hong, *supra* note 46, at 107. According to Bateman, Itu Aba is 38.4-50 hectare, Thitu Island 22-37.2-hectare, West York Island 16-hectare, Spratly Island 13-30 hectare. See Bateman, *supra* note 174, at 128.

¹⁸⁷ Indeed, Ishii devalues the Chinese claim to the Spratlys as an outlying archipelago that “the state practices which may support the straight baseline surrounding the mid-ocean archipelago....are quite different from the Spratlys, in terms of the size, the status of each islands, and the whole size of the maritime area that is covered by the group of islands. The claim made by Chinese scholars that China may be entitled to draw straight baselines around [the Spratlys] lacks those geographical examination in detail”). See Ishii, *supra* note 3, at 146. Further, Ishii argues that if the archipelagos do not satisfy the conditions of either Article 7 or 47, states may not draw straight baselines for midocean archipelagos. See *id.* at 137. Similarly, Kopela notes that most continental states have employed straight baselines for “closely-knit archipelagos where the enclosed waters are closely linked to the land domain of the islands” with the exception of China and India, which have applied straight baseline in broadly scattered archipelagic formations. See KOPELA, *supra* note 3, at 165–66.

¹⁸⁸ See, e.g., Nong Hong, *Continental States’ Outlying Archipelagos*, 32 OCEAN Y.B. 110 (2018) [hereinafter Hong, *Continental States’*] (noting that “[t]he territorial claims of the Philippines, Vietnam, Malaysia, and Brunei to parts of Nansha Islands cannot deny that China has sovereignty over the Nansha Islands in its entirety”).

¹⁸⁹ Kopela points out that “the case of the Chinese claim of straight baselines in the Paracel Islands should be considered separately because of the sovereignty dispute concerning this archipelago, as the neighbouring states have protested against this claim both on the basis of the sovereignty dispute and of the incompatibility of the applied system with international law.” See KOPELA, *supra* note 3, at 177.

eventually, “[p]rotest...[will demonstrate] a manifest lack of international recognition of archipelagic status” of the Spratlys.¹⁹⁰

VI. POLITICO-LEGAL IMPLICATION OF PROCLAIMING THE SPRATLY ISLANDS AS A CHINA’S OUTLYING ARCHIPELAGO

The necessity of employing a special baseline system for a group of islands was claimed and supported for the protection of the security and economic interests of states composed of archipelagos or possessing outlying archipelagos.¹⁹¹ The security reason behind allowing a special regime for a group of islands is clearly reflected in Article 52(2).¹⁹² In fact, due to concerns about the passage of Dutch warships in its waters, a newly independent Indonesia considered employing a special baseline system for itself in the 1950s.¹⁹³ In the meantime, the Philippines have not designated archipelagic sea lanes out of fear of security.¹⁹⁴ In short, security is all about acknowledging and operating archipelagos on the part of states.

From this perspective, the Chinese approach to the outlying archipelagic status of the Spratly Islands needs to be evaluated through the lens of how China perceives security in the region. Of course, great powers have established spheres of influence over their immediate neighbors throughout history,¹⁹⁵ meaning that China may claim the Spratlys and the outlying archipelago regime in pursuit of its sphere of influence in the South China Sea. However, a brief perusal of the current geopolitical context helps us understand that security seeking has motivated China to claim the Spratlys as an outlying archipelago.¹⁹⁶

¹⁹⁰ Herman, *supra* note 138, at 184.

¹⁹¹ In terms of differentiating archipelagic states and continental states possessing outlying archipelagos, Portugal claimed that “[a]pplication of a different regime to the latter would mean that the archipelagic part of the territory of mixed States would be regarded as second class territory.” See U.N. Conference on the Law of the Sea, *Summary Rec. of Mtgs. of the Second Comm. 37th Mtg.*, 266, U.N. Doc. A/CONF.62/C.2/SR.37 (Aug. 12, 1974).

¹⁹² Article 52(2) of UNCLOS contains the right of archipelagic states to suspend the innocent passage of foreign ships through archipelagic waters. United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, art. 52(2).

¹⁹³ THE OXFORD HANDBOOK, *supra* note 87, at 139.

¹⁹⁴ *Id.* at 177 n. 148.

¹⁹⁵ Robert S. Ross, *Balance of Power Politics and the Rise of China: Accommodation and Balancing in East Asia*, 15 SEC. STUD. 392 (2006).

¹⁹⁶ China may pursue expansion across the South China Sea to create secure maritime frontiers or buffer zones to head off American attacks on its homeland. See JOHN MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 84, 87. By the same token, Buszynski assesses that China has developed its naval capabilities to protect “China’s extended trade routes and energy supplies” and deploy “a sea-based second-strike nuclear capability”

Purportedly, states promote rules that support their national interests.¹⁹⁷ China increasingly deals with laws of the sea as a norm-maker, perceiving the UNCLOS regimes as “instrumental and strategic, rather than a matter of deep identification with the principles.”¹⁹⁸ Indeed, as structural power relations shift, China strives to promote its normative agendas under the preconception that “the Western States have been exercising disproportionate influence in defining ‘international’”¹⁹⁹ law of the sea.

Borrowing the “power matters” logic from *Schachter*, the Chinese claim to the Spratlys as an outlying archipelago can be viewed as pursuing its perceived interest in violation of its law of the sea obligations, which may lead to shaping the future law concerning outlying archipelagos.²⁰⁰ Suppose that China does proclaim the outlying archipelagic status of the Spratly Islands by adopting straight baselines with or without invoking the law of the sea system. In such a scenario, what China does and says (and its weight, utility, and efficacy) will be calculated by international lawyers in their epistemological process on the development or change of customary rules.²⁰¹

That being said, it seems essential for Chinese international lawyers to map out the pros and cons (legal and political) of establishing straight baselines for the Spratly Islands in providing balanced legal opinion to decision-makers. The first legal implication is that the outlying archipelagic/straight baselines for the Spratly Islands will be ignored in maritime delimitation. As CSIL acknowledges, “there exists a complex issue...over territorial sovereignty and

in its vicinity. See Leszek Buszynski, *The South China Sea: Oil, Maritime Claims, and U.S.–China Strategic Rivalry*, 35 WASH. Q. 145, 145 (2012).

