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Arguing International Law in the South China Sea Disputes: The *Haiyang Shiyou 981* and *USS Lassen* Incidents and the *Philippines* v. *China* Arbitration

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Abstract

This article focuses on how international law is argued by the parties to the South China Sea disputes and in what context these legal arguments are presented. To this end, the article analyses three recent issues in the South China Sea: the incident involving the *Haiyang Shiyou 981* drilling rig, which operated in a maritime area in dispute between Vietnam and China; the passage of the *USS Lassen* in the vicinity of Subi Reef, which is occupied by China; and the arbitration between the Philippines and China under the United Nations Convention on the Law of the Sea. The article concludes that looking at what legal arguments are or are not made and in what broader context those arguments are placed can contribute to a better understanding of the role of international law in the South China Sea disputes.

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Keywords

China – Vietnam – South China Sea – arbitration – navigation – provisional arrangements – USA – Philippines

Introduction

International law figures prominently in many discussions concerning the South China Sea disputes. International law provides a tool for determining which of the claimant States has sovereignty over the disputed islands in the South China Sea and contains rules for determining the maritime entitlements of the disputed islands and the delimitation of these entitlements with those of the coasts surrounding the South China Sea. The analysis of international law often focuses on determining the content of the applicable law and how it should be applied in the context of the South China Sea. This article instead focuses on how international law is argued by the parties to the South China Sea disputes and in what context these legal arguments are presented. It is believed that the latter approach provides a better indication about the extent to which international law may be having an impact on State behaviour in the South China Sea disputes than only focusing on the measure of compliance with international law. Achieving a better understanding of the views of States on the significance they attach to certain rules may also contribute to a better understanding of what legal approaches may be an effective policy tool for managing the South China Sea disputes.

The present article is intended to contribute to the first of the abovementioned issues; *i.e.*, how is international law having an impact on State behaviour in the South China Sea. To this end, the article will focus on three recent issues in the South China Sea:[2] first, the incident involving the *Haiyang Shiyou 981* (*HYSY 981*) drilling rig, which operated with a Chinese license in a maritime area in dispute between Vietnam and China to the south of the Paracel Islands; second, the passage of the *USS Lassen* in the vicinity of Subi Reef, which is occupied by China and on which China has carried out land reclamation activities

2 The selection of these three issues was based on the following criteria: an issue should have a significant legal dimension and should be concerned with the South China Sea; the selected issues should concern different parties to the South China Sea dispute; and there should be sufficient information on the legal arguments of the parties directly involved in these issues. The sample was limited to three issues because it is considered that this provides sufficient information to address the central research question within the limits of a journal article.

and construction work and third, the arbitration between the Philippines and China under the United Nations Convention on the Law of the Sea (LOSC).[3] These three issues are discussed in the three sections that follow below. Apart from looking at the kind of legal arguments the parties involved in each of these issues employ, each section also briefly considers how these arguments relate to the applicable law and assesses the broader context in which specific arguments are being made. A final section of the article provides an assessment of the three issues in the light of the central question of the article set out above and contains overall conclusions.

The *Haiyang Shiyou 981* Incident

In May 2014, the *HYSY 981* drilling rig was moved to an area south of the Paracel Islands by the China National Offshore Company to drill for hydrocarbons under a Chinese license. The rig drilled at two specific locations. The first location was at 15° 29.58 N; 111° 12.06 E, and the rig subsequently was moved to the location 15° 33.38 N; 111° 34.62 E.[4] These two locations are, respectively, 17 and 25 nautical miles distant from Triton Island, the nearest island in the Paracel Islands, over which group China and Vietnam have a sovereignty dispute.[5] Both locations are beyond the 12-nautical-mile territorial sea of the Paracel Islands. The locations are, respectively, some 120 and 140 nautical miles from

3 Concluded on 10 December 1982; entry into force 16 November 1994; 1833 *UNTS* 396.

4 These locations are reported in *Letter dated 3 July 2014 from the Permanent Representative of Viet Nam to the United Nations addressed to the Secretary-General* (UN Doc. A/68/943 of 9 July 2014), Annex, section 1 and a number of Notices to Mariners published by the Chinese Maritime Safety Administration (see *e.g.*, Navigation Warning 14033 of 3 May 2014 (http://www.msa.gov.cn/page/article.do?articleId=7291b46d-ab69-4949-8a88-6c55dad815e8); Navigation Warning 14041 of 27 May 2014, available at http://www.msa.gov.cn/page/article.do?articleId=390bd50d-b5a9-44b0-a132-c16350e6f358. It should be noted that some of the webpages referenced in this article may no longer be available online. All these pages are on file with the author.

5 A Chinese document mentions that both locations are 17 nautical miles from Triton Island, referring to the island by its Chinese name of Zhongjian (*Letter dated 9 June 2014 from the Chargé d'affaires a.i. of the Permanent Mission of China to the United Nations addressed to the Secretary-General* (UN Doc. A/68/907 of 9 June 2014), Annex, section 1; see also *Letter dated 22 May 2014 from the Chargé d'affaires a.i. of the Permanent Mission of China to the United Nations addressed to the Secretary-General* (UN Doc. A/68/887 of 27 May 2014), Annex, para. 2). The figure of 17 nautical miles for both locations is not in accordance with the geographical coordinates of the locations provided above.

the Cu Lao Re Islands, the nearest undisputed Vietnamese territory and, respectively, some 180 and 190 nautical miles from China's Hainan Island. The drilling operations led to confrontations at sea between Chinese and Vietnamese vessels and to riots in Vietnam against Chinese business interests and Chinese workers. On 15 July 2014 it was reported that the *HYSY 981* had finished its operations to the south of the Paracel Islands and was moved back to Hainan. The operations originally had been scheduled to terminate only on 15 August 2014. A number of explanations have been offered for this early departure: the successful completion of the operations; avoiding damage to the rig by the typhoon Rammasun; US pressure on China; and avoiding a further deterioration of China's relations with Vietnam.[6]

The legal and non-legal arguments of China and Vietnam to justify their own positions and actions, and to criticize those of the other party have been set out in detail in a number of documents that have been submitted to the United Nations. These documents not only concern arguments related to the activities of the *HYSY 981*, but also revisit their arguments in relation to the sovereignty dispute over the Paracel Islands in quite some detail. In general, the documents dealing with the latter matter repeat well-known arguments of the parties to support their position on sovereignty.[7] One point of this aspect of the incident merits further attention. Vietnam has taken the position that the Paracel Islands should not receive any weight in a delimitation of the continental shelf and exclusive economic zone between itself and China[8] and, as

6 C Thayer, 'Four Reasons China Removed Oil Rig *HYSY-981* Sooner Than Planned' *The Diplomat*, 22 July 2014, available at http://thediplomat.com/2014/07/4-reasons-china-removed-oil-rig-hysy-981-sooner-than-planned/; see also 'Why Did China Withdraw *Haiyang Shiyou 981* Oil Rig?', available at http://www.southchinasea.com/analysis/813-why-did-china-withdraw-haiyang-shiyou-981-oil-rig.html; 'Vietnam Politburo Member Le Hong Anh Meets Liu Yunshan Chinese Politburo Member', available at http://vietlaw4u.com/vietnam-politburo-member-le-hong-anh-meets-liu-yunshan-chinese-politburo-member/; S. LaGrone 'China and Vietnam Call A Maritime Truce', available at http://news.usni.org/2014/08/27/china-vietnam-call-maritime-truce.

7 See UN Doc. A/68/907 (n 5); Letter dated 3 July 2014 from the Permanent Representative of Viet Nam to the United Nations addressed to the Secretary-General (UN Doc. A/68/942 of 9 July 2014); Letter dated 22 August 2014 from the Permanent Representative of Viet Nam to the United Nations addressed to the Secretary-General (UN Doc. A/68/981 of 27 August 2014); Letter dated 8 December 2014 from the Permanent Representative of China to the United Nations addressed to the Secretary-General (UN Doc. A/69/645 of 10 December 2014).

8 See AG Oude Elferink, 'Do the coastal states in the South China Sea have a continental shelf beyond 200 nautical miles?' in: S Jayakumar, T Koh and R Beckman (eds.), *The South China Sea Disputes and Law of the Sea* (Elgar, London, 2014) pp. 164–191 at p. 172.

was mentioned above, the *HYSY 981* incident took place beyond the territorial sea of the Paracel Islands. This makes the sovereignty dispute over the Paracel Islands irrelevant for deciding the legal issues involved in the *HYSY 981* incident from the Vietnamese perspective. It might thus seem that Vietnam let itself be dragged into a legal battle over matters that it would not have liked to set at centre stage itself. It is likely that Vietnam had little choice in this respect, as China justified its activities with reference to its sovereignty over the Paracel Islands from the outset.[9] It is interesting that Vietnam initially also argued that 'the Chinese actions gravely infringe[d] upon Viet Nam's sovereignty, sovereign rights and jurisdiction over the [Paracel] archipelago'.[10] In documents that were communicated to the UN subsequently, Vietnam decoupled the Chinese actions and the question of sovereignty over the Paracels.[11] These documents consistently observe that the incident took place well inside Vietnam's exclusive economic zone and continental shelf, but at no time referred to the fact that they took place in the vicinity of the Paracel Islands.

Prior to reviewing the legal arguments advanced by China and Vietnam in relation to the *HYSY 981* incident, a brief review of the relevant rules of the LOSC is appropriate. The *HYSY 981* operated at two locations. These two locations are not only within the maritime entitlements of the Paracel Islands, but also within 200 nautical miles of undisputed territory of China and Vietnam. This implies that, independently of how the sovereignty dispute will be resolved, this area is subject to overlapping maritime entitlements. Articles 74 and 83

9 See *e.g.*, the report *China Urges against Vietnamese Interference in Territorial Water Exploration* at Xinhuanet, quoting Chinese Foreign Ministry spokesperson Hua Chunying as stating that 'the Xisha [Paracel] Islands are part of China's inherent territory and the activities of the Chinese companies in the Xisha Islands are within the mandate of China's sovereignty and administration', available at http://news.xinhuanet.com/english/china/2014-05/07/c_133317025.htm. A similar view is expressed in *Letter dated 7 May 2014 from the Permanent Representative of Viet Nam to the United Nations addressed to the Secretary-General* (UN Doc. A/68/870 of 9 May 2014), Annex, para. 3.

