International Law & Sovereignty: A Divisive Concord of paradigms in the South China Sea

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Abstract
The contemporary system of interdependent states, driven by the continuous demands of globalization has led to the ever-increasing relevance of international law in governing over the comity of nations. The adherence to international law was understood as the basis for peaceful coexistence and the viable recourse for dispute settlement among sovereign states in the international community. Yet such paradigms have held its' own share of compromises over time. As is in the case of the South China Sea, wherein the traditional underpinnings of international relations are undergoing profound changes and; the divisive display of states' sovereignty & the resounding concord over the primacy of international law are the principal causes for the diplomatic impasse.
Hence, this raises the question on how the situation will proceed. Specifically, this paper assesses whether International law, with respect to the principle of sovereignty, still depends on its traditional enforcement mandate or has it found a contemporary basis to sustain its effectiveness. The paper argues that International law continues to be an effective measure albeit, it has significantly gained momentum as a socially-observed behavior – rather than a binding force – that constructively imbues discipline alongside the sovereignty of states.

Keywords: International Law, Sovereignty, Global Governance, South China Sea, High Seas, ASEAN

Introduction

The fall of the Berlin Wall signified the end of the cold war period and the advent of a new era in diplomatic history and international relations. The prevailing system of interdependence, alongside the continuous trends in globalization & advances in modern technology, reflects the veering momentum towards the formation of a greater global society.

As anarchy remains to be the defining structure of global relations, the absence of a world government is sustained through the concept of international law and the principle of sovereignty.[1] These paradigms in international relations scholarship shares a functional–in which both function as one in nature despite their respective differences; consequentially serving the bureaucratic vacuum and establishing the building blocks of global governance–intrinsic link; for the cornerstone of International law[2] resides in the primacy of respect to the doctrine of Sovereignty; through which the states' supremacy is conferred & its conduct of internal affairs and external relations are justified–and reciprocally, the latter is in turn, observed through the various global institutions (e.g. the United Nations, the International Court of Justice), that provides the avenues for states to equally participate in international discourse. [3]

However, the wave of challenges arising has disconcerted the system; leaving the principles on which it stands, in a questionable state. This has been the apparent situation, which is most magnified in the case of the South China Sea (SCS); where tensions on overlapping claims of territorial boundaries among neighboring states remain unresolved. Although efforts to bring the situation to its legal decisive end has been made and done, the decision of the International Arbitration Tribunal–of which was clearly in favor of the contending points raised by the Philippines–conversely turned the situation, towards the deepening of the status quo; rendering the award, baseless (due to the continuous activities of China) and deprived of both its jurisdictional authority & inconceivable enforcement.

Hence, the situation in the South China Sea warrants a challenging task for International law and a question over the principle of Sovereignty. This paper therefore, analyses the tribunal award made through the use of International law *vis-à-vis* the defining limits enshrined on a states' sovereignty. Specifically, this paper answers whether International law derives its legitimacy from its enforcement mandate or from other contemporary sources. To address this, the paper is divided into two major parts. The first part assesses the evolution of the relationship of international law and sovereignty; how this–has and–continually affect the contemporary system of global governance, with emphasis on its application in the case of the SCS; and argues that the situation led to a strengthened emphasis towards a constructive source of legitimacy for international law. The second part argues that the development of the contemporary nature of international law was corollary to the affirmative response of the international community concerning its relevance and suitability to govern over matters of conflicting interests.

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[1] Jacopo Leone. *Post-Sovereign Security and the Absence of the Political*. 95-96
[2] MP Ferreira-Snyman. *The Evolution of State Sovereignty: A Historical Overview*. 01-05
[3] Arnel Mateo. *The Role of the Doctrine of State Sovereignty in the dev't of International law*. 02

Conceptual Framework

The concept of the "Construction of Correlative Consensual Condition" is a proposed concept influenced by the English School of International Relations Theory. This concept aims to encapsulate the interplay of differences between international law & sovereignty; and present them as a natural occurrence that creates a normative phenomenon.

The concept is built upon the idea that there exists a "society of states". The society is governed by *normative structures* (international law) that affect the behavior of states. The nature of these structures is that they have inherent mixture of *prescriptive influences*–of which certain ideas may be formed for the purpose of creating ideal concepts–and *directive influence*–of which certain actions can be done for the purpose of addressing certain matters of necessity and/or the implementation of already existing agreed principles–formed & ascribed through a *communal understanding* over different issues. Likewise, states are considered to be the *respective units* of society. These units have inherent *distinct authority* (sovereignty) which is reflected through their decisions and interactions within the society.