¹⁹⁷ MORTON A. KAPLAN & NICHOLAS DEB. KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* 7 (1961). Indeed, in December 2014, Xi directed officials to “have more Chinese voices in the formulation of international rules” and “inject more Chinese elements” in the order to “maintain and expand our country’s developmental interests.” See *Xi Jinping Speaks at the 19th Collective Study Session of the CCP Political Bureau, Stresses Need to Accelerate Free Trade Zone Strategy*, XINHUA (Dec. 6, 2014) <https://english.news.cn/20230202/c5201b04ec42dea2a0bbe4eac44b5e/c.html>.

¹⁹⁸ Mlada Bukobansky, *The Responsibility to Accommodate: Ideas and Change*, in ACCOMMODATING RISING POWERS: PAST, PRESENT, AND FUTURE 94 (2016).

¹⁹⁹ Lu Zhu & Anthea Roberts, *Is International Law International?*, 18 CHINESE J. INT’L L. 1009, 1009–12 (2019).

²⁰⁰ Oscar Schachter, *The Role of Power in International Law*, 93 AM. SOC. INT’L L. 205, 205 (1999). See also Oriana Skylar Mastro, *In the Shadow of the Thucydides Trap: International Relations Theory and the Prospects for Peace in U.S.–China Relations*, 24 J. CHINESE POL. SCI. 35, 35 (2019).

²⁰¹ BYERS, *supra* note 102, at 19 (stressing that powerful states “which are capable of engaging in more behavior than others will have an advantage in developing, maintaining or changing customary rules to protect and promote their own particular interests”). States tend to reserve the determination of what the rules are and how they apply such rules to a specific situation to themselves. See KAPLAN & KATZENBACH, *supra* note 197, at 20.

maritime delimitation in the South China Sea.”²⁰² CSIL, by extension, assesses that:

[I]n a maritime delimitation situation, the determination of maritime entitlements is an important issue in and cannot be delinked from maritime delimitation... This process includes the ascertainment of the parties’ entitlements and the overlap of them and the drawing of a boundary line in the overlapping area, finally delimitating the respective scope of their entitlements.²⁰³

CSIL seems to rely on *Aegean Sea*, in which ICJ opined that “[a]ny disputed delimitation of a boundary entails some determination of entitlement to the areas to be delimited.”²⁰⁴ Notably, “entitlement” is different from “title.” States’ entitlement to ocean areas, such as the continental shelf, can exceed their title.²⁰⁵ This is why, in *Jan Mayen*, ICJ used the expressions of “area of overlapping claims,” “the potential area of overlap of claims,” and “area of overlapping potential entitlement” to clarify the concept of “entitlement.”²⁰⁶

Recent jurisprudence by international courts distinguishes the baselines that states employ to measure the breadth of ocean areas of their entitlement (EEZ and the continental shelf) from the baselines that states or courts need to identify to draw an equidistance/median line for maritime boundary delimitation.²⁰⁷ With this qualification, in *Black Sea*, ICJ held that it “select[s] base points by reference to the physical geography of the relevant coasts,”²⁰⁸ and in *Caribbean Sea and the Pacific Ocean*, ICJ selected “base points located on the natural coast and on solid land.”²⁰⁹ Further, with regard to the validity of baselines that have

²⁰² CSIL, *supra* note 5, at 250.

²⁰³ *Id.* at 308. *See also id.* at 265 (emphasizing that “in the delimitation situation between China and the Philippines in the South China Sea, claims to maritime entitlements are an indivisible part of the maritime delimitation dispute”).

²⁰⁴ *Aegean Sea Continental Shelf Case (Greece v. Turk.)*, Judgment, 1978 I.C.J. Rep. 3, ¶ 84 (Dec. 19).

²⁰⁵ Bjørn Kunoy, *The Delimitation of an Indicative Area of Overlapping Entitlement to the Outer Continental Shelf*, 83 BRIT. Y.B. INT’L L. 65, 65–66 (2013).

²⁰⁶ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.)*, Judgment, 1993 I.C.J. Rep. 38, ¶ 18–19 (June 14). Similarly, Paul Reichler, in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, discerns how entitlement is distinct from title saying that “[e]ntitlement, of course, is not title. It is for the Court to determine title, by dividing the area of overlapping potential entitlements equitably between the Parties.” *See Territorial and Maritime Dispute (Nicar. v. Colom.)*, Public Sitting, 2012 I.C.J., ¶ 18 (Apr. 24).

²⁰⁷ *See, e.g., Maritime Delimitation in the Black Sea (Rom. v. Ukr.)*, Judgment, 2009 I.C.J. Rep. 61, ¶ 137 (Feb. 3).

²⁰⁸ *Id.*

²⁰⁹ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicar.)*, Judgment, 2018 I.C.J. Rep. 139, ¶ 143 (Feb. 2). ILA adopts the same approach. *See INTERNATIONAL LAW ASSOCIATION, BASELINES UNDER THE INTERNATIONAL LAW OF THE SEA FINAL REPORT* ¶ 28 (2018).

been unilaterally employed, in *Libya-Malta*, ICJ excluded the small islet of Filfla, which was part of straight baselines, for maritime delimitation.²¹⁰ In the aggregate, future outlying archipelagic/straight baselines for the Spratlys will likely be faced with ignorance in the maritime delimitation phase.