10 UN Doc. A/68/870, (n 9) at Annex, para. 5.

11 See Letter dated 28 May 2014 from the Chargé d'affaires a.i. of the Permanent Mission of Viet Nam to the United Nations addressed to the Secretary-General (UN Doc. A/68/897 of 30 May 2014), Annex, para. 2. Subsequently. Vietnam twice presented two documents simultaneously, with one document addressing the incident and the other the sovereignty issue (UN Doc. A/68/942 (n 7); UN Doc. A/68/943 (n 4); Letter dated 22 August 2014 from the Permanent Representative of Viet Nam to the United Nations addressed to the Secretary-General (UN Doc. A/68/980 of 27 August 2014) and UN Doc. A/68/981 (n 7). For a statement clearly distinguishing the two issues see e.g. UN Doc. A/68/943 (n 4) at Annex, section 1.

of the LOSC are concerned with the delimitation of the exclusive economic zone and continental shelf. Common paragraph 3 of these Articles provides that in the absence of agreement on a boundary, 'the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.' Paragraph 3 constitutes the main yardstick for determining the legality of actions of claimant States in areas of overlapping entitlements.[12] The positions of China and Vietnam leave no doubt that they both claim this area. It is interesting that any direct reference to Articles 74(3) and 83(3) is conspicuously absent from the public statements of both States on the legal aspects of the dispute.[13]

China initially did not refer to the exclusive economic zone and continental shelf to pinpoint the location of the incident. For instance, a statement of a spokesperson of the Ministry of Foreign Affairs refers to 'waters off China's Xisha Islands'.[14] Similarly, a position paper of May 2014 refers to 'waters close to China's Xisha Islands'.[15] In addition, the paper makes reference to the fact that the *HYSY 981* was operating 17 nautical miles from Triton Island in the Paracel

12 For a discussion of Articles 74(3) and 83(3) see *e.g.* D Anderson and Y van Logchem, 'Rights and obligations in areas of overlapping maritime claims' in Jayakumar et al. (eds) (n 8) at pp. 192–228. It might be pointed out that this assessment could be varied due to China's reliance on the 9-dash line and a historic rights claim. However, as the analysis below indicates, China has based its legal arguments in relation to the *HYSY 981* incident on the LOSC and other rules of international law without making any reference to the 9-dash line, which may be seen as an acknowledgement that the 9-dash line is not relevant to assessing rights over oil and gas activities on the continental shelf.

13 Arguably, some statements by Vietnam could be said to rely implicitly on this provision (see *e.g.*, UN Doc. A/.68/870 (n 9) at Annex, para. 6; UN Doc. A/68/897 (n 11) at Annex, para. 1. The latter document proposes that '[o]nce China pulls out its oil rig, the two sides shall immediately exchange views on measures to contain and stabilize the situation and on maritime issues between the two countries'.

14 *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 6 May 2014*, available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1153131.shtml); see also the statement by Yi Xianliang, the Deputy Director-General of the Department of Boundary and Ocean Affairs of the Foreign Ministry of China, reported in 'Company's drilling activities are within Chinese waters: official' (*Xinhuanet* 11 May 2014; available at http://news.xinhuanet.com/english/china/2014-05/11/c_133325741.htm).

15 UN Doc. A/68/887 (n 5) at Annex, para. 1. A Vietnamese source mentions that during meetings China twice mentioned that the area concerned was located in the contiguous zone and territorial waters of the Paracel Islands (UN Doc. A/68/870, (n 9) at Annex, para. 2).

Group and 150 nautical miles from the coast of Vietnam.[16] This assertion obviously ignores that a sovereignty dispute exists over the Paracel Islands and moreover suggests that distance from these coasts is determinative of the matter of which State would have control over the activities concerned. The latter position is problematical in the light of the law applicable to areas of overlapping claims as expressed in Articles 74(3) and 83(3) of the LOSC. Furthermore, it is debatable whether the area would be attributed to China if the sovereignty dispute were to be resolved in favour of China and maritime boundaries would be established in accordance with the applicable law.[17]

In a subsequent position paper, China explicitly refers to the continental shelf and exclusive economic zone, although the paper first mentions that the operations are taking place in the contiguous zone of the Paracel Islands.[18] The contiguous zone does not give the coastal State jurisdiction over oil and gas activities, but the argument may have been intended to press home the point that closeness to the Paracel Islands should settle the legal case.[19] However, the paper subsequently refers to the fact that China and Vietnam have not agreed on the delimitation of their continental shelf and exclusive economic zone, thus recognizing that these zones overlap at the locations of the incident. However, the paper concludes on this point that the waters concerned 'will never become the exclusive economic zone and continental shelf of Vietnam, no matter which principle is applied in the delimitation process'.[20] As was mentioned above, the latter point is debatable, and in any case, the fact that an area eventually will be attributed to one of the parties in a delimitation agreement does not make Articles 74(3) and 83(3) of the LOSC, which are applicable to areas of overlapping claims, inoperative.

Vietnam, in referring to the location of the rig, from the outset took the position that it was located 'entirely within the exclusive economic zone and continental shelf of Viet Nam'.[21] Vietnam, like China, took the position that 'whatever the principle applied for the purpose of boundary demarcation, the area where the Chinese oil rig operated could never be within the exclusive

16 UN Doc. A/68/887 (n 5) at Annex, para. 2.

17 See *e.g.* Oude Elferink (n 8) at pp. 188–189.

18 UN Doc. A/68/907 (n 5) at Annex, section I.

19 The reference to the contiguous zone is followed by a reference to the distance to the Paracel Islands and Vietnam's mainland coast (*ibid.*).

20 *Ibid.*, section III. This argument was repeated in UN Doc. A/69/645 (n 8) at Annex, section 1.

21 UN Doc. A/68/870 (n 9) at Annex, para. 2. See also *e.g.* UN Doc. A/68/980 (n 11) at Annex, para. 1.

economic zone or on the continental shelf of China'.[22] This statement merits the same *caveats* as set out above in relation to China's position on this point.

The exchanges between China and Vietnam on the *HYSY 981* incident also involved one other argument on maritime zone entitlements. In reaction to a Chinese reference to its baselines around the Paracel Islands,[23] Vietnam observed that those baselines were not in accordance with the LOSC and had been protested by Vietnam and other states.[24] In response, China argued the legality of its baselines.[25] It is interesting that China's focus is entirely on the procedural aspects of the determination of these baselines (*i.e.* the due publicity and deposit requirements contained in the LOSC), although the protests against these baselines concerned their concordance with the substantive provisions (*i.e.* the rules for determining along which coasts specific types of straight baselines may be drawn) of the LOSC. The Chinese position in the latter respect is problematical and it would be difficult to offer a credible defense. China's baselines around the Paracel Islands do not meet the requirement of a coastline that is 'deeply indented and cut into', or a coastline that has a fringe of islands in its immediate vicinity.[26] The Chinese baselines along the Paracel Islands might meet the numerical requirements contained in Article 47 of the LOSC, but that provision is inapplicable because China does not meet the criteria of an archipelagic State.[27]

Apart from the location of the drilling operations, China also justified the activities of the *HYSY 981* by pointing out that this concerned 'a continuation of the routine process of explorations', which had included 'seismic surveys and well site surveys, for the past 10 years'.[28] It is interesting that this argument reveals a certain tension with China's argument that the operations were taking place in undisputed Chinese waters. The reference to ongoing operations, with the implicit suggestion that there had never been a Vietnamese protest, rather gives the impression of reliance on Articles 74(3) and 83(3) of the LOSC, which allow certain unilateral activities to take place in a disputed maritime area as long as they are not perceived as jeopardizing or hampering the conclusion of

22 UN Doc. A/68/980 (n 11) at Annex, para. 1.

23 See *e.g.* Letter dated 24 July 2014 from the Permanent Representative of China to the United Nations addressed to the Secretary-General (UN Doc. A/68/956 of 28 July 2014), Annex, para. 7.

24 UN Doc. A/68/980 (n 11) at para. 2.

25 UN Doc. A/69/645 (n 8) at Annex, section 2.

26 LOSC Article 7(1).

27 See the definition contained in LOSC Article 46.

28 See UN Doc. A/68/907 (n 5) at Annex, section 1; see also *e.g.* UN Doc. A/68/887 (n 5) at Annex, para. 2.

a final delimitation agreement.[29] In response to China's reference to the ongoing nature of the activities, Vietnam pointed out that it had sent law enforcement vessels to give warning of the illegal nature of earlier Chinese activities and that it had also repeatedly protested them through diplomatic channels and public statements.[30] From the perspective of Articles 74(3) and 83(3), two observations are called for. First, the fact that a unilateral activity is a continuation of earlier unilateral activities does not make it in accordance with these provisions *per se*. Both the nature of the activity and the position of the other State concerned would have to be taken into account in this connection. As *Guyana* v. *Suriname* indicates, even non-intrusive activities, like seismic surveys, may, in the circumstances of the specific case, fail to meet the requirement of not jeopardizing or hampering the conclusion of a final agreement.[31]

China and Vietnam also fundamentally disagreed about the actions both states took to, respectively, allow and prevent the activities of the *HYSY 981*. According to China:

> Shortly after the Chinese operation started, Viet Nam sent a large number of vessels, including armed vessels, to the site, illegally and forcefully disrupting the Chinese operation and ramming the Chinese Government vessels on escort and security missions there. In the meantime, Viet Nam also sent frogmen and other underwater agents to the area, and dropped large numbers of obstacles, including fishing nets and floating objects, into the waters. As of 5 p.m. on 7 June, the number of Vietnamese vessels in the area had peaked at 63, attempting to break through China's cordon and ramming the Chinese Government ships a total of 1,416 times.[32]

China characterized Vietnam's conduct as 'harassment',[33] 'violent disruption of the normal operation of the Chinese company',[34] and 'illegal and forcible

29 The leading case that has further clarified this provision is *In the Matter of an Arbitration between Guyana and Suriname* (*Guyana* v. *Suriname*), award of 17 September 2007, paras. 465–470, 479–484. In addition, the Chinese argument may also have been intended to signal that Vietnam, due to its earlier silence, was now estopped from protesting these follow-up operations. The Vietnamese reaction to the Chinese argument (see text after this footnote) makes reliance on estoppel problematic.