Society, in this regard, should then be understood as a system that recognizes the interplay of these factors within it. The arising conflicts, therefore, is not the result of the incompatibility of these principles, but rather, it is the normative phenomenon towards the Construction of a Correlative Consensual Condition. The Correlative factor emphasizes the mutual understanding of states on the respective function of International law. Consensual factor underscores the existence of the sovereignty of states–the basis of their underlying inherent authority A shared understanding of these principles results to a Condition–a normative phenomenon that slowly structures itself as the prevailing regime over the situation.

The situation in the South China Sea is a portrayal of complex developments within the Construction of a Correlative Consensual Condition. Inevitably, this means that compromises–based on the understanding that over the principles of sovereignty and International law are to be made, in order to establish a prevailing regime.

Social Construction of International Law & Sovereignty

International Law & Sovereignty shares its co-existential roots through the precedent established by the Peace of Westphalia. The prevailing system of states propelled these principles in the forefront of global discussions & international relations scholarship. However, peaks of historical shifts in diplomacy have often transpired from a debate over these principles, particularly in the case of the South China Sea; where international law has declared its jurisdiction over the issue, amidst the persisting assertion of sovereignty among neighboring states. This necessitates a contemporary understanding of the stronger facets at work within both respective principles. To discuss this, the paper gravitates on two major points which expounds the subject at hand. The first focuses on the historical transition of these paradigms and how these should affect our view over the developments in the South China Sea case; while the other focuses on the reception of the international community towards the future of the South China Sea.

i. International Law & Sovereignty: A Historical Prospective Prescription

The Thirty Years War has often been suggested as the greatest and longest armed contests of the early modern period. While the factors that started the conflict varied, its essential significance lies on how it culminated to an end.[4] The essence of the Peace of Westphalia was its standard definition over what a "sovereign" means– Supreme authority within a territory.[5] Given that this is how it was defined; an understanding over how the concept of sovereignty came to be can only be precisely explained through its history. It should be noted that the treaty had never included a sovereign states system or even proposed the primacy of the state as a legitimate unit.[6] How states later formed to be a reigning authority in Europe, came after the waning contention against their authority by the Holy Roman Empire. This is the reason why Westphalia is often credited for instigating the transition of the concept of sovereignty and the birth place for the consolidation of a sovereign states system.[7] Over the next centuries, the world witnessed the decline of European colonial empires; as it culminated towards the proliferation of modern sovereign political entities. Today, norms of sovereignty are enshrined in the Charter of the United Nations, whose article 2(4) prohibits attacks on "political independence and territorial integrity," and whose Article 2(7) sharply restricts intervention.[8]

Through the evolution of the concept of sovereignty, the growth of international law saw its expansion. It is worth noting that among the fundamental principles on which international law stands, sovereignty is perceived as an important cornerstone–for the sovereign will of the state is the ultimate authority in the composition of international law. In retrospect, the political actors at Westphalia, those predecessors to states, consciously and in collaboration with each other, acted based on the authority bestowed respectively upon them, to redefine the framework of their system. This system would particularly emphasize states as the key actors of international law. International law is then, created by the practice of states (custom) and through agreements entered into by states (treaties); states are party to the rules of law but still have the ability to change law over time as a developmental process.[9] However, this should not entirely lead us to conclude for the inefficacy of international law but rather bring us closer to the interplay of factors surrounding international law. Rosalyn Higgins, a former president of the International Court of Justice, argues that "international law is not the vindication of authority over power. It is the decision-making by authorized decision-makers, when authority and power collide." Those authorized to make decisions are more broadly states, but more specifically those state-officials. Within Westphalia, this premise was demonstrated by the actors present, who acted with legal authority to deliberately codify shared values of the actors within a legally binding framework.[10] As Higgins describes modern law, this too demonstrates that the events of Westphalia left an important footprint in the path leading to the creation of states and a state-based international legal system.