Second, the implication of sovereignty disputes over maritime features needs to be counted, bearing in mind the relationship between maritime entitlements of land territory and territorial sovereignty thereon. As CSIL stresses, “[s]ettled sovereignty over a feature is the prerequisite for what maritime entitlements it may generate and what the State having sovereignty over it eventually claims.”²¹¹ In situations where territorial disputes over features existed, as the argument goes, “no international court or tribunal had ever determined their maritime entitlements without having decided on sovereignty over them.”²¹² If applied to the matter at hand, one may conclude that neither China, the Philippines, or any other claimant is entitled to unilaterally employ straight baselines by using disputed features as basepoints for an outlying archipelago in the Spratly Islands.

Equally important to note about territorial disputes is that if China uses low-tide elevations (not located within 12 nm of an island)²¹³ as basepoints in drawing outlying archipelagic/straight baselines in the Spratlys, the United States, amongst others, could not accept. In other words, if China treats submerged landmass as the object of appropriation, as if it is a land territory, the United States will oppose it, and as a result, a seemingly (*de facto*) dispute over the territoriality of submerged features will arise between China and the United States in the South China Sea.²¹⁴

²¹⁰ Concerning the Continental Shelf (Libyan Arab Jarnahiriya/Malta), Judgment, 1985 I.C.J. Rep. 13, ¶ 64 (June 3) (opining that “it [is] equitable not to take account of Filfla in the calculation of the provisional median line between Malta and Libya”).

²¹¹ CSIL, *supra* note 5, at 264.

²¹² *Id.*

²¹³ A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea. 2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. art. 13 (entered into force Nov. 16, 1994).

²¹⁴ The possession and exercise of American sea power, which is embodied by the presence of the US military in the regional seas, is integral to American hegemony in East Asia. See James Manicom, *China and American Seapower in East Asia: Is Accommodation Possible?*, 37 J. STRATEGIC STUD. 351, 351 (2014).

Third, if the interconnecting waters within the Spratly archipelago fall under China's sovereignty as "internal waters,"²¹⁵ China will face huge objections and outcries from the international community because international navigation in certain areas in the South China Sea will suffer accompanying disruption.²¹⁶ An estimated \$3.4 trillion worth of international shipping trade passes through the South China Sea each year.²¹⁷ Although China seems to consider accommodating "the need for international navigation"²¹⁸ through the possible Spratlys outlying archipelago,²¹⁹ vast internal waters in the middle of the South China Sea enclosed by straight baselines will inevitably hamper the passage of foreign ships, not least warships.²²⁰ Again, huge protests against such an outlying archipelago may be followed, thereby proving "a manifest lack of international recognition of archipelagic status."²²¹

From the political perspective, if China perceives that regional developments involving security situations are provocative enough to exhort its elites to come up with a decisive measure, China may see the benefits of proclaiming outlying archipelagic/straight baselines for the Spratlys as outweighing the costs.²²² The security situations that contribute to Chinese negative perception generally

²¹⁵ CSIL, *supra* note 5, at 477.

²¹⁶ Hong, *Continental States*, *supra* note 188, at 116.

²¹⁷ China Power Team, *How Much Trade Transits the South China Sea?*, CHINA POWER (Aug. 2, 2017) <https://chinapower.csis.org/much-trade-transits-south-china-sea/>; *see also* DEPARTMENT OF DEFENSE, ANNUAL REPORT TO CONGRESS [ON] MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 41 (2017) https://dod.defense.gov/Portals/1/Documents/pubs/2017_China_Military_Power_Report.PDF.

²¹⁸ CSIL, *supra* note 5, at 324.

²¹⁹ *See* *Phil. v. China*, 2013-19, ¶ 212 (quoting MINISTRY OF FOREIGN AFFS. OF CHINA, *Vice Foreign Minister Zhang Yesui Makes Stern Representations to US over US Naval Vessel's Entry into Waters near Relevant Islands and Reefs of China's Nansha Islands* (Oct. 27, 2015), https://www.fmprc.gov.cn/mfa_eng/gjhdq_665435/3376_665447/3432_664920/3435_664926/201510/t20151029_589951.html); Kuen-chen Fu, *Freedom of Navigation and the Chinese Straight Baselines in the South China Sea*, in *FREEDOM OF NAVIGATION AND GLOBALIZATION* 190 (2015).

²²⁰ Due to the consequential prevention of naval passage, maritime powers have opposed extending the archipelagic waters regime to outlying archipelagos. *See* *Phil. v. China*, 2013-19, ¶ 16.21; KOPELA, *supra* note 3, at 50.

²²¹ Herman, *supra* note 138, at 184.

²²² *See* Nong Hong, Jianwei Li, & Pingping Chen, *The Concept of Archipelagic State and the South China Sea: UNCLOS, State Practice and Implication*, 2013 CHINA OCEANS L. REV. 209, 238-39 (noting that "the perceived negative developments by China over the South China Sea disputes may push China to announce its baselines for the Nansha and Zhongsha island groups as a response"). On the other hand, some commentators worry that China may seek pretexts to undertake planned actions instead of reacting to others' actions with a view to eliciting concessions from other claimants or chipping away at the regional status quo by means of raising the risks of accidental clashes. *See* Wei Zongyou, *China's Maritime Trap*, 40 WASH. Q. 167, 171-73 (2017).

include the Freedom of Navigation (FON) Program,²²³ aggressive naval operations, and aerial reconnaissance activities of the United States.²²⁴