30 See UN Doc. A/68/943 (n 4) at Annex, section 1.

31 Award of 17 September 2007 (n 29) at para. 481.

32 UN Doc. A/68/907, (n 5) at Annex, section II.

33 Company's drilling activities, (n 14).

34 UN Doc. A/68/887 (n 5) at Annex, paras 2 and 3.

disruption of the drilling activities of China'.[35] China argued that the Vietnamese actions 'seriously infringed upon the legitimate and lawful rights of the Chinese side' and 'China's sovereignty, sovereign rights and jurisdiction'.[36] The actions moreover posed a risk to the safety and freedom of navigation and the safety of the *HYSY 981* and its personnel.[37] China furthermore emphasized that the Vietnamese actions left it no choice other than to take necessary actions in response, but that in doing so it had exercised great restraint.[38] China also repeatedly requested Vietnam to withdraw its personnel and vessels from the area.[39] Apart from referring to the infraction of China's sovereignty, sovereign rights and jurisdiction, China also considered that the Vietnamese actions constituted a violation of the UN Charter, the LOSC and the 1988 SUA Convention and 1988 SUA Protocol.[40] Apart from invoking these legal instruments against Vietnam, China also underscored its own adherence to the relevant principles of international law and its commitment to 'peace and stability in the South China Sea,' indicating that '[t]he least China wants is any turbulence in its neighbourhood'.[41] Vietnam's actions, on the other hand, were considered as having damaged peace and stability in the region.[42]

The Vietnamese arguments to a large extent are a mirror image of those of China. Vietnam repeatedly submitted that the illegal deployment of the *HYSY 981* in Vietnam's exclusive economic zone and continental shelf seriously infringed upon Vietnam's rights as defined in the LOSC.[43] Vietnam moreover indicated its willingness to commence a dialogue with China on pending maritime issues, but made this conditional on the withdrawal of

35 UN Doc. A/68/956 (n 23) at Annex, para. 7; see also UN Doc. A/69/645, (n 8) at Annex, section 1.

36 UN Doc. A/69/645 (n 8) at Annex, section 1; UN Doc. A/68/887 (n 5) at Annex, para. 3; see also UN Doc. A/68/907 (n 5) at Annex, section II.

37 See *e.g.* UN Doc. A/68/887, (n 5) at, Annex, para. 3; See UN Doc. A/68/907, (n 5) at Annex, section II.

38 UN Doc. A/68/887, *ibid.*; See UN Doc. A/68/907 (n 5) at Annex, section III.

39 See *e.g.* Company's drilling activities (n 14); UN Doc. A/68/887, (n 5) at Annex, para. 3.

40 See UN Doc. A/68/907 (n 5) at Annex, section II. In a subsequent position paper China referred more generally to Vietnam violating 'international law and basic norms governing international relations' (UN Doc. A/69/645 (n 8) at Annex, para. 1).

41 See UN Doc. A/68/907 (n 5) at Annex, section V.

42 *Ibid.*, section II.

43 See UN Doc. A/68/870 (n 9) at Annex, para. 2; Letter dated 6 June 2014 from the Permanent Representative of Viet Nam to the United Nations addressed to the Secretary-General (UN Doc. A/68/906 of 9 June 2014), Annex, para. 1.

the rig.[44] Vietnam did not respond to China's allegations that Vietnam's actions had endangered the safety of navigation and that of the rig and its personnel, but instead focused on Chinese actions directed against Vietnamese vessels.[45] In addition, Vietnam referred to specific incidents involving the ramming and sinking of a Vietnamese fishing vessel and the ramming and breaking of a Vietnamese coastguard vessel.[46] Vietnam characterized one of these actions as a violation of the prohibition against the threat or use of force enshrined in the UN Charter and 'inhumane conduct against fellow seafarers'.[47] Similarly to China, Vietnam maintained that the 'actions by China have aggravated tensions in the [South China] Sea and seriously threatened peace, stability, freedom of navigation and maritime security and safety in the region'.[48] Finally, Vietnam submitted that the Chinese actions went against the spirit and letter of the South China Sea Declaration of the Conduct (DOC),[49] and relevant rules of international law, including bilateral agreements and the LOSC, and had affected the political trust between the two countries.[50]

Providing an assessment of the legality of the actions of China and Vietnam to, respectively, protect and prevent the operation of *HYSY 981* is beyond the scope of the present article. However, it would seem that the actions of both States *prima facie* may not have been in full compliance with Articles 74(3) and 83(3) of the LOSC. The underlying assumption of these Articles is the exercise of restraint by States having overlapping claims to the continental shelf or exclusive economic zone.[51] A similar requirement of restraint is contained in paragraph 5 of the DOC. This preliminary assessment would certainly seem to be to the point if the stringent requirements on permissible actions formulated

44 See *e.g.* UN Doc. A/68/870 (n 9) at Annex, para. 6; UN Doc. A/68/897 (n 11) at Annex, para. 1.

45 See *e.g.* UN Doc. A/68/906 (n 43) at Annex, para. 2; Annex, para. 2; UN Doc. A/68/943 (n 4) at Annex, section 1.

46 UN Doc. A/68/906 (n 43) at Annex, para. 2; Annex, para. 2; UN Doc. A/68/943 (n 4) at Annex, section 1.

47 UN Doc. A/68/943, *ibid.*

48 UN Doc. A/68/906 (n 43) at Annex, para. 2.

49 Declaration on the Conduct of Parties in the South China Sea; adopted on 4 November 2002; available at < http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>.

50 UN Doc. A/68/870 (n 9) at Annex, para. 5; UN Doc. A/68/906 (n 43) at Annex, para. 1.

51 See the discussion in Anderson and Van Logchem (n 12) at pp. 207–208.

in *Guyana* v. *Suriname* were to be applied.[52] However, it should be noted that the Tribunal's approach in that case has not been free from criticism.[53]

It may be noted that the *HYSY 981* returned to the South China Sea in 2015. The rig this time was deployed at the location 17° 03' 75' N and 109° 59' 05' E.[54] This location is some 69 nautical miles from Hainan, some 87 nautical miles from North Reef in the Paracel Islands and some 106 nautical miles from the Vietnamese island of Cu Lao Cham. This implies that the rig was to the north of an equidistance line between Vietnam and Hainan, placing the rig in undisputed Chinese waters.[55] The choice to deploy the rig at this location may be explained by commercial interests. However, it should be acknowledged that the choice for this location might in addition also be explained by two interlocking aims. China may have wanted to emphasize that it had not withdrawn the rig from the South China Sea in 2014 because of Vietnam's reaction to its

52 Award of 17 September 2007 (n 29) at 479–484. At these paragraphs the Award indicates that unilateral drilling is not in accordance with the duty of restraint contained in Articles 74(3) and 83(3) and that this may be the case for, first, seismic surveys, depending on the circumstances of the case, and, second, an authorization by a State to drill in a disputed area. In paragraphs 483 and 484 the Award fails to list the option of law enforcement among the possible responses to drilling that has been unilaterally authorized by the other party.

53 Anderson and Van Logchem (n 12) at pp. 219–220 and the literature included in *ibid*., at nn 123 and 124; see also D Bethlehem, 'The Secret Life of International Law' (2012) 1(1) *Cambridge Journal of International and Comparative Law*, pp. 23–36 at pp. 31–32. For an excellent discussion of this aspect of the award in the broader context of law enforcement and the use of force, see P Jimenez Kwast, 'Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award' (2008) 13 *Journal of Conflict & Security Law* pp. 49–91 at pp. 72–83. Jimenez Kwast submits that 'especially compared to the other (arguably more 'forcible') cases considered above, the actual measures taken [by Suriname] do not appear to be essentially different from standard law enforcement operations against foreign vessels', but she argues that the functional character of the actions should also be considered and in that light observes that the Tribunal had reasonable grounds to conclude that the actions of Suriname constituted the threat of the use of force as prohibited by the UN Charter, but then continues '[n]evertheless, the circumstances of the case leave room for doubt' (*ibid*., p. 82).

54 See A Panda, 'China's HD-981 Oil Rig Returns, Near Disputed South China Sea Waters' *The Diplomat*, 27 June 2015, available at http://thediplomat.com/2015/06/chinas-hd-981-oil-rig-returns-to-disputed-south-china-sea-waters/.

55 Vietnam has placed the northern endpoint of the outer limits of its continental shelf on this equidistance line (see Oude Elferink (n 8) at p. 172).

deployment. At the same time, the selected location strongly suggests that China wanted to avoid a further incident with Vietnam.

The *HYSY 981* incident bears witness to the significance States attach to justifying their actions and criticizing the actions of the other State concerned in terms of international law. Both China and Vietnam refer to the rules of entitlement to maritime zones and their delimitation to justify their position that the rig was operating in their undisputed maritime zones. Second, both States rely on legal argument to condemn the actions of the other State in the area in which the rig was operating. At the same time, the fact that both States used the law to justify opposite conclusions on both points suggests that international does not have an impact on State behaviour. However, it should be realized that reliance on legal arguments by a State to justify its actions in public does not necessarily imply that internal deliberations in that State have previously conclusively determined that those arguments are legally sound.[56] For example, neither China nor Vietnam referred to Articles 74(3) and 83(3) of the LOSC, which require States to exercise restraint in disputed maritime areas. Instead, both parties took the position that the rig was located in their uncontested waters. However, it seems unlikely that either party was unaware of the implications of these provisions. For China, reliance on these Articles would have been problematic, because the unilateral deployment of a rig in a disputed area is not in accordance with the applicable law. For Vietnam the absence of reliance on these provisions is more difficult to fathom in view of China's non-compliance with them. However, Articles 74(3) and 83(3) also may be perceived to place limitations on the actions a State has at its disposal in reacting to its prior breach by another State.[57]

The arguments of Vietnam and China in relation to China's baselines along the Paracel Islands highlight another interesting point. Whereas Vietnam referred to non-compliance with substantive rules of law, China did not engage with that argument, but instead pointed to its compliance with procedural

56 For examples in this respect see AG Oude Elferink, *The Delimitation of the Continental Shelf between Denmark, Germany and the Netherlands in the North Sea; Arguing Law, Practicing Politics?* (Cambridge University Press, Cambridge, 2103). For instance, Denmark argued that the German island of Sylt constituted a relevant circumstance, but this argument internally was qualified as a red herring (*ibid*., pp. 393 and 448). In its negotiations with Germany, Denmark forcefully argued the applicability of the equidistance method to establish their bilateral boundary, but Sørensen, the legal advisor of the Danish Foreign Ministry, in an internal document submitted that the outcome of a decision of the International Court of Justice (ICJ) on this matter would be completely unpredictable (*ibid*., p. 162).

57 See *e.g. Guyana* v. *Suriname* award (n 29) at para. 446.

requirements. This reference to compliance with procedure suggests legality, while avoiding the need to become specific on the underlying issues of substance. Finally, the incident illustrates that a specific legal argument is presented in the context of broader principles, like regional stability.