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[4] John Whiteclay Chambers. *The Oxford Companion to American Military History*. 223-224
[5] Daniel Philpott. *Sovereignty*. 01
[6] David Maland. *Europe in the Seventeenth Century.* 04
[7] Winston P. Nagan & Garry Jacobs. *The Evolution of Sovereignty*. 02
[8] Tatah Mentan. *The Elusiveness of Peace in a Suspect Global System.* 82
[9] R. Baker. *Customary International Law in the 21st Century Old Challenges & New Debates.* 174-177
[10] Rachel Alberstadt. *Is Westphalia relevant to the evolution of international law?* 02-03

The science of international law as it exists today is a result of slow historical growth and is the product of two main factors: certain theories and principles on the one hand and international practice or custom on the other. Though one can never truly determine the relative value and influence of the contributions of each of these factors, what remains clear, however, is that during its formative period, international law was mainly developed by great thinkers and jurists who were forced to rely upon the weight of general ideas or theoretical considerations rather than upon any satisfactory body of accumulated custom if they desired to ameliorate conditions or improve international relations. International law recognizes the mutual interests of states involved but its agreements and norms also reflect the issues of the time. It changes over time when the interests of states change, providing a more flexible and thus legitimate arrangement.[11]

The case of the South China Sea reflects this transitional difference in the understanding of international law. Under the preamble of the United Nations Convention on the Law of the Sea (UNCLOS), it states there that the convention was "prompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea."[12] This was the essence of what the UNCLOS stands for and the intention of the parties involved. However, empirical observations proves to show otherwise; as the rising tensions in South China Sea, especially the arbitration lawsuit brought by the Philippines[13], have stimulated debate and research about China's South China Sea policy; thereby, also further questioning the applicability of the UNCLOS.[14] In what could have finally been the conclusion, the final award issued by the International arbitration tribunal[15] in favor of the Philippines, especially over the source of the parties' rights and obligations in the South China Sea and the effect of UNCLOS on China's claims to historic rights within its claimed 'nine-dash line',[16] fueled a stronger Chinese opposition[17] and a strengthened status quo. To what could have aided in sustaining the momentum of events, the change of presidency in the Philippines seems to have brought a new approach[18] towards resolving the country's differences with China; what was once decisive and assertive over their claims in the West Philippine Sea, now turned into an attitude calling for 'restraint' and 'sobriety'.[19]

Clearly, sovereignty and international law are continuously being co-defined, with respect to their essential predeterminations and their role on existing conditions. The South China Sea case may have brought up differing opinions, waived against both principles but our emphasis should not further lie over which reign's primacy over the other; rather, understand and come to terms over how the gaps can be filled and the compromises that needs to be done. The South China Sea is evidently a question of sovereignty due to the overlapping claims of territorial boundaries among states and the national interests at stake over the vast economic opportunities. And if sovereignty

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[11] Amos S. Hershey. *History of International Law Since the Peace of Westphalia.* 01
[12] United Nations Convention on the Law of the Sea – Preamble.
[13] Gregory B. Poling. *The Philippines vs. China in the South China Sea: A Legal Showdown.* 01
[14] Nong Hong. *UNCLOS and Ocean Dispute Settlement: Law and Politics in the South China Sea.* 03
[15] *The South China Sea Arbitration* – PCA Case Document
[16] Marina Tsirbas. *What Does the Nine-Dash Line Actually Mean?* 01
[17] *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.* – MFA-PRC
[18] Sajjad Ashraf. *What happens now in the South China Sea?*
[19] *Statement of the Secretary of Foreign Affairs* – DFA-RPH

is in question, then further arguments against it are no question. Sovereignty is, after all, the undisputed authority of the state over the preservation of its territorial integrity.[20] However, the existing conditions do not solely depend over the determination of a states' sovereignty; existing global institutions and regimes establishes the parameters for the exercise of such rights. The situation now turns as a question of International law as well. The jurisdiction claimed by the international arbitration tribunal implies an answer to their function under international law but their decision over the matter at hand, though rightly based on the understanding that the case is a question of ocean rights, is also a question over how sovereignty is being defined.

The dilemma that the situation induces demands the question of where to begin. If we begin with the question sovereignty, then it will ultimately reject any succeeding arguments against it. If we are to start at the application of international law, then it would lead back to a question of states' sovereignty. It is for this reason that a historical understanding over these principles necessitates our attention. If we are to determine which is important over the other by virtue of precedence, then sovereignty stands undisputedly in this respect. Yet doing so in such measure, rejects its lying intricacies and further demands justification over the realities at hand. What needs to be criticized is its nature. In a nutshell, sovereignty evolved from being a regional concept of delineation of powers in Europe, granted over key figures of authority with respecting territories; towards as an internationally-recognized principle and an inherent element ascribed over the state. This transition over the understanding of sovereignty suggests that its definition is a question of identity.[21] The determination on which aspect of sovereignty do we give emphasis on, whether be it the individuals handling the decisions of the state or the state as actors in the international community, affects how these come to play once International law comes to the picture. To see sovereignty as dependent over the decisions of individuals, suggests that states are officials that have power within the system of international law. On the other hand, to emphasize on it being an aspect of the state, suggests that states are subjects of international law.[22] It then becomes a question of subjectivity on the part of international law.