Nevertheless, if Chinese international lawyers look at the totality of the circumstances, they will realize the costs of materializing the outlying archipelago plan outweigh the benefits. If China encloses the Spratlys as an outlying archipelago, the international community may perceive it not as equivalent or symmetric with regard to presumable prior actions of others (e.g., U.S. FONs or Philippines' resource exploitation activities). Rather, China's enclosure of the Spratlys as an outlying archipelago is more likely to harm other states' (not least other claimants') core interests. Also, maritime powers will find it detrimental to their position, precipitating a clash of national interests.²²⁵

More specifically, the United States will take immediate action if China encloses the ocean areas of the Spratly Islands by straight baselines as internal waters.²²⁶ Admittedly, the command of the global commons has been the foundation of American military security.²²⁷ That is to say, maritime supremacy in the form of a globally present navy is the key to maintaining international and regional order.²²⁸ In line with its traditional role of providing freedom of the seas, the United States "cannot tolerate China eventually moving to prevent

²²³ FON was created in 1979 to preserve American national interests and demonstrate non-acquiescence to excessive maritime claims asserted by coastal states. See *U.S. Department of Defense Freedom of Navigation Program Fact Sheet*, U.S. DEP'T DEF. (Mar. 2015), [https://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20-%20Fact%20Sheet%20\(March%202015\).pdf](https://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20-%20Fact%20Sheet%20(March%202015).pdf).

²²⁴ America is not a claimant of the South China Sea dispute. Nonetheless, China perceives that the United States is not a neutral party on the dispute. See Wu Shicun, *South China Sea: Expect More Instability in 2021 as the US Encourages 'Lawfare' and Conflict*, NAT'L INST. S. CHINA SEA STUD. (Jan. 25, 2021), http://en.nanhai.org.cn/index/research/paper_c/id/419.html (claiming that, "[u]nder Biden, the US is likely to mobilise its resources and rally allies and partner countries to keep up the [SCS] hype, and push the narrative that the arbitration award is part of international law and rules. It may also encourage Vietnam to sue China over [SCS] claims in the same international court of arbitration, while covertly supporting actions by Vietnam, the Philippines and Malaysia based on the ruling . . . Under US inducement and coercion, some claimants preoccupied with the arbitral award could make a move, citing international law and rules").

²²⁵ STEPHEN M. WALT, *RIISING POWERS AND THE RISKS OF WAR: A REALIST VIEW OF SINO-AMERICAN RELATIONS*, in *WILL CHINA'S RISE BE PEACEFUL?: SECURITY, STABILITY, AND LEGITIMACY* 16 (Asle Toje ed., 2018).

²²⁶ Aaron L. Friedberg, *The Future of U.S.-China Relations Is Conflict Inevitable?*, 30 INT'L SEC. 7, 20 (2005).

²²⁷ See Barry R. Posen, *Command of the Commons: The Military Foundation of U.S. Hegemony*, 28 INT'L SEC. 5, 8 (2003).

²²⁸ See James T. Conway, Gary Roughead, & Thad W. Allen, *A Cooperative Strategy for 21st Century Seapower*, 61 NAVAL WAR COLL. REV. 7 (2008); see also Manicom, *supra* note 214, at 352 (emphasizing that "overwhelming American military strength at sea has remained an enduring feature of East Asian international relations since the end of World War II").

freedom of commercial navigation through the South China Sea because it contains crucial sea lanes of communication.”²²⁹

What may puzzle the United States is that some vast ocean areas (the high seas or EEZs) with fundamental and strategic value in maritime security²³⁰ will become China’s internal waters that US naval warships can no longer navigate or conduct military activities.²³¹ Regardless of the Chinese measure of rendering the Spratlys internal waters, the United States will maintain navigation and military operation of its warships. If taken without limit, armed conflicts between China and the United States may ensue.²³²

Another aspect that deserves receiving Chinese international lawyers’ attention is that China’s security seeking in the South China Sea by enclosing the Spratlys will invite “balancing from extra-regional powers and create a more difficult situation in the [South China Sea], eventually making China less secure to a certain extent.”²³³ In other words, the Chinese measure to crowd out other claimants and maritime powers from the Spratlys under the veneer of legality will inevitably intensify the “security dilemma” in the region. Political theorists explain that states that worry about their security are driven to acquire more power to escape from others’ dominance; ironically, such security-seeking subsequently endangers others’ security, making them prepare for the worst—the vicious circle of (in)security and power accumulation continues.²³⁴

Put differently, the United States (and other claimants as well) will find it hard to grasp China’s intentions of enclosing the Spratlys, and thus, fear will be embedded; consequently, the United States (and the disputants) may “resort to the accumulation of power or capabilities as a means of defense, and these

²²⁹ ROBERT J. ART, *THE UNITED STATES AND THE RISE OF CHINA: IMPLICATIONS FOR THE LONG HAUL*, IN *CHINA’S ASCENT: POWER, SECURITY, AND THE FUTURE OF INTERNATIONAL POLITICS* 281 (Robert S. Ross & Zhu Feng eds., 2008).

²³⁰ China Power Team, *supra* note 217.

²³¹ One thing to note about military activities in foreign EEZs is that China understands coastal states can regulate a foreign state’s military activities within their EEZs, and thus, naval vessels do not have the right of innocent passage. See Shao Jin, *The Question of Innocent Passage of Warships: After UNCLOS III*, 13 *MARINE POL’Y* 56, 67 (1989); Jia Guide, *New China and International Law: Practice and Contribution in 70 Years*, 18 *CHINESE J. INT’L L.* 727, 740 (2019).

²³² ART, *supra* note 229, at 286 (explaining the concept of U.S. maritime supremacy as “defeat[ing] China in a conflict on the high seas, maintain[ing] freedom of the sea lanes in the area, and protect[ing] the insular nations in the region from Chinese political-military coercion, attack, and conquest”).