The *USS Lassen* Incident

On 27 October 2015, the *USS Lassen*, a guided missile destroyer of the US Navy, navigated within 12 nautical miles of Subi Reef. This navigation was carried out in the framework of the Freedom of Navigation Program (FONOP) of the US Department of Defense and State Department. The FONOP has been in operation since 1979 and is intended to 'demonstrate a non-acquiescence to excessive maritime claims asserted by coastal states'.[58] The program includes operational activities by US military forces.[59] Subi Reef is occupied by China and the navigation of the *USS Lassen* within 12 nautical miles led to a strong reaction from China.[60]

Subi Reef is a low-tide elevation[61] and one of the features in the South China Sea on which China has carried out land reclamation and built infrastructure from December 2013 until 2015. Under the LOSC and customary international law, a low-tide elevation may contribute to the baseline for measuring the breadth of the territorial sea if it is wholly or partly within the territorial sea of an island or the mainland.[62] Determining whether China would be entitled

58 *U.S. Department of Defense Freedom of Navigation Program; Fact Sheet* (March 2015; available at http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20(March%202015).pdf), p. 1. For a detailed discussion of the FONOP see A Etzioni, 'Freedom of Navigation Assertions: The United States as the World's Policeman'; available at https://icps.gwu.edu/sites/icps.gwu.edu/files/downloads/Etzioni_Freedom%20of%20Navigation%20AFS.pdf.

59 Fact sheet (n 58) at p. 1.

60 The current section largely focusses on the arguments of China and the United States concerning the passage of the *USS Lassen* within 12 nautical miles of Subi Reef and does not discuss its broader setting in detail. For a discussion of the latter point see *e.g.* JG Odom, 'Why US FON Operations in the South China Sea Make Sense; The U.S. Navy's Freedom of Navigation Program is an important expression of international law,' *The Diplomat*, 31 October 2015; available at http://thediplomat.com/2015/10/why-us-fon-operations-in-the-south-china-sea-make-sense/.

61 See *e.g.* UK Admiralty chart 1201 Reefs in the China Sea (last corrected 1996).

62 LOSC Article 13. Artificial islands on a low-tide elevation do not change its status (see *ibid.*, Article 60(8).

to use Subi Reef as part of its baselines is complicated by the sovereignty dispute over the Spratly Islands. Subi Reef is within 12 nautical miles of the low-water line along Thitu Reefs, on which Thitu Island and Sandy Cay are located. Thitu Island is occupied by the Philippines and Sandy Cay reportedly is not occupied.[63] However, in view of the fact that China claims sovereignty over all of the Spratly Islands and has a 12-nautical-mile territorial sea, from the Chinese perspective, the *USS Lassen* passed through China's territorial sea. Unofficial reports issued shortly after the incident indicated that the *USS Lassen* was exercising the right of innocent passage in transiting the 12-nautical-mile zone of Subi Reef.[64] The official US position subsequently transpired to be more nuanced, but confirmed that the passage was carried out in accordance with the regime of innocent passage. No prior notification of the passage was given to China.[65] The US and China differ over at least one important aspect of the regime of innocent passage. Whereas China maintains that foreign warships are only entitled to enter China's territorial sea with prior permission,[66] the US takes the position that neither prior notification nor permission is required.[67]

63 A Panda, 'Setting the Record Straight on US Freedom of Navigation Operations in the South China Sea' *The Diplomat*, 11 November 2015, available at http://thediplomat.com/2015/11/setting-the-record-straight-on-us-freedom-of-navigation-operations-in-the-south-china-sea/.

64 See *ibid*.

65 See Letter of the Secretary of Defense to the Chairman of the US Senate Committee on Armed Services of 21 December 2015, available at http://news.usni.org/wp-content/uploads/2016/01/Sen.-McCain-FONOP-Letter-Response.pdf#viewer.action=download. The letter states that the passage 'involved a continuous and expeditious transit that is consistent both with the right of innocent passage [...] and the freedom of navigation'. The letter further explains that it is believed that Subi Reef was a low-tide elevation before it was turned into an artificial island and might be located in the territorial sea of an island that is entitled to a territorial sea, entitling the reef to a territorial sea. The letter observes that '[g]iven the factual uncertainty, we conducted the FONOP in a manner that is lawful under all possible scenarios' (*ibid.*).

66 See Law on the Territorial Sea and the Contiguous Zone of 25 February 1992, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf, Article 6.

67 See Joint Statement by the United States and Soviet Union, with Uniform Interpretation of the Rules of International Law governing Innocent Passage adopted on 23 September 1989, available at http://cil.nus.edu.sg/rp/il/pdf/1989%20USA-USSR%20Joint%20Statement%20on%20the%20Uniform%20Interpretation%20of%20Rules%20of%20International%20Law-pdf.pdf; Letter of the Secretary of Defense (n 65).

Whether warships enjoy the right of innocent passage without prior permission or notification is contentious.[68] As Noyes and Tanaka point out, whereas the LOSC does not make a distinction between warships and other ships and the LOSC regime also contains other indications that it is equally applicable to warships,[69] a significant minority of States challenges this interpretation. According to Noyes more than 40 States have made the passage of warships conditional on prior notification or permission.[70]

A detailed statement on the US views on the South China Sea, including the issue of navigational freedoms, was provided by US Assistant Secretary of State Russel in testimony before the House Committee on Foreign Affairs Subcommittee on Asia and the Pacific in February 2014, just after China had started its land reclamation activities in the South China Sea in December 2013.[71] The Assistant Secretary emphasized the long-term US policy goal of defending the freedom of the seas and that it is in the US interest to maintain peace and stability, uphold respect for international law and allow lawful commerce and freedom of navigation and overflight in the South China Sea, which is a 'vital thoroughfare [...] for global commerce and energy'. Russel also made clear that the US did not want to take sides in the sovereignty disputes in the South China Sea. However, he also emphasized two points. First, territorial claims should not be asserted by 'the use of intimidation, coercion or force'. Second, maritime claims of the claimant States should be in accordance with customary international law. The Assistant Secretary indicated that this implied that claims 'must be derived from land features and otherwise comport with the international law of the sea.' Russel also specifically addressed the status of China's 9-dash line,[72] observing, *inter alia*, that:

> Any use of the 'nine dash line' by China to claim maritime rights not based on claimed land features would be inconsistent with international

68 See *e.g.* John E Noyes, 'The Territorial Sea and Contiguous Zone' in DR Rothwell, AG Oude Elferink, T Stephens and KN Scott (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015); pp. 91–113 at p. 98; Y Tanaka, 'Navigational Rights and Freedoms' in *ibid.*, pp. 536–558 at p. 545.

69 See *ibid.*, pp. 98–99, 545–547.

70 *Ibid.*, p. 99.

71 Daniel R Russel, Testimony Before the House Committee on Foreign Affairs Subcommittee on Asia and the Pacific, Washington, DC, 5 February 2014, available at http://www.state.gov/p/eap/rls/rm/2014/02/221293.htm.

72 The term '9-dash line' refers to a line consisting of nine segments that have been included in maps originating from China. The 9-dash line includes most of the South China Sea. The status of this line remains unclear.

> law. The international community would welcome China to clarify or adjust its nine-dash line claim to bring it in accordance with the international law of the sea.[73]

Russel further added that the US would continue 'to oppose claims that impinge on the rights, freedoms, and lawful uses of the sea that belong to all nations. [...] [F]reedom of navigation is reflected in international law, not something to be granted by big states to others'.[74]

In a speech on 30 May 2015, US Secretary of Defense Carter discussed the US interest in protecting navigational freedoms in the context of China's land reclamation activities in the South China Sea. Carter acknowledged that all disputants in the past had engaged in such activities, but observed that China had 'gone much further and much faster than any other. [...] China has reclaimed over 2,000 acres, more than all other claimants combined [...] and more than in the entire history of the region. And China did so in only the last 18 months'.[75] According to Carter, the US, being a Pacific nation and a trading nation, had 'every right to be involved and concerned.'[76] Carter added that these concerns were not just those of the US. Carter set out the US position as consisting of two aspects. First, the US wanted a lasting solution to the disputes that would protect the interests of all involved parties. The US supported 'the right of claimants to pursue international legal arbitration and other peaceful means to resolve these disputes',[77] an indirect reference to the arbitration initiated by the Philippines against China, which has been vociferously opposed by the latter. Second, the US would continue to defend the freedoms of navigation and overflight and 'will fly, sail, and operate wherever international law allows'.[78] These freedoms were essential for the prosperity and security of South East Asia and this concerned rights belonging to all nations.[79] Finally, Carter submitted that 'China is out of step with both the international rules and norms that underscore the Asia-Pacific's security architecture, and the regional consensus that favors diplomacy and opposes coercion.'[80]

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73 Russel (n 71).

74 *Ibid.*

75 A. Carter, 'A Regional Security Architecture Where Everyone Rises', speech delivered 30 May 20115, available at http://www.defense.gov/News/Speeches/Speech-View/Article/606676/iiss-shangri-la-d.

76 *Ibid.*

77 *Ibid.*

78 *Ibid.*

79 *Ibid.*

80 *Ibid.*

Notwithstanding the assertions of Assistant Secretary Russel and Secretary Carter that the US would not hesitate to continue to defend navigational rights in the South China Sea, a specific publicized exercise of those rights was a long time in the making.[81] When the commander of the US forces in the Pacific did suggest in September 2015 that the US should exercise its rights in the vicinity of China's newly built artificial islands, this led to an immediate reaction of the Chinese Ministry of Foreign Affairs. As a spokesperson of the Ministry noted, China, like the US, had a strong interest in the freedom of navigation.[82] However, reliance on the freedom of navigation should not be used as a pretext to challenge China's territorial sovereignty over the Spratly Islands and adjacent waters and China's security.[83] This reference to 'adjacent waters' is ambiguous as to which maritime zones are concerned. On the other hand, a subsequent statement by a Foreign Ministry spokesperson explicitly observed that 'maintaining the freedom of navigation and overflight' should not be used as a pretext to infringe China's territorial sea and airspace.[84]

Developments in the South China Sea also figured prominently during the meeting between Presidents Obama and Xi at the end of September 2015. President Obama confirmed that the US would 'continue to sail, fly and operate anywhere that international law allows'.[85] President Xi submitted that China had the right to uphold its 'territorial sovereignty and lawful and legitimate maritime rights and interests'. China remained 'committed to maintaining peace and stability in the South China Sea' and to 'upholding the freedom

81 It has been reported that this was due to differences in the US administration on how to deal with China (see A Wright, B Bender and P Ewing, 'Obama team, military at odds over South China Sea' *Politico*, 31 July 2015; available at http://www.politico.com/story/2015/07/barack-obama-administration-navy-pentagon-odds-south-china-sea-120865; see also SP Henseler, 'Why We Need South China Sea Freedom of Navigation Patrols' *The Diplomat*, 6 October 2015; available at http://thediplomat.com/2015/10/why-we-need-south-china-sea-freedom-of-navigation-patrols/.

82 *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on 18 September 2015*, available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1298026.shtml.

83 *Ibid.*

84 *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 9 October 2015*, available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1304670.shtml.