Since sovereignty is the cornerstone of International law, it stands to reason that international law relies on the very principle it attempts to govern. It may immediately imply the supremacy of one over the other but the nature of what it governs remains to be a critical determinant on the true nature of international law. The question of subjectivity suggests the dual-faceted paradox of sovereignty to both refer to the decision-makers of the system and as incentive over states, being subjects of the system. This in turn suggests both the nature and function of international law as a system. International law exists through the consent given by the decision-makers of the system and this process of giving consent results to the creation of the system. The norms and institutions that exist, so as to create an atmosphere that emphasizes on the rule of international law, justifies the very reason as to why states are consequentially bound to international law. This leads us now to the question of what makes up the processes involve in the 'inter' of international law.

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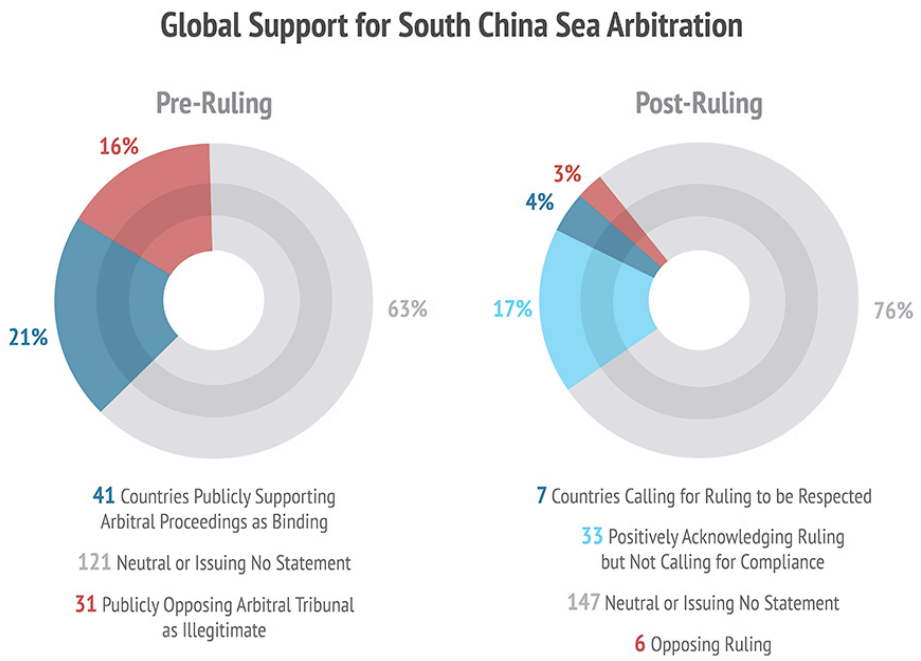
[20] Jamie Scudder. *Territorial Integrity: Modern States and the International System.*
[21] Jeremy Waldron. *Are Sovereigns Entitled to the Benefit of the International Rule of Law?* 01
[22] Samantha Besson. Sovereignty, International Law and Democracy. 02

ii. The "Inter" in International Law

The case of the South China Sea is clearly one that immediately presents as a regional issue of concern. How the tensions can come to a resolution is dependent on the regional actors involved. Yet the very nature of the conflict has come alongside the continuous change in the understanding of the principles of sovereignty and international law. With the recent developments in the region, it can no longer be denied that how things will proceed is a matter of concern within the international community. This demands now a global understanding of the matter at hand. The regional dynamics may have portrayed an ineffective display of International law, but if contrasted over its reception in the international community, there is a pattern that can be observed.

After the long awaited result of the arbitration case, the tribunal at the Permanent Court of Arbitration in The Hague declared a ruling in favor of the Philippines against Beijing's claims in the South China Sea. This has been warmly welcomed by the international community, and has been voiced out by countries like the United States, Japan, Australia and the European Union. Though the award is declared binding over parties concerned this has been contested and ignored by the People's Republic of China. This flagrant display of deviance towards international law has led us to question the efficacy & legitimacy of international law. However, if we would begin to understand the interplay of factors that are at work in this matter, we would see that International law does not solely depend on its legal mandate to enforce the law; simply because it has an inherent social constructive element that allows it to be observed in the international community. The resounding call for the parties involved to abide in the court's decision and uphold the rule of law, suggests the social constructive legitimacy of international law.