²³³ KLAUS HEINRICH RADITIO, *UNDERSTANDING CHINA’S BEHAVIOUR IN THE SOUTH CHINA SEA: A DEFENSIVE REALIST PERSPECTIVE* 129 (2019).

²³⁴ John Herz coined the term “security dilemma” and elaborated the concept. See John H. Herz, *Idealist Internationalism and the Security Dilemma*, 2 *WORLD POL.* 157, 157 (1950).

capabilities inevitably contain some offensive capabilities.”²³⁵ In brief, China’s security seeking by means of the outlying archipelago can cause a reverse effect to the detriment of its (and regional) security.

In addition, adopting an outlying archipelago for the Spratlys will negatively affect the accommodation/containment debate within (powerful) states (e.g., the United States, Russia, the United Kingdom, and the European Union). A strand of political thought, on the one hand, suggests that containment or deterrence, which effectiveness was proved during the Cold War,²³⁶ is to be employed to fare against a growing China. Supporters of this power transition theory believe that the Sino-American war is inevitable in the South China Sea, owing to some conditions for war despite the presence of nuclear weapons.²³⁷ On the other hand, another strand of thinking in political science holds that accommodation or appeasement is the necessary key to peace,²³⁸ given that China is satisfied with the status and perks associated with the rank of great powers in the regional or global system.²³⁹

The central proposition of this debate is that China’s intention matters in deciding accommodation or containment²⁴⁰—appeasement is necessary if China

²³⁵ SHIPING TANG, A THEORY OF SECURITY STRATEGIES FOR OUR TIME: DEFENSIVE REALISM 39–40 (2010) (offering an account of eight major aspects of the security dilemma).

²³⁶ Scholars assess that the United States with maritime supremacy can utilize its command of the global common, and prevail over the East Asian Seas, maintaining freedom of navigation. *See* Posen, *supra* note 227, at 39; ART, *supra* note 229, at 286.

²³⁷ *See* JACK S. LEVY, POWER TRANSITION THEORY AND THE RISE OF CHINA, IN CHINA’S ASCENT: POWER, SECURITY, AND THE FUTURE OF INTERNATIONAL POLITICS 17–18 (Robert S. Ross & Zhu Feng eds., 2008) Power transition theory postulates that states with enhanced power (a function of population, economic productivity, and political capacity) are non–status quo states, demanding redistributing power and goods in the system no matter the cost. *See id.* at 18; *see also* Robert S. Ross & Zhu Feng, *The Rise of China: Theoretical and Policy Perspectives*, in CHINA’S ASCENT: POWER, SECURITY, AND THE FUTURE OF INTERNATIONAL POLITICS 305 (Robert S. Ross & Zhu Feng eds., 2008).

²³⁸ As U.S. power continued to rise, Britain gradually adopted an accommodation policy, came to terms with territorial and commercial disputes in North and South America, and invited American troops to Europe to fight in WWI. *See* WALT, *supra* note 225, at 21.

²³⁹ *See* T.V. PAUL, THE ACCOMMODATION OF RISING POWERS IN WORLD POLITICS, IN ACCOMMODATING RISING POWERS: PAST, PRESENT, AND FUTURE 4–5 (T.V. Paul ed., 2016) (noting that accommodation involves “mutual adaptation and acceptance by established and rising powers, and the elimination or substantial reduction of hostility between them”).

²⁴⁰ Some worry that any reforms to American strategy will inevitably attract more Chinese demands, entailing the collapse the security structure, whereas others claim that if America does not accommodate China, it facilitates China’s rise and elicit hard balancing on the part of the great powers. *See* LYLE J. GOLDSTEIN, MEETING CHINA HALFWAY: HOW TO DEFUSE THE EMERGING US-CHINA RIVALRY 359 (2015); Zhu Feng, *China’s Rise Will Be Peaceful: How Unipolarity Matters*, in CHINA’S ASCENT: POWER, SECURITY, AND THE FUTURE OF INTERNATIONAL POLITICS 52 (Robert S. Ross & Zhu Feng eds., 2008); Robert S. Ross & Zhu Feng,

is conservative (not harming the vital interests of other powerful countries), whereas containment is best for a highly ambitious China.²⁴¹ For the United States, there is the bottom line for accommodation.²⁴² If China prevents freedom of commercial navigation through the South China Sea by any means, America will not tolerate it because free trade is at the core of American interests.²⁴³ In other words, unless the Chinese proposal of revision undermines American core interests, war is not inevitable; accommodation is possible.²⁴⁴

With this in mind, Western international lawyers should pay considerable attention to China's claims to understand how China feels about its security in the South China Sea²⁴⁵ and "where the risks of confrontation and the necessity of accommodation lie."²⁴⁶ On another side, Chinese international lawyers should take into account the possibility that a future measure of enclosing the South China Sea by straight baselines can pose a great threat to other actors, including the United States.²⁴⁷ Additionally, American international lawyers should note that the U.S. position and its behavior significantly leverage China's future position and vice-versa.²⁴⁸ It is true that "an ever-changing China's rise will

Introduction, in CHINA'S ASCENT: POWER, SECURITY, AND THE FUTURE OF INTERNATIONAL POLITICS 6 (Robert S. Ross & Zhu Feng, 2008).

²⁴¹ See Ross & Feng, *supra* note 237, at 306–07; see also Jeffrey W. Legro, *Purpose Transitions: China's Rise and the American Response, in CHINA'S ASCENT: POWER, SECURITY, AND THE FUTURE OF INTERNATIONAL POLITICS 185–86* (Robert S. Ross & Zhu Feng eds., 2008) (noting that, "[i]f a revisionist mindset is guiding China and the U.S. reinforces that with conciliatory policies that allow revisionist parties to claim success, Chinese supporters of integration will be marginalized").