85 Remarks by President Obama and President Xi of the People's Republic of China in Joint Press Conference (The White House, Office of the Press Secretary, 25 September 2015, available at https://www.whitehouse.gov/the-press-office/2015/09/25/remarks-president-obama-and-president-xi-peoples-republic-china-joint).

of navigation and overflight that countries enjoy according to international law'.[86] President Xi justified the land reclamation activities by pointing out that they were carried out on Chinese territory and were not directed against any country.[87]

As was set out above, the *USS Lassen*'s passage in the vicinity of the Subi Reef on 27 October 2015 was in accordance with both the regime of innocent passage and that of freedom of navigation,[88] implying that the passage also conformed to the more stringent requirements of the former regime. Navigation in accordance with the regime of innocent passage can be explained by the fact that the Subi Reef is, as discussed above, a low-tide elevation within 12 nautical miles of the low-water line along the islands of Thitu and Sandy Cay, which are both claimed by China. US Secretary of Defense Carter, without referring explicitly to the *Lassen* incident, just over a week after the *USS Lassen* passed in the vicinity of Subi Reef and China had issued sharp criticism, reaffirmed that the US would 'continue to fly, sail and operate wherever international law permits'.[89] Carter also observed that '[f]reedom of navigation and the free flow of commerce [...] were rules that worked for decades to promote peace and prosperity in [South East Asia]' and that the US did not take sides in the disputes in the South China Sea.[90] Similar statements are included in the Letter by Secretary Carter to Senator McCain of 21 December 2015.[91]

The passage of the *USS Lassen* immediately drew comments from the Chinese Ministries of Defense and Foreign Affairs. A spokesperson of the Ministry of Defense did not explicitly refer to the territorial sea, but used the terms 'offshore waters' and 'adjacent waters'.[92] The US action was characterized as 'an abuse [...] of freedoms of navigation provided for in international law', while declaring the passage of the *Lassen* 'a serious threat [...] to China's

86 *Ibid.*

87 *Ibid.*

88 See above text at (n 65); see also Panda (n 63); G Webster, 'How China Maintains Strategic Ambiguity in the South China Sea' *The Diplomat*, 29 October 2015, available at http://thediplomat.com/2015/10/how-china-maintains-strategic-ambiguity-in-the-south-china-sea/.

89 L Fernandino, 'Carter Reiterates Call for Peaceful Resolution in South China Sea', DoD News, Defense Media Activity, 4 November 2015, available at http://www.defense.gov/News-Article-View/Article/627673/carter-reiterates-call-for-p.

90 *Ibid.*

91 See Letter of the Secretary of Defense, (n 65).

92 'Defense Ministry's regular press conference on Oct.29 [2015]', available at http://eng.mod.gov.cn/TopNews/2015-10/29/content_4626892.htm; see also Webster (n 88) reporting on a statement of a Defense Ministry Spokesperson of 27 October 2015.

national security'.[93] The Chinese Ministry of Foreign Affairs issued a statement on the activities of the *Lassen* on 27 October 2015.[94] The statement refers to the illegal entry of the *Lassen* in waters near Subi Reef without the permission of the Chinese Government. The statement asserts that the passage of the *Lassen* 'put the personnel and facilities [in the area] at risk and endangered regional peace and stability', without providing any specifics.[95] It is interesting that a spokesperson of the Ministry of Defense who was asked about details on this latter point replied by repeating the general point.[96] Similarly, the spokesperson did not provide a specific answer to the question what particular actions made the passage of the *Lassen* illegal in view of the fact that international law accords the right of innocent passage through the territorial sea to all ships.[97]

The 27 October statement of the Ministry of Foreign Affairs reaffirmed that land reclamation and construction work were taking place in Chinese territory and were not directed at any country. The Chinese activities would 'not have any impact on the freedom of navigation and over-flight in the South China Sea to which all countries are entitled under international law'.[98] At the same time, the statement distinguished between commercial shipping and military navigation, asserting that China would stand firm against an infringement of its sovereignty and security interests under the cloak of an exercise of the freedom of navigation or overflight.[99] The assertion that the passage of the *USS Lassen* was illegal was further explained by a spokesperson of the Ministry of Foreign Affairs on the next day. In answer to a question, spokesperson Lu Kang explained that the *Lassen* had entered the waters off Subi Reef without authorization from the Chinese authorities.[100] The spokesperson further

93 *Ibid.*

94 As reported in *Foreign Ministry Spokesperson Lu Kang's Regular Press Conference on 27 October 2015*, available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1309625.shtml.

95 *Ibid.*

96 Defense Ministry's press conference (n 92). The reply did add that the US actions also threatened the 'safety of routine operation of Chinese fishery workers in the area', again without providing any details (*ibid.*).

97 *Ibid.*

98 As reported in Lu Kang Press Conference (n 94); see also Defense Ministry's press conference (n 92).

99 As reported in Lu Kang Press Conference, *ibid.*

100 *Foreign Ministry Spokesperson Lu Kang's Regular Press Conference on 28 October 2015*, available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1309900.shtml.

asserted that the passage violated the LOSC, other rules of international law and Chinese legislation.[101]

As the above reveals, the American and Chinese narratives of the *Lassen* incident and its context differ radically. Whereas the US presents itself as a guardian of the navigational freedoms of the international community that have brought prosperity to the region, China considers that the passage of the *Lassen* was in violation of international law and Chinese legislation and a threat to China's security. At face value, the law of the sea allows reliance on both these narratives. As the preamble of the LOSC states, it is intended to set up 'a legal order for the seas and oceans which will facilitate international communication' while having 'due regard for the sovereignty of all States'[102] and these considerations are reflected in the LOSC's careful balance between coastal State interests and those of international communication. However, the circumstances of the passage of the *Lassen* fit somewhat uneasily with the American narrative.[103] The *Lassen* passed through the 12-nautical-mile zone of Subi Reef in accordance with the regime of innocent passage as interpreted by the United States. This implies that the main legal issue relating to this passage concerned the requirement contained in Chinese legislation that warships have to obtain prior authorization for passage through China's territorial sea.[104] Chinese legislation does not apply this requirement to merchant shipping, making the argument that the *Lassen*'s passage was intended to protect the trade interests of the international community, instead of the strategic interest of the US, problematic.[105]

The circumstances of the passage of the *Lassen* made it easy for China to portray itself as a champion of the freedom of navigation and international

101 *Ibid.*

102 LOSC, 4th preambular paragraph.

103 It may be noted that US sources commenting on US strategic interests focus on the importance of maintaining navigational rights to allow the projection of US naval power on the oceans (see *e.g.* the references in Etzioni (n 58) at p. 10, who, *inter alia*, refers to a 2011 publication by Admiral MG Mullen, the then Chairman of the Joint Chiefs of Staff).

104 See also Letter of the Secretary of Defense (n 65); see also below for a further discussion of this point.

105 See also below text at (n 113) and following. It could be argued that any encroachment on a specific right of other States by a coastal State may eventually lead to an erosion of all navigational rights of other States. However, it is submitted that this is not a credible argument. Although the navigational rights of warships have been controversial throughout the development of the modern law of the sea and remain so to this day, there is no indication that this is having a significant impact on merchant shipping.

trade.[106] A large part of China's trade flows through the South China Sea and China's land reclamation and construction on Subi Reef and other features in the South China Sea do not obstruct trade routes and merchant shipping.[107] On the other hand, China's argument that the land reclamation and construction work take place in its own territory is far from convincing. Although China is in control of the areas concerned, its actions are difficult to square with the DOC, which specifically calls on the parties 'to undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.'[108]

A number of commentators on the *Lassen* incident have argued that China in its criticism of the US actions has remained ambiguous about its position. For instance, Odom observes that even after the passage of the *Lassen*, 'China remained ambiguous in the specific nature of the geographic features within the Spratlys and maritime zones around those features that it is claiming'.[109] In a similar vein, Webster submits that '[by avoiding the term 'territorial sea' and any explicit statement about the basis for calling the U.S. action illegal, officials for the most part maintained China's carefully cultivated ambiguity about the nature of Chinese claims in the South China Sea'.[110] However, although the Chinese sources discussed above do not refer explicitly to the territorial sea, the statement of spokesperson Lu Kang of the Chinese Ministry of Foreign Affairs of 28 October 2015, which clarified the Ministry's position of the previous day, leaves virtually no doubt that China has taken the position that the *Lassen*'s passage within 12 nautical miles of Subi Reef was not in accordance with Chinese legislation on the territorial sea. Lu Kang referred

106 For a different assessment in this respect, see J Ku, 'China's Weak Legal Basis for Criticizing the US Navy's Freedom of Navigation Operations in the South China Sea' *Opinio Juris* 27 October 2015, available at http://opiniojuris.org/2015/10/27/chinas-weak-legal-basis-for-criticizing-the-us-navys-freedom-of-navigation-operations-in-the-south-china-sea/.

107 The land reclamation and building activities have been carried out on existing reefs, which implies that they were not located in international shipping routes. The land reclamation activities may have had some impact on the location of the baseline in certain instances, but in view of the extent of these activities this does not concern any significant changes.

108 DOC (n 49) at para. 5.

109 JG Odom, 'Why US FON Operations in the South China Sea Make Sense' *The Diplomat*, 31 October 2015, available at http://thediplomat.com/2015/10/why-us-fon-operations-in-the-south-china-sea-make-sense/.

110 Webster (n 88).

to an unauthorized passage. Chinese legislation requires prior permission for passage of foreign warships through the territorial sea.[111] No such requirement is contained in China's Exclusive Economic Zone and Continental Shelf Act.[112] The criticism that China has remained ambiguous on the status of different features in the South China Sea is not exactly to the point. The *USS Lassen* was passing in accordance with the right of innocent passage. In other words, although this passage challenged China's requirement of prior authorization for passage through its territorial sea, it cannot in itself be construed as a direct challenge to the baselines from which China's territorial sea is measured. In that light there would seem to be no reason for China to elaborate on the status of the features generating these uncontested baselines.

On 30 January 2016, the US carried out a further operation under the FONOP, which this time concerned the passage of the *USS Curtis Wilbur* through the territorial sea of Triton Island in the Paracel Islands in accordance with the regime of innocent passage. The passage was intended to challenge the notification and authorization requirements of the three claimants, *i.e.* China, the Republic of China and Vietnam. No prior notification of the intended passage was given to any of the claimants.[113] It is interesting that the way this incident played out differs in a number of respects from that involving the passage of the *USS Lassen*. In the latter case, uncertainty about the US position initially existed, which was only clarified after some two months when US Secretary of Defense Carter provided information in a letter to Senator McCain.[114] In the case of the passage of *USS Curtis Wilbur*, the Office of the Secretary of Defense almost immediately issued a statement. Second, the statement did not make

111 Law on the Territorial Sea and the Contiguous Zone (n 66) at Article 6.

112 This Act explicitly provides that: 'Any State, provided that it observes international law and the laws and regulations of the People's Republic of China, shall enjoy in the exclusive economic zone and the continental shelf of the People's Republic of China freedom of navigation and overflight and of laying submarine cables and pipelines, and shall enjoy other legal and practical marine benefits associated with these freedoms. The *laying of submarine cables and pipelines must be authorized* by the competent authorities of the People's Republic of China' (emphasis provided) (Exclusive Economic Zone and Continental Shelf Act of 26 June 1998, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf, Article 11.