Figure 1: Global Support for South China Sea Arbitration[23]



[23] Asia Maritime Transparency Initiative. *Who is taking sides after the South China Sea Ruling?*

The graph above shows the statistics for the number of countries that has taken their sides, before and after the ruling. There are some points that we need to consider here. First is the percentage of those who oppose. Before the ruling, 16% or 31 countries publicly showed their opposition against the ruling; yet it dramatically dropped to 3% after the ruling was made. Second is the percentage of those who supported. Before the ruling, 21% or 41 countries stood their ground that the ruling is binding and must be followed; yet this figure translated into two categories after the ruling was made. 4% reaffirmed the importance of the ruling that it needs to be respected while, 17% simply acknowledged the positive effect that this ruling will bring but not necessarily call for a strict compliance on both parties. Lastly is the trend of the neutral number of states. Before the ruling, 63% or 121 countries remained neutral over the issue; yet this number increased to 147 countries or 76% after the ruling was made.

The reality of this statistics over the importance of the South China Sea Arbitration case strongly supports the argument that its legitimacy lies on the support given by the international community. Despite the fact that a great deal of number of states remained neutral over the issue, this should not lead us to conclude that the international community was ignorant over the developments in the South China Sea, but rather lead us to understand over the perspective where, the states who choose to take a stand are coming from. Though there are is a clear number of states in opposition, the trend it showed suggests that the significant decrease of those who oppose after the ruling was made, signifies that they have acquired a clearer understanding of the conflict through the clarifications made in the ruling, thereby changing their disposition over the issue. This in turn, shows both a renewed appreciation of International law and an informed perspective over the sensitivities of the conflict. While this trend is also seen on those who support it, the difference lies on the consistency of the number of states that retained their position. Though only 7 remained strongly supportive for the implementation of the ruling and 33 were simply optimistic of what this resolution can bring, the total number of countries who supported the issue remained the same. This signifies the importance of two things at the same time: one is the acknowledgement of the sovereignty of states and the other is the importance of international law. The reason why a number of states simply displayed their acknowledgement over the issue suggests that they remain cognizant of the fact that states are sovereign and will be the ones to decide over how the matter will be solved. However, states also acknowledge that international law has given the opportunity for the framework on how a resolution can be peacefully made. This in turn strengthens the argument that international law is still a relevant factor and an ideal guiding principle that could define or lead the decisions done by the state. It should also be observed that, the low number of states who strongly support it should not lead us to belittle the significance that this implies.

The “inter” in International law presupposes at the onset, the inherent aspect that it has concerning the process and interactions made in global relations. While there is a clamor over the need for a sovereign institution to exists as the structural enforcement agency that would fully realize the implementation of International law, we remain with the reality that International law relies on the successes and loses of the interactions made by states within the system. This in turn, may pull us to be frustrated over the system but this frustration should propel us to emphasize on the mechanisms that can improve the system and the avenues by which we can ensure the sustained relevant influence of International law.

Conclusion

The South China Sea has captured the attention of the international community not simply because of it being a conflict, but more importantly because of the geopolitical implications that this conflict will bring. The future of China's leadership, the relevance of the United States presence in Asia and the regional dynamics are all at stake. Beyond the conflict over the potential economic resources are the interests of those who are shaping themselves towards the future they desire. A rising China would want to be considered as a key regional player and a responsible global leader in international affairs. How China will form a resolution over the conflict will be closely observed by the international community.

Meanwhile, the United States needs to reflect on how they want the world to perceive the leadership that they want to maintain. This however is shaping up to be clear as the U.S starts to show its isolationist tendencies given by the surge of populist movement and their change in the presidency. An Asia with or without the United States will definitely bring significant implications and developments in the region. This leaves us now with the question on what the future holds for the regional players in the South China Sea. With the upcoming celebration of the 50th anniversary of the Association of Southeast Asian Nations and the leadership role of the Philippines, key statements and a clear disposition of the regional bloc remains on the table. How the Philippines would want to steer the status quo through ASEAN, given their cooperative shift of engagement to China, will be a strong determinant on how the situation will proceed.