²⁴² See Friedberg, *supra* note 226, at 20.

²⁴³ ART, *supra* note 229, at 281, 287 (adding that, "[s]hould China begin to move beyond area denial to sea control, the United States will have to take additional measures to preserve its maritime supremacy").

²⁴⁴ See WALT, *supra* note 225, at 16.

²⁴⁵ According to Jervis' "system effect"—meaning that systems composed of densely interconnected units are often characterized by feedback loops and nonlinear interactions, small causes will often have large effects that are difficult to predict or to control. U.S. gestures of reducing the FON operations or other military activities in the South China Sea may contribute to subdue China's concern about security in the region significantly. See ROBERT JERVIS, *SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE 6, 20* (1997).

²⁴⁶ Theodore McLauchlin, *Great Power Accommodation and the Processes of International Politics, in ACCOMMODATING RISING POWERS: PAST, PRESENT, AND FUTURE 295* (T.V. Paul ed., 2016); see also Steven E. Lobell, *Realism, Balance of Power, and Power Transitions, in ACCOMMODATING RISING POWERS: PAST, PRESENT, AND FUTURE* (T.V. Paul ed., 2016) (calling on Western observers to investigate the origins of conflict in a specific way).

²⁴⁷ The process of Western players' intuitive perception of China enclosing the Spratlys may be compounded by the ideational, ideological, epistemological, and policy gap between China and Western countries. See, e.g., TERRENCE KELLY ET AL., *THE U.S. ARMY IN ASIA, 2030–2040 135* (2014).

²⁴⁸ See Legro, *supra* note 241, at 183.

shape and be shaped by an ever-changing international system.”²⁴⁹ That is, the whereabouts of the future of the South China Sea dispute are contingent upon each other’s response.²⁵⁰

Regionally and locally, China’s advancement towards the enclosure of the South China Sea will directly affect the neighboring coastal states, nudging regional states (mostly ASEAN members) to move toward the United States.²⁵¹ Thus far, most states in the region have refused to choose between China and the United States as they find it useful to keep both of them in the region, relying on their security in the United States and economy in China.²⁵² Nevertheless, in recent years, China’s assertive actions have heightened strategic uncertainty, causing some states in the region to welcome a growing U.S. presence.²⁵³ If extra-regional players, especially the United States, are invited by regional states (in the form of, e.g., joint military drills or forming regular strategic South China Sea talks) owing to China’s enclosing the Spratlys, the internationalization of the South China Sea dispute will be accelerated despite China’s long-standing opposition.²⁵⁴

In a more fundamental sense, China’s move to enclose the vast ocean areas will backfire in three ways: (1) exacerbating the “China threat” discourse, (2) losing the legitimacy of a regional leader, and (3) precipitating judicial and/or collective actions against China. First, many international relations writers (particularly realists) label China as “revisionist,” looking for opportunities to shift the balance of power by expelling the United States from Asia using force,

²⁴⁹ Avery Goldstein, *Parsing China’s Rise: International Circumstances and National Attributes*, in *CHINA’S ASCENT: POWER, SECURITY, AND THE FUTURE OF INTERNATIONAL POLITICS* 85 (Robert S. Ross & Zhu Feng eds., 2008).

²⁵⁰ See Ji Hyun Kim, *Possible Future of the Contest in the South China Sea*, 9 *CHINESE J. INT’L POL.* 30 (2016); see also Kai He, *China’s Bargaining Strategies for a Peaceful Accommodation after the Cold War*, in *ACCOMMODATING RISING POWERS: PAST, PRESENT, AND FUTURE* 201 (T.V. Paul ed., 2016) (noting that, “[d]epending on how China bargains with the outside world and how the outside world reacts, China’s rise may lead to either a peaceful accommodation or a violent conflict”).

²⁵¹ For ASEAN states, the United States is a benign hegemon, without territorial ambitions that has acted as a stabilizing force for the benefit of regional economic development. See Foot, *supra* note 13, at 88.

²⁵² *Id.* at 87 (adding that “[r]egional states . . . continue to look to the United States to play an essential role in deterrence [against China]”).

²⁵³ Asle Toje, *Introduction*, in *WILL CHINA’S RISE BE PEACEFUL? SECURITY, STABILITY, AND LEGITIMACY* 1, 9 (Asle Toje ed., 2018).

²⁵⁴ China has been opposing the internationalization of the South China Sea issue. See MARK J. VALENCIA ET AL., *SHARING THE RESOURCES OF THE SOUTH CHINA SEA* 77 (Shigeru Oda ed., 1997). Meanwhile, upon analyzing the 1995-96 Taiwan Strait Confrontation, Ross argues that China’s coercive tactics ultimately backfired. See Robert Ross, *The 1995-96 Taiwan Strait Confrontation: Coercion, Credibility, and the Use of Force*, 25 *INT’L SEC.* 87, 115 (2000).

if necessary (China threat).²⁵⁵ If China carries out its plan at issue, the “revisionist” label will be validated, thereby causing advocates for China’s peaceful rise to shrink.²⁵⁶

Second, China will lose legitimate leadership. Customary rules are understood to be made and changed on the basis of legitimacy and in the community that “resist superpower manipulation and instead require ongoing discussion and cooperation.”²⁵⁷ Hegemony plays an important role in the customary legislative process, but only “sociologically strong” rules, which are supported by states and societal power, will be confirmed as legitimate rules.²⁵⁸ It is important to remember that China’s ongoing and forthcoming regional hegemony²⁵⁹ may not necessarily provide legitimacy to its leadership and rule-making role. In Bull’s words, “great powers are powers recognized by others to have, and conceived by their own leaders and peoples to have, certain special rights and duties.”²⁶⁰ Echoing this understanding, Simpson reevaluates that “hegemony is a juridical category dependent on the ‘recognition’ of ‘rights and duties’ and the consent of other states in the system.”²⁶¹ From this perspective,