113 See *Statement from the Office of the Secretary of Defense* of 30 January 2016 (reproduced at *e.g.* S LaGrone, 'U.S. Destroyer Challenges More Chinese South China Sea Claims in New Freedom of Navigation Operation' *USNI News*, 30 January 2016, available at http://news.usni.org/2016/01/30/u-s-destroyer-challenges-more-chinese-south-china-sea-claims-in-new-freedom-of-navigation-operation.

114 Letter of the Secretary of Defense (n 65).

any explicit reference to commercial interests. The reaction of the Chinese Ministry of Foreign Affairs also differed to some extent.[115] First, this time explicit reference was made to Chinese territorial waters.[116] The US was again accused of abusing navigational rights and disregarding the security concerns and sovereignty of coastal States, but this time any reference to the fact the passage put Chinese personnel or facilities at risk was missing.[117]

The *Philippines* v. *China* Arbitration

On 22 January 2013 the Philippines initiated an arbitration against China under the LOSC. The Philippines, *inter alia*, sought a determination that China's 9-dash line was not in accordance with the LOSC, that certain features in the Spratly Islands and on Scarborough Reef where either rocks in the sense of Article 121(3) of the LOSC or low-tide elevations and a determination that effectively would imply a recognition that certain parts of the South China Sea form part of the continental shelf and exclusive economic zone of the Philippines.[118] Upon the notification of this step, the Chinese ambassador in the Philippines stated that China considered that the disputes concerning the South China Sea 'should be settled by the parties concerned through negotiations'.[119] Notwithstanding the Chinese refusal to participate in the proceed-

115 The reaction of Vietnam, one of the other States that was targeted by the US operation, also is not without interest. In answering a question about the passage of the *USS Curtis Wilbur*, a spokesperson of the Vietnamese Ministry of Foreign Affairs observed that Vietnam respected the right of innocent passage as defined in Article 17 of the LOSC. Any reference to the fact that the US had not given prior notification, which is required by Vietnamese legislation (see *Law of the Sea of Vietnam* of 21 June 2012, Article 12(2), available at http://vietnamlawmagazine.vn/law-of-the-sea-of-vietnam-4895.html) is conspicuously absent.

116 Foreign Ministry Spokesperson Lu Kang's Regular Press Conference on 1 February 2016, available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1337080.shtml.

117 *Ibid.*

118 Notification and Statement of Claim dated 22 January 2013, available at http://www.philippineembassy-usa.org/uploads/pdfs/embassy/2013/2013-0122-Notification%20and%20Statement%20of%20Claim%20on%20West%20Philippine%20Sea.pdf.

119 Statement of the Chinese Embassy on the Submission of South China Sea Issue to International Arbitration by the Philippine Side dated 23 January 2013, available at http://ph.chineseembassy.org/eng/xwfb/t1007184.htm.

ings, the arbitration has gone ahead. Because there was no agreement on the choice of procedure, the dispute is being heard by an arbitral tribunal that has been constituted in accordance with Annex VII to the LOSC.[120] The tribunal rendered an award on jurisdiction and admissibility on 29 October 2015,[121] finding that it had jurisdiction on seven of the submissions of the Philippines, reserved consideration of that issue for the merits stage of the proceedings for seven other submissions and directed the Philippines to clarify and narrow the scope of one submission during the merits phase.[122] Hearings on the merits were conducted from 24 to 30 November 2015 and the tribunal has indicated that it expects to issue its Award in 2016.[123]

Although China has not participated in the proceedings, it made comments on a number of occasions. This makes it possible to ascertain how the positions of the Philippines and China compare as regards their justifications for, respectively, opting for arbitration and refusing to participate in it and accept its outcome. The Philippines Notification and statement of claim treads lightly in this respect. The diplomatic note presenting the Notification and statement of claim asserts that the arbitration is being brought to further the friendly relations with China and in compliance with the obligations of the Philippines under Article 279 of the LOSC and the means specified by Article 33 of the Charter of the United Nations and has the aim of seeking a 'peaceful and durable resolution of the dispute in the [South China Sea].'[124]

Two statements of the Philippines Secretary of State Del Rosario at, respectively, the hearings on jurisdiction and admissibility and on the merits in

120 See LOSC Article 287(5).

121 In the Matter of an Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China; Award on Jurisdiction and Admissibility of 29 October 2015, available at http://www.pcacases.com/web/sendAttach/1506.

122 *Ibid.*, para 413 (G), (H) and (I).

123 See Press Release; Arbitration between the Republic of the Philippines and the People's Republic of China dated 30 November 2015, available at http://www.pcacases.com/web/sendAttach/1524), p. 7.

124 *Note verbale* of the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China No. 13-0211 dated 22 January 2013. The Notification and statement of claim pays limited attention to justifying the Philippines claim, except for noting that 'China's interference with and violations of the Philippines' rights under [the LOSC] have been steadily escalating' (Notification and statement of claim (n 118) at para. 13).

The Philippines v. *China* provide a detailed justification for the initiation of the proceedings and why the tribunal should rule in favour of the Philippines.[125]

During his opening statement at the hearings on jurisdiction and admissibility, Secretary Del Rosario pointed to the significance of the rule of law in international relations, referring to international law as the 'great equaliser'.[126] This in particular applied to the development of the law of the sea, which culminated in the LOSC, the 'constitution for the oceans'.[127] In respect of the LOSC, Del Rosario noted that Part XV was perhaps the most critical in fully realizing the equalizing power of international law.[128] Del Rosario further explained that the Chinese actions in the South China Sea 'have created significant uncertainty and instability in our relations with China and in the broader region.'[129] The Chinese actions, conducted with overwhelming force, had left the Philippines no other option than reliance on international law.[130] Negotiations no longer were an option because of the 'impasse caused by China's intransigent insistence that China alone possesses maritime rights in virtually the entirety of the South China Sea'.[131] In closing, the Secretary of State observed that the arbitration was not only of utmost significance to the Philippines, the region and the world, but also 'to the integrity of the Convention and to the very fabric of the 'legal order for the seas and oceans' that the international community so painstakingly crafted over many years.'[132]

During his closing statement at the hearings on the merits, Secretary Del Rosario started out by praising the tribunal for its moral strength in rendering its award on jurisdiction and admissibility: '[i]t is a compelling rebuke to those who doubt that international justice does exist and will prevail'.[133] Themes that figured in his earlier statement again are present. International law is once more presented as the great equalizer, and the significance of the arbitration for the region and the international community at large and the legal

125 These statements are reproduced in the transcript of the hearings at respectively *Final Transcript Day 1—Jurisdiction Hearing*, available at http://www.pcacases.com/web/sendAttach/1399 at pp. 10–24; and *Final Transcript Day 4—Merits Hearing*, available at http://www.pcacases.com/web/sendAttach/1550 at pp. 188–200.

126 Final Transcript Day 1 (n 125) at p. 10.

127 *Ibid*., pp. 10–11.

128 *Ibid*., p. 12.

129 *Ibid*., p. 16.

130 *Ibid*.

131 *Ibid*., p. 20.

132 *Ibid*., p. 24.

133 Final Transcript Day 4 (n 125) at p. 189.

order represented by the LOSC is emphasized.[134] Allowing China to maintain its claim would put the 'Convention's 'Constitution for the Oceans' [...] itself at risk'.[135]

The most significant difference between the two statements in all likelihood is the shift as regards the focus of the case. In the opening statement at the jurisdiction hearings, China's historic rights claim was characterized as the 'central element of the legal dispute between the parties'.[136] In the closing statement at the merits hearings, there is still a discussion of this claim, but the entitlement of the Spratly Islands to maritime zones takes centre stage.[137] In conclusion, Secretary Del Rosario observed that:

> Nothing would contribute more to these objectives [of maintaining and strengthening of international peace and security contained in the UN Charter and the LOSC] than the Tribunal's finding that China's rights and obligations are neither more nor less than those established by [the LOSC], and that the entitlements of the tiny insular features it claims are limited to 12 miles.
>
> Finding otherwise would gravely undermine these same objectives. It would leave the Philippines and its ASEAN neighbours in worse straits than when we embarked on this arbitral voyage.[138]

China presented an elaborate overview of its arguments to reject the arbitration in a position paper of 7 December 2014.[139] The position paper advances three grounds to corroborate the absence of jurisdiction of the Annex VII tribunal. First, it is submitted that the arbitration in essence is concerned with the issue of sovereignty over the Spratly Islands and Scarborough reef, an issue beyond the scope of the LOSC and its dispute settlement procedures.[140] Second, China and the Philippines have agreed in, among others, the DOC to settle their disputes through negotiations, excluding recourse to third-party settlement.[141]

134 See *ibid.*, pp. 188, 189, 191, 198.

135 *Ibid.*, p. 194.

136 Final Transcript Day 1 (n 125) at p. 14.

137 See Final Transcript Day 4 (n 125) at pp. 195–199.

138 *Ibid.*, p. 198.

139 Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines of 7 December 2014, available at http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

140 *Ibid.*, para. 3.

141 *Ibid.*

Finally, if the tribunal were to hold that the claim of the Philippines was concerned with the interpretation and application of the LOSC, China submitted that the whole dispute as submitted was concerned with the delimitation of maritime boundaries,[142] a matter that had been excluded by China from compulsory dispute settlement through a declaration under Article 298 of the LOSC in 2006. On this basis China concluded that the tribunal manifestly lacked jurisdiction and 'by virtue of the freedom of every State to choose the means of dispute settlement, China's rejection of and non-participation in the present arbitration stand on solid ground in international law.'[143]

It may be noted that the position paper is completely silent on the issue of historic rights. It only contains one fleeting reference to 'historical or long-standing practice in the region' in the context of an argument on the nature of the issues submitted to arbitration.[144] To the contrary, the position paper in two instances specifically asserts that the maritime entitlements China enjoys are derived from its sovereignty over the Spratly Islands.[145] In one of these instances reference is made to the maritime entitlements under the LOSC.[146] These references are difficult to square with a reliance on historic rights, which presuppose practice of a specific nature in the waters concerned, resulting in rights different from those that may be exercised under the general rules of the LOSC.