Hence, the possibilities on how the situation will proceed, remains open for any sudden changes. What remains clear at this point in time is the positive trend of the current engagements in the region. Nevertheless, what needs to be done here is to approach the situation in a scholarly manner. The realities of the situation is best explained when the paradigms involved are scrutinized from their historical evolution to its contemporary application. The existence of sovereignty may seem to block any efforts made through international law but what we need to understand is where international law draws its effectiveness. It is clearly evident that while international organizations are acknowledged as significant actors, it is at the behest and under the authority or direction of states that they act. However, as a social construct of society, what needs to be emphasized here is the pulsating support that reverberates across the comity of nations in the importance of International law. How agreements over matters of diverging interests remain founded on the principles it was established, yet dependent on the circumstances at hand, shows the very nature of how Sovereignty and International law interacts in the realm of global politics.

References

Baker, R. (2010). Customary International Law in the 21st Century: Old Challenges and New Debates. *European Journal of International Law*, 174-177.

Besson, S. (2011). Sovereignty, International Law and Democracy. *The European Journal of International Law*, 02.

C, C., R, S., & S, D. (2012). *The Significance of the Wall*. Retrieved from Berlin Wall Pressbooks Web Site: https://berlinwall.pressbooks.com/chapter/the-significance-of-the-wall/

Chambers, J. W. (1999). *The Oxford Companion to American Military History.* Oxford University Press.

Ferreira-Snyman, M. P. (2008). *The Evolution of State Sovereignty: A Historical Overview.* Sabinet African ePublications.

Hershey, A. S. (1912). History of International Law Since the Peace of Westphalia. *The American Journal of International Law*, 01.

Hong, N. (2012). *UNCLOS and Ocean Dispute Settlement: Law and Politics in the South China Sea.* Routledge.

Leone, J. (2010). Post-Sovereign Security and the Absence of the Political. *Journal of Peace, Conflict and Development*, 95-96.

Maland, D. (1966). *Europe in the Seventeenth Century.* London: Macmillan.

Mateo, A. (2014). *The Role of the Doctrine of State Sovereignty in the develoment of International law.*

Mentan, T. (2016). *The Elusiveness of Peace in a Suspect Global System.* African Books Collective.

Nagan, W. P., & Jacobs, G. (2013). The Evolution of Sovereignty. *E-Journal of the World Academy of Art & Science*, 02.

Philpott, D. (2016). *Sovereignty.* Retrieved from Stanford Encyclopedia of Philosophy: https://plato.stanford.edu/archives/sum2016/entries/sovereignty/

Poling, G. B. (2015, January 26). The Philippines vs. China in the South China Sea: A Legal Showdown. *The National Interest*, p. 01.

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. (2014, December 07). Retrieved from Ministry of Foreign Affairs of the People's Republic of China: http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml

Scudder, J. (2015, May 01). *Territorial Integrity: Modern States and the International System.* Retrieved from Exploring Geopolitics Web Site: http://www.exploringgeopolitics.org/publication_scudder_jamie_territorial_integrity_modern_states_international_political_system_jurisdiction_peace_westphalia_lebanon_somalia/

Statement of the Secretary of Foreign Affairs. (2016, July 12). Retrieved from The Official Web Site of the Department of Foreign Affairs - Republic of the Philippines: http://www.dfa.gov.ph/newsroom/dfa-releases/9900-statement-of-the-secretary-of-foreign-affairs-2

The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China). (n.d.). Retrieved from Permanent Court of Arbitration Web Site: http://www.pcacases.com/web/view/7

Tsirbas, M. (2016, June 02). *What Does the Nine-Dash Line Actually Mean?* Retrieved from The Diplomat Web Site: Read the Diplomat, Know the Asia Pacific: http://thediplomat.com/2016/06/what-does-the-nine-dash-line-actually-mean/

United Nations Convention on the Law of the Sea - Preamble. (n.d.). Retrieved from United Nations Website: http://www.un.org/depts/los/convention_agreements/texts/unclos/preamble.htm

Waldron, J. (2011). Are Sovereigns Entitled to the Benefit of the International Rule of Law? *The European Journal of International Law*, 01.

What happens now in the South China Sea? (2016, July 23). Retrieved from East Asia Forum: Economics, Politics and Public Policy in East Asia and the Pacific Web Site: http://www.eastasiaforum.org/2016/07/23/what-happens-now-in-the-south-china-sea/

Who is taking sides after the South China Sea ruling? (2016, August 15). Retrieved from Asia Maritime Transparency Initiative: https://amti.csis.org/sides-in-south-china-sea/