²⁵⁵ See, e.g., MEARSHEIMER, *supra* note 196, at 2–3, 21, 402; Denny Roy, *Hegemon on the Horizon?: China’s Threat to East Asian Security*, 19 INT’L SEC. 149, 159–60 (1994); James R. Holmes & Toshi Yoshihara, *China’s “Caribbean” in the South China Sea*, 26 SAIS REV. INT’L AFF. 79, 79 (2006); Michael Tkacik, *Understanding China’s Goals and Strategy in the South China Sea: Bringing Context to a Revisionist Systemic Challenge – Intentions and Impact*, 34 DEF. & SEC. ANALYSIS 321, 335 (2018); Ross, *supra* note 195, at 392; Adam Ward, *China and America: Trouble Ahead?*, 45 SURVIVAL 35, 35–36 (2003); Thomas J. Christensen, *Fostering Stability or Creating a Monster?: The Rise of China and U.S. Policy Toward East Asia*, 31 INT’L SEC. 81, 95 (2006).

²⁵⁶ Indeed, some scholars argue that China does not have revisionist intentions and is satisfied with the status quo. See Alastair Iain Johnston, *Is China a Status Quo Power?*, 27 INT’L SEC. 5, 5–6 (2003); DAVID C. KANG, *CHINA RISING: POWER AND ORDER IN EAST ASIA* 198 (2007); Feng, *supra* note 240, at 42. One Chinese scholar criticizes the U.S. for labelling it as not a responsible stakeholder, complaining that “China can only be described as responsible if it works with the [U.S.] in maintaining the existing international order.” Alison Adcock Kaufman, *The “Century of Humiliation,” Then and Now: Chinese Perceptions of the International Order*, 25 PAC. FOCUS 1, 15 (2010) (quoting Wang Te-chen, *Zhong-Mei yuedi duihua zhuanjia cheng yiti guangfan* [China-US Dialogue Will Start Toward the End of This Month; Expert Says the Subjects Will be Wide-Ranging], DA GONG BAO (2009) (China)).

²⁵⁷ Michael Byers, *Introduction: The Complexities of Foundational Change*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 1, 12 (Michael Byers & Georg Nolte eds., 2003).

²⁵⁸ Achilles Skordas, *Hegemonic Custom?*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 317, 347 (Michael Byers & Georg Nolte eds., 2003).

²⁵⁹ Some U.S. elites already regard China as a regional hegemon. See CONG. RSCH. SERV., R42784, U.S.-CHINA STRATEGIC COMPETITION IN SOUTH AND EAST CHINA SEAS: BACKGROUND AND ISSUES FOR CONGRESS 14 (2021).

²⁶⁰ HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 196 (Palgrave 2d ed. 2002).

²⁶¹ GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* 70 (2004).

China is demanded to consider more attentively the desires of others in consideration of the possible enclosure of the Spratlys.²⁶²

Third, other claimants (especially Vietnam or the Philippines) will likely instigate a lawsuit or, at least, collective actions against China. It is not a secret that Vietnam has in mind the I.C.J. litigation²⁶³ or UNCLOS compulsory dispute settlement mechanism to seek legal redress for unfair developments of the dispute.²⁶⁴ Boyle observes that international courts are not likely to “throw out good cases on jurisdictional grounds if they can avoid doing so.”²⁶⁵ Such judicial activism²⁶⁶ seems best exemplified by *South China Sea*.²⁶⁷ The purpose of such legal action may pertain to the existence of a particular rule for outlying archipelagos and, if any, its applicability to the Spratlys or Paracels.²⁶⁸ What is more, neighboring countries of the South China Sea could take collective action against the measure of enclosing ocean areas hitherto known as public goods.²⁶⁹

The issue of the Spratlys’ outlying archipelago status is sometimes viewed as a bargaining process between China and the outside world, especially the

²⁶² Foot, *supra* note 13, at 95 (noting that “what can happen when we have shifts in relative power; the realization that turning power into real influence requires being attentive to the desires of others”); *see also* BYERS, *supra* note 102, at 20.

²⁶³ VALENCIA ET AL., *supra* note 254, at 33.

²⁶⁴ In November 2019, Vietnam’s Deputy Foreign Minister Le Hoai Trung warned that Vietnam is seriously considering bringing legal challenges against China underscoring the centrality of UNCLOS in resolving S.C.S. disputes. They state that “the U.N. Charter and U.N.C.L.O.S. have sufficient mechanisms for us to apply those [legal] measures.” Richard Javad Heydarian, *The Importance of Being China*, NAT’L INT. (Jan. 12, 2020), <https://nationalinterest.org/feature/importance-being-china-112951>; *see also* *Experts Call for Vietnam to Sue China in International Court Over South China Sea Incursions*, RADIO FREE ASIA (Oct. 9, 2019), <https://www.rfa.org/english/news/vietnam/lawsuit-10092019152725.html/>.

²⁶⁵ Alan Boyle, *Law of the Sea Perspectives on Climate Change*, in *THE 1982 LAW OF THE SEA CONVENTION AT 30: SUCCESSES, CHALLENGES AND NEW AGENDAS* 157, 164 (David Freestone ed., 2013).

²⁶⁶ Many international lawyers fulminate against a phenomenon of judicial activism in the case of international arbitration. *See, e.g.*, Kirsten E. Boon, *International Arbitration in Highly Political Situations: The South China Sea Dispute and International Law*, 13 WASH. UNIV. GLOB. STUD. L. REV. 487, 490–92 (2014).