The position paper attributes ulterior motives to the Philippines in bringing the arbitration. Rather than seeking a solution of the South China Sea disputes, the arbitration in China's view is intended to exert political pressure, 'so as to deny China's lawful rights in the South China Sea through the so-called 'interpretation or application' of the Convention'.[147] Subsequently, the position paper suggests that the initiation of the arbitration is an abuse of rights.[148] China justifies this position by pointing out that the Philippines, fully knowing that its claims are essentially concerned with territorial sovereignty and that China has not accepted that such a claim could be settled by compulsory dispute settlement, all the same initiated the arbitration. That step 'surely

142 *Ibid.*

143 *Ibid.*

144 *Ibid.*, para. 68. In addition, paragraph 92 refers to the 'complex historical background and sensitive political factors' of the South China Sea issue.

145 *Ibid.*, paras 21 and 26; see also *ibid.*, para. 10.

146 *Ibid.*, para. 21; see also *ibid.*, para. 10.

147 *Ibid.*, para. 56.

148 *Ibid.*, para. 84. Article 300 of the LOSC explicitly requires States Parties to the Convention to not exercise rights, jurisdictions and freedoms under the LOSC in a way that would constitute an abuse of rights.

contravenes the relevant provisions of the Convention, and does no service to the peaceful settlement of the disputes'.[149] Subsequently, the position paper asserts that the unilateral submission of a dispute over sovereignty or maritime rights while this is being opposed by the other party 'cannot be regarded as in conformity with the rule of law, as it runs counter to the basic rules and principles of international law'.[150] These arguments provide the basis for China's unilateral decision to not accept the arbitration and its refusal to participate in it. These steps are intended 'to preserve China's sovereign right to choose the means of peaceful settlement of its own free will and the effectiveness of its 2006 declaration, and to maintain the integrity of Part XV of the Convention as well as the authority and solemnity of the international legal regime for the oceans.'[151]

Following the tribunal's award on jurisdiction and admissibility of 29 October 2015, the Chinese Ministry of Foreign Affairs commented on it the next day.[152] This statement echoes the Chinese position paper and reconfirms its conclusions,[153] but also differs in some respects. The tone of the statement is decidedly more acrimonious and, apart from the Philippines, also the tribunal is now the object of China's criticism. The tribunal is charged with 'maliciously evading' China's declaration under Article 298 of the LOSC, 'obstinately forc[ing] ahead with the arbitration' and 'completely deviat[ing] from the purposes and objectives of the [LOSC],' thereby eroding its integrity and authority'.[154] The statement reaffirms that the arbitration is an abuse of Part XV of the LOSC and 'calls upon all parties concerned to work together to safeguard the integrity and authority of the [LOSC]'.[155] Contrary to the position paper, the statement suggests that China's maritime rights are not derived from the LOSC, but have their basis in history.[156]

The above review indicates that both China and the Philippines ground their position in the need to maintain the integrity and effectiveness of the LOSC and international law generally. For the Philippines this implies a broad

149 Position Paper (n 139) at para. 84.

150 *Ibid*., para. 90.

151 *Ibid*., para. 85.

152 Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines dated 30 October 2015, available at http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml.

153 See *ibid*., para. II.

154 *Ibid*., para. IV.

155 *Ibid.*

156 *Ibid*., para. I.

interpretation of the competence of compulsory dispute settlement bodies and for China a punctilious deference to the freedom of States to choose their preferred modes of dispute settlement. Both approaches negate the very essence of Part XV as a carefully crafted compromise that allows unilateral recourse to compulsory dispute settlement, while including a number of significant exceptions to this principle. China's reliance on its freedom to choose its preferred mode of dispute settlement ignores the fact that by becoming a party to the LOSC it accepted significant limitations on that freedom. The LOSC does not leave any doubt that parties are not entitled to unilaterally determine that a tribunal has no jurisdiction and that the outcome of an arbitration is not binding on them.[157] The tribunal's October 2015 award on jurisdiction and admissibility is carefully reasoned and its outcome cannot be called unreasonable and certainly not, to use China's words, 'completely deviat[ing] from the purposes and objectives of the [LOSC]'.[158] Moreover, the fact that a decision on jurisdiction on seven of the submissions of the Philippines was reserved for the stage of the merits implies that the tribunal may still find that the exceptions of the LOSC, including China's declaration under LOSC Article 298, are pertinent in those instances. In that light, China's acerbic criticism of the tribunal after the award on jurisdiction and admissibility may have been untimely.

The plea of the Philippines' Secretary of State Del Rosario during the merits phase of the arbitration that the tribunal must find that it has jurisdiction on all submissions to do justice identifies a fundamental problem of the Philippines case and its insistence on this point indicates that the Philippines is very much aware of this. If the tribunal finds that even one or a limited number of islands in the Spratly Islands have an entitlement to a full suite of maritime zones, the

157 See LOSC, Article 288(4); Annex VII, Articles 9 and 11.

158 Statement (n 152) at para. IV. This is not to say that certain aspects of the tribunal's reasoning are beyond criticism. For instance, its departure from the award in the *Southern Bluefin Tuna* as regards the interpretation of Article 281 of the LOSC would not seem to have been required to conclude that Article 281 did not bar the jurisdiction of the tribunal. As the tribunal itself indicates, this finding was not relevant to the DOC, which according to the tribunal does not constitute a binding instrument (Award of 29 October 2015 (n 121) at para. 219). The departure from *Southern Bluefin Tuna* for the tribunal was critical in relation to the Convention on Biological Diversity (CBD) (see *ibid.*, paras. 270 and following). However, in this case the tribunal could also have relied on Article 22 of the CBD, which explicitly reserves the rights and obligations of contracting parties under the LOSC. By departing from *Southern Bluefin Tuna*, the tribunal has unnecessarily exposed itself to a Chinese criticism that it has deliberately engaged in judicial activism by disregarding a decision of a highly qualified tribunal presided over by a former president of the ICJ, to find it has jurisdiction.

uncertainty about the extent of the maritime entitlements of the islands in relation to the surrounding coasts will continue and those islands will in any case have undisputed water-column rights over the central part of the South China Sea.[159] As Secretary Del Rosario argued, finding against the Philippines on this point would gravely undermine the objectives of the LOSC and leave the Philippines 'in worse straits than when we embarked on this arbitral voyage'.[160] Unfortunately for the Philippines, the fact that a State would be worse off if it loses a case should not determine the outcome of a case, and making this a criterion to decide court cases would make compulsory dispute settlement illusory. Second, the objectives of the LOSC would not be served by a misinterpretation or misapplication of a controversial and critical provision of the LOSC like Article 121(3) merely in the interest of a party in having a decision on the extent of its maritime entitlements. In this connection, it may be noted that a finding that all islands in the Spratly Islands are rocks in the sense of Article 121(3) of the LOSC also has very serious policy implications. Many states have relied on similar or smaller features than the largest of the Spratly Islands to determine the extent of their continental shelf and exclusive economic zone entitlement. Calling that practice into question might undermine the very objectives the Philippines is asking the tribunal to uphold.

Like the *HYSY 981* and *Lassen* incidents, the arguments of China and the Philippines have brought the significance, or lack thereof, of China's historic rights claim into a clearer perspective. Whereas the Philippines originally presented the issue of historic rights at centre stage, in the end it identified the determination of the maritime entitlements of the Spratly Islands as being of critical importance. As the Philippines argued itself, a negative decision in this respect would make the Philippines worse off than it was before the start of the arbitration. China in its position paper relied on its maritime entitlements under the LOSC, not on a claim of historic rights. As was set out above, this accords with the Chinese approach in the *HYSY 981* and *Lassen* incidents.[161]

159 See the discussion in Oude Elferink (n 8) at p. 188. It may be noted that the situation is different in relation to Scarborough Reef. If the features on Scarborough Reef were found to be rocks in the sense of Article 121(3) of the LOSC, China would have no other basis to claim exclusive economic zone rights in the area and the area beyond 12 nautical miles of the baseline of Scarborough Reef would be part of the exclusive economic zone of the Philippines.

160 Final Transcript Day 4 (n 125) at p. 198.

161 To the contrary, in its criticism of the award on jurisdiction China focused on the historic nature of its rights in the South China Sea. This ambiguity may be explained by a wish to distance the Chinese position from the provisions of the LOSC on maritime zone entitlement and the jurisdictional reach of Part XV of the LOSC over those provisions.

In the light of China's limited reliance on its historic rights claim, it is apposite to ask whether distancing itself more explicitly from this claim might be in China's interest. On the one hand, it may be difficult to justify such a step to a domestic audience.[162] On the other hand, a disavowal of the historic rights claim would prevent other parties from arguing that China is ambiguous about its position and is not playing by the rules.[163] Second, even if these historic rights were to exist, they would be of limited significance to China. In the *Eritrea/Yemen* arbitration, a tribunal that determined sovereignty over islands and established a maritime boundary held that a traditional fishing regime should be perpetuated.[164] In this connection, the tribunal distinguished traditional artisanal fishing from industrial fishing, observing that:

> However, the term "artisanal" is not to be understood as applying in the future only to a certain type of fishing exactly as it is practised today. "Artisanal fishing" is used in contrast to "industrial fishing". It does not exclude improvements in powering the small boats, in the techniques of navigation, communication or in the techniques of fishing; but the traditional regime of fishing does not extend to large-scale commercial or industrial fishing nor to fishing by nationals of third States in the Red Sea, whether small-scale or industrial.[165]

Applying the notion of historic rights to oil and gas activities would probably be best qualified as a non-starter.[166]

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162 In addition, maintaining a historic rights claim gives China a foothold in the South China Sea distinct from its claimed sovereignty over the Spratly Islands. However, it would seem that such rights would be difficult to uphold if an authoritative process were to determine that sovereignty over the Spratly Islands does not rest with China.

163 This is one of the key arguments of the Philippines in *The Philippines* v. *China*, but it has also been leveled by US officials (see *e.g.* Russel (n 71); D Russel, *Remarks at the Fifth Annual South China Sea Conference*, 21 July 2015, available at http://www.state.gov/p/eap/rls/rm/2015/07/245142.htm. This view has also been expressed in the literature (see *e.g.* Odom (n 109); A Panda, '*Lassen Faire* in the South China Sea: Takeaways from the First US FONOP', *The Diplomat* 28 October 2015, available at http://thediplomat.com/2015/10/lassen-faire-in-the-south-china-sea-takeaways-from-the-first-us-fonop/); Webster (n 88).

164 In the Matter of an Arbitration pursuant to an Agreement to Arbitrate dated 3 October 1996, (Eritrea/Yemen), Award of 9 October 1998, para. 526.

165 In the Matter of an Arbitration pursuant to an Agreement to Arbitrate dated 3 October 1996, (Eritrea/Yemen), Award of 17 December 1999, para. 106.