²⁶⁷ Youngmin Seo, *The Marine Environmental Turn in the Law of the Sea and Fukushima Wastewater*, 45 *FORDHAM INT’L L.J.* 51, 97–98 (2021) (noting that, “[d]espite China’s rejection of the tribunal’s jurisdiction on the grounds that the core of the case lies in the territorial issue over maritime features and that explicit consent of the parties is the prerequisite for international arbitration, the tribunal found that it had jurisdiction”).

²⁶⁸ BYERS, *supra* note 102, at 209.

²⁶⁹ Peter-Tobias Stoll, *Compliance: Multilateral Achievements and Predominant Powers*, in *UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* 456, 476 (Michael Byers & Georg Nolte eds., 2003); *see also* Suisheng Zhao, *East Asian Disorder: China and the South China Sea Disputes*, 60 *ASIAN SURV.* 490, 508–09 (2020) (assessing that “China has faced a dilemma between the need to maintain the regional stability (*weiwèn*) and forcefully pursue its own interests and rights (*weiquan*) . . . China’s successful power play has certainly contributed to disorder in East Asia”).

United States.²⁷⁰ If this is the case, Chinese international lawyers should review whether proclaiming the Spratlys as an outlying archipelago is an effective way of signaling its intentions.²⁷¹ It is not easy for a hegemon to voluntarily accommodate a rising power's demands; hence, China is urged to bargain hard enough by adopting wise bargaining strategies.²⁷² Taken as a whole, enclosing the South China Sea as an outlying archipelago does not seem like an efficient bargaining strategy for China.

CONCLUSION

International law undergoes continuous evolution, not being a static set of rules.²⁷³ Customary rules on outlying archipelagos seem to have evolved since the adoption of UNCLOS. Further, China's move in a certain direction will likely influence the development of customary rules on this matter.²⁷⁴ Regardless of whether such rules are already established or in the making, UNCLOS will and should play an important role in assessing the legality of the outlying archipelagic/straight baseline of outlying archipelagos.²⁷⁵

The outlying archipelago regime has to strike a balance between territorial integrity, security of continental states, and maintaining regional harmony.²⁷⁶ In this sense, states are urged to select basepoints for drawing an outlying archipelago with care; as such, basepoint selection will receive scrutiny in terms of their legitimacy under relevant principles deriving from UNCLOS.²⁷⁷ Kopela observes that the "cautious application of the archipelagic concept may have been the reason for the lack of protest on behalf of the states of the international community."²⁷⁸

²⁷⁰ He, *supra* note 250, at 201 (assessing that "China's rise is a bargaining process between China and the outside world").

²⁷¹ McLauchlin, *supra* note 246, at 297.

²⁷² He, *supra* note 250, at 203.

²⁷³ Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), Judgment (Second Phase), 1970 I.C.J. 3, ¶ 37 (Feb. 5).

²⁷⁴ BYERS, *supra* note 102, at 37.

²⁷⁵ See Zhang, *supra* note 49, at 129 (arguing that UNCLOS "has a very limited, if not negligible, role in assessing the legality of the straight baselines as applied to dependent mid-ocean archipelagos").

²⁷⁶ Charlotte Ku, *The Archipelagic States Concept and Regional Stability in Southeast Asia*, 23 *Case W. RSRV. J. INT'L L.* 463, 477–78 (1991).

²⁷⁷ Herman, *supra* note 138, at 199.

²⁷⁸ KOPELA, *supra* note 3, at 184 n.164 (discussing that the only states that have applied straight baseline systems in broadly scattered archipelagos are China for the Paracels and India for the Lakshweed Islands, both of which do not conform to the conditions stipulated in article 47(2)).

Despite the “international” nature of international law of the sea, international lawyers are prone to interpret the contents of law differently as they take side with their own government’s legal position.²⁷⁹ With this in mind, this article pursues the desired role of international lawyers in performing tasks that are not strictly legal in nature.²⁸⁰ Admittedly, “efficacy” is the source of Chinese policy change.²⁸¹ This paper shows, through the lens of political scientists’ analyses, how a Chinese move to proclaim the enclosure of the South China Sea as an outlying archipelago goes against “efficacy” in accomplishing its foreign policy goals.

Now, it is time for international lawyers of both sides (as colleagues in the invisible college) to put together their thoughts to manage the escalating Sino-American rivalry by considering the intentions and legitimacy of their own arguments of their own and their adversary’s.²⁸² It will be helpful to remember that there has always been a silver lining in the history of rivalry and legal conflicts.²⁸³ If Chinese ambitions are so extensive, the United States and other claimants cannot find a way to accommodate such requests.²⁸⁴ However, if the intentions behind the Chinese claim to the outlying archipelagic status of the Spratlys are understood and treated with care, China will understand and treat the international community’s concerns with care, too; if refused, it will be compelled to become a refuser or revisionist.²⁸⁵

²⁷⁹ ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 318 (2017) (noting that “US and Chinese international lawyers and academics often line up with the positions of their respective governments”).

²⁸⁰ BYERS, *supra* note 102, at 16.

²⁸¹ Ross & Feng, *supra* note 237, at 308.

²⁸² MICHAEL J. MAZARR ET AL., CHINA AND THE INTERNATIONAL ORDER xiv (2018).

²⁸³ GRAHAM ALLISON, DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES’ TRAP? 225 (2017) (noting that “[d]espite disparities in legal interpretation and ideas for regional order, rivals throughout history have found ways to accept intolerable circumstances for other benefits”).

²⁸⁴ Friedberg, *supra* note 226, at 20.

²⁸⁵ Legro, *supra* note 241, at 185.