166 See also the remark on the 9-dash line in (n 12).

General Assessment and Conclusions

The purpose of this article was to review how international law is argued by the parties to the South China Sea disputes and in what context these legal arguments are presented. To this end the article looked at three specific issues, the deployment of the *HYSY 981* near the Paracel Islands in 2014, involving China and Vietnam, the passage of the *USS Lassen* in the vicinity of Subi Reef in October 2015, involving China and the US, and certain aspects of *The Philippines* v. *China* arbitration, which was initiated unilaterally by the Philippines in January 2013, with a decision on the merits currently pending.

As the above analysis indicates, international law figures prominently in the arguments of both parties in all three instances. This is logical in respect of the arbitration involving China and the Philippines, which constitutes a legal procedure, but requires further explanation in the other two issues. Moreover, even in the case of the arbitration, the question exists of why specific arguments are made and not others.

The fact that States justify their actions in terms of international law does not necessarily mean that international law shapes their actions in any significant way. It has been argued that States use international law because it is a commonly recognized discourse for communication at the international level, and not because States consider that international law restricts their policy options.[167] The *HYSY 981* incident could be said to confirm this view. As was set out above, a number of reasons have been advanced to explain why the rig was moved out of the disputed area. The wish to comply with international law was not mentioned in this connection. Moreover, China and Vietnam in connection with the *HYSY 981* incident used the same rules of international law to justify radically opposed positions, again suggesting that international law has little impact on State behaviour. Still, as was also set out, there was some development in the legal views of China and Vietnam on some points,[168] suggesting that arguing in terms of international law may be perceived by the other party as having an impact on its legal argument and requiring an adjustment of that argument. In addition, the fact that an argument is not publicly made does not necessarily mean that it is not taken into consideration and it may have played a role in policy formulation. Finally, a comparison of the deployment of the *HYSY 981* in, respectively, 2014 and 2015 indicates that international law has a

167 For a cogent statement of this view see *e.g.* JL Goldsmith and EA Posner, *The Limits of International Law* (Oxford University Press, Oxford, 2005).

168 This concerns the arguments in relation to maritime delimitation and the way in which Vietnam dealt with the issue of sovereignty over the Paracel Islands in the context of the incident.

critical importance for States in shaping their claims to maritime zones and their reactions to activities of other parties.

The *USS Lassen* incident and the aspects of *The Philippines* v. *China* discussed in this article do suggest the relevance of international law in shaping State behaviour. The US, in planning the passage of the *USS Lassen*, carefully considered the possible maritime zone entitlements of specific features in the South China Sea, which had an impact on the nature of the passage of the *Lassen*. A comparison of the passage of the *USS Lassen* and the more recent passage of the *USS Curtis Wilbur* through the territorial sea of Triton Island in the Paracel Islands suggests some development in the approach of China and the US.[169] This may in part be explained by the fact that their original narrative disclosed a tension between the facts and the legal and other arguments that were being invoked.[170] It might seem to be contradictory to argue that China's actions in relation to *The Philippines* v. *China* are in any way shaped by international law, in view of its rejection of the jurisdiction of the tribunal and its characterization of the award of 29 October 2015 as null and void, notwithstanding the provisions of the LOSC, which indicate that a party to an arbitration is not entitled to make such determinations unilaterally. However, the fact that China has engaged with the tribunal the way it did, indicates that it has sought to influence its outcome, implying the relevance of the arbitration and international law.[171] China presented its position paper just days before its Counter Memorial in the arbitration was due. This timing hardly can be coincidental. As the rules of procedure of the tribunal indicate, preliminary objections to its jurisdiction and admissibility had to be made not later than in the Counter Memorial.[172] The tribunal took note of the position paper and decided to consider it as a plea concerning jurisdiction.[173] The difference with the actions of the Russian Federation in the *Arctic Sunrise* arbitration, in which the Russian Federation failed to appear and rejected the arbitration, is notable in this respect. The Russian Federation only presented an elaborate

169 See above text at (n 113) and following.

170 See text at (nn 96, 97, 103) and following.

171 See also J Ku, 'Touchy, Touchy. What China's Sensitivity about the Philippines Arbitration Reveals about the Strength of Its Legal Position, *Opinio Juris*, 30 July 2015, available at http://opiniojuris.org/2015/07/30/touchy-touchy-what-chinas-sensitivity-about-the-philippines-arbitration-reveals-about-the-strength-of-its-legal-position/.

172 Rules of Procedure, Article 20(2), available at http://www.pca-cpa.org/PH-CN%20-%20Rules%20of%20Procedure%20(ENG)a7ec.pdf?fil_id=2504.

173 See *Press Release* dated 22 April 2015, available at http://www.pcacases.com/web/sendAttach/1298, p. 1.

legal position[174] at a very late stage of the procedure, which was consequently ignored by the tribunal.[175]

China's refusal to participate in the arbitration has led to a debate on whether this will affect China's reputation as a reliable partner with whom to enter into international legal agreements.[176] It has been suggested that China may indeed suffer damage to its reputation because of its rejection of the arbitration[177] and that this may not be limited to issues relating to the South China Sea, but may spill over into other issue areas.[178] However, it has also been argued that China should be able to weather adverse effects to its reputation.[179] In this respect, Ku refers to the *Arctic Sunrise* arbitration and *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua* v. *United States of America*), in which powerful States chose to ignore a decision of an international court without suffering long-term effects.[180] As regards *The Philippines* v. *China*, it can be expected that China may at any rate run into difficulties if it will continue to employ legal arguments that have been found to be irrelevant in the arbitration in future negotiations or to justify its actions by them. Whether China

174 The Ministry of Foreign Affairs of the Russian Federation, *On certain legal issues highlighted by the action of the* Arctic Sunrise *against* Prirazlomnaya *platform* (5 August 2015); available at http://www.mid.ru/documents/10180/1641061/Arctic+Sunrise.pdf/bc7b321e-e692-46eb-bef2-12589a86b8a6.

175 In the Matter of the Arctic Sunrise Arbitration (*Netherlands* v. *The Russian Federation*), Award of 14 August 2015, para. 68.

176 For an elaboration of the concept of reputation and its implications see AT Guzman, *How International Law Works; A Rational Choice Theory* (Oxford University Press, Oxford, 2008). One implication of acquiring a worse reputation may be that a State will have to invest more resources in convincing other States that it will not renege on future commitments.

177 See J Goldenziel, 'International Law Is the Real Threat to China's South China Sea Claims' *The Diplomat* 3 November 2015, available at http://thediplomat.com/2015/11/international-law-is-the-real-threat-to-chinas-south-china-sea-claims/; A Aitken, 'Manila's Legal Strategy in the South China Sea: Forcing Beijing to Choose between Territorial Ambitions and Reputation' (2014) *Journal of Public and International Affairs* pp. 7–24 at pp. 17–222.

178 See Truong-Minh Vu and Trang Pham, 'Who Will "Win" in the Philippines' South China Sea Case against China?' *The Diplomat* 28 August 2015, available at http://thediplomat.com/2015/08/who-will-win-in-the-philippines-south-china-sea-case-against-china/; on this issue see also the text at (n 181) below.

179 See J Ku, 'Why China Will Ignore the UNCLOS Tribunal Judgment, and (Probably) Get Away with It' *Opinio Juris*, 4 November 2015, available at http://opiniojuris.org/2015/11/04/china-faces-its-nicaragua-v-united-states-moment/; see also Aitken (n 177) at pp. 19, 20.

180 See Ku (n 179). Ku does not provide any yardstick for making this determination. Whether the existence of long-term effects is an appropriate yardstick is moreover also open to debate.

will suffer serious long-term effects on its reputation in other issue areas solely because of its rejection of the outcome of the arbitration seems unlikely.[181]

A final aspect that the three cases have in common is the invocation of broader principles, which may be of both a legal and non-legal nature, like China's reference to the UN Charter and peace and stability in the region in the *HYSY* incident, the US invoking international trade and the prosperity of the region to justify the *USS Lassen*'s exercise of navigational rights near Subi Reef and China seeking to dissociate those broader interests from the specific legal rules relied on by the US, and the Philippines and China arguing their positions in relation to their arbitration in terms of the integrity of the LOSC. An explanation of this reliance on such broader principles in international law argumentation has been provided by a number of theoretical approaches to international law, like constructivism or the international law-as-ideology approach.[182] These approaches have in common that States are viewed as constructing their identity by arguing in terms of international law, or as Scott puts it by upholding the ideology—international law—of the international power structure.[183] Reliance on these broader, 'background', principles in justifying actions that are governed by more specific rules may contribute to enhancing a State's credibility in relation to these actions and may show the discrepancy between the opposing party's actions and these broader principles.

For this strategy to be successful, however, the link between 'background' principles and the actions concerned has to be credible. The present discussion identifies a number of instances in which this is problematic. As was argued above, the US's invocation of trade interests sits uncomfortably with an action that is concerned with a difference of views over the interpretation of a specific rule concerning the passage of warships through the territorial sea. The nature of the rules in question and the fact that this concerned the passage of a warship, not a merchant vessel, gives China's arguments that it is itself a main proponent and beneficiary of international trade and freedom of

181 It has been argued that States may have different reputations in different issue areas and that a change in reputation in one issue area may not affect its reputation in other issue areas (Guzman, (n 176 at pp. 100–106; J von Stein, 'The Engines of Compliance' in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations; The State of the Art* (Cambridge University Press, Cambridge, 2013) pp. 477–501 at pp. 481–482.

182 J Brunnée and SJ Toope, 'Constructivism and International Law' in Dunoff and Pollack (eds) (n 181), at pp. 119–145; SV Scott, 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics' 1994(5) *European Journal of International Law*, pp. 313–325.

183 Scott (n 182), at p. 318.

navigation and that the US was pursuing a particular interest *prima facie* credibility. Similarly, China's invocation of the integrity of the LOSC is problematic in light of the fact that China at the same time challenges core principles of the dispute settlement regime enshrined in the LOSC, such as the competence of international courts and tribunals to determine the scope of their jurisdiction and the underlying notion of judicial independence.[184]

As the present article suggests, there is more to the analysis of international legal argument in the South China Sea context than the binary opposition of compliance with and deviation from the law. Looking at what legal arguments are or are not made and in what broader context those arguments are placed can contribute to a better understanding of the role of international law in the South China Sea disputes.

184 In this light it will be interesting to see how China will pursue its call on interested parties to collaborate in maintaining the integrity of the LOSC, issued after the tribunal handed down its award on jurisdiction and admissibility on 29 October 2015 (see text at (n 155). It in any case seems unlikely that sufficient support could be mustered to overhaul these aspects of the LOSC.