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## U.S. Policy in the Arctic: The Implications of the South China Sea Arbitration Award on American Policy and UNCLOS

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**U.S. POLICY IN THE ARCTIC: THE  
IMPLICATIONS OF THE SOUTH CHINA  
SEA ARBITRATION AWARD ON  
AMERICAN POLICY AND UNCLOS**

*Brian Finneran\**

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## I. INTRODUCTION

In July 2016, the Permanent Court of Arbitration handed down an award, in favor of the Philippines, in the matter of the South China Sea dispute, between the People's Republic of China (China) and the Philippines.<sup>1</sup> The Tribunal's near 500-page award addressed many disputes involving maritime entitlements around afforded certain features in the South China Sea. The Tribunal's legal reasoning, and China's reaction to the award, could have an impact around the world in other disputes involving the law of the sea.

One region that could be impacted by the award is the Arctic. Disputes in the Arctic are not of the same strategic importance as those concerning the South China Sea right now.<sup>2</sup> Nevertheless, climate change is leading to reduced ice in the Arctic, and the increasingly longer periods of open water are leading to an increased interest in both shipping and exploration for oil and gas.<sup>3</sup> This, in turn, is leading to increased interest in environmental protection in the region.<sup>4</sup> With that increased interest, the applicability of some of the issues decided in the South China Sea Award to disputes in the Arctic will be of importance.

The disputes in the South China Sea were brought before the Tribunal under the United Nations Convention on the Law of the

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<sup>1</sup> Thomas Schoenbaum, *The South China Sea Arbitration Decision and a Plan for Peaceful Resolution of the Disputes*, 47 J. Mar. L. & Com. 451, 451 (2016).

<sup>2</sup> See Yann-huei Song, *Conflicting Outer Continental Shelf claims in the East and South China Seas: Proposals for Cooperation and Peaceful Resolution*, 35 HAW. L. REV. 485, 490-96 (2013) (explaining ecological importance and explaining U.S. interest); see also Commander Dustin E. Wallace, *An analysis of Chinese Maritime Claims in the South China Sea*, 63 NAVAL L. REV. 128, 130-33 (2014) (explaining shipping importance and China's assertion that the South China Sea is a core interest).

<sup>3</sup> Andrew Haptsig, Ivy Fredericksen, et. al., *Arctic Bottleneck: Protecting the Bering Strait Region from Increased Vessel Traffic*, 18 OCEAN & COASTAL L. J. 35, 35 (2012) (arguing for increased presence for environmental protection to offset increased risk from increased shipping traffic).

<sup>4</sup> Taylor Simpson-Ward, *Changes in Latitudes Call for Changes in Attitudes: Towards Recognition of a Global Imperative for Stewardship, Not Exploitation, in the Arctic*, 37 SEATTLE U. L. REV. 1239, 1240-1241 (2014) (calling for stewardship over exploitation).

Sea (UNCLOS or the Convention). UNCLOS was signed in 1982 and came into force in 1994 when Guyana ratified.<sup>5</sup>

UNCLOS is a wide reaching, multi-lateral treaty that defines the legal rights and responsibilities of states with regards to the oceans.<sup>6</sup> The Convention includes rules with regard to the status and rights attached to features (e.g. islands, rocks, reefs, etc.), limits of coastal states' rights regarding contiguous waters, maritime conservation, deep-sea mining, and dispute resolution.<sup>7</sup>

The South China Sea is shared by many states. Within the Sea are a group of islands known as the Spratly Islands (Spratlys)(see Figure 1). China, the Philippines, Malaysia, Taiwan, Brunei, and Vietnam claim sovereignty over all or some of the islands.<sup>8</sup> In the group, there are islands with habitation, along with small, uninhabited islands and several reefs. China has used these islands and features to define its territorial seas.<sup>9</sup> Along with the dispute over the islands, this also created an overlap in territorial seas between China and the Philippines.<sup>10</sup>

The Philippines sought review under UNCLOS from the Permanent Court of Arbitration. China objected to the jurisdiction of the Tribunal, claiming the dispute was about sovereignty of the Spratlys, which is beyond the reach of UNCLOS.<sup>11</sup> The Tribunal found that while a dispute over sovereignty did exist, it could rule on

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<sup>5</sup> Wallace, *supra* note 2, at 136.

<sup>6</sup> *Id.* at 137-143 (reviewing the legal arguments put forward by China defending their actions in the South China Sea).

<sup>7</sup> See United Nations Convention on the Law of the Sea art. 298, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

<sup>8</sup> Song, *supra* note 2, 493-494.

<sup>9</sup> Zhiguo Gao, Bing Bing Jia, *Agora: The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AM. J. INT'L. L. 98, 104, (2013) (explaining the historical developments of the Nine-Dash line in Chinese law).

<sup>10</sup> *Id.* at 104.

<sup>11</sup> *In re* Arbitration Between the Republic of the Philippines and the People's Republic of China, PCA Case No. 2013-19, Jurisdiction and Admissibility, ¶ 1 (Oct. 29, 2015), <http://www.pca-cpa.org> [hereinafter Award on Jurisdiction]; *In re* Arbitration Between the Republic of the Philippines and the People's Republic of China, PCA Case No. 2013-19, Award, ¶ 1 (July 12, 2016), <http://www.pca-cpa.org> [hereinafter Award].

the issues raised by the Philippines without ruling on the specific issue of sovereignty.<sup>12</sup> UNCLOS has an option to declare issues of maritime delimitation beyond the reach of mandatory arbitration.<sup>13</sup> China exercised that option in 2006.<sup>14</sup> The Tribunal found the issue of maritime zone entitlement to be distinct from maritime delimitation.<sup>15</sup> Because of its objections, China did not participate in the arbitration and does not accept its rulings.

Despite China's objections, the Tribunal felt it could move forward and use Chinese position papers, a collection of documents from members of the Chinese government outlining their policy, to represent their positions.<sup>16</sup> The Tribunal made important rulings, both on jurisdiction and on issues relating to entitlements of rights to maritime zones. On jurisdiction, the Tribunal found that since both states were parties to UNCLOS, the Tribunal had jurisdiction, even though one state refused to participate beyond objecting to jurisdiction.<sup>17</sup> The Tribunal also defined "rocks" as features above water at high tide, but which could not sustain human habitation or economic life of their own.<sup>18</sup> This definition was applied to features that had people, but used the fact that the inhabitants required supplies from elsewhere to survive as a basis for their ruling.<sup>19</sup> This definition means that those features could not generate their own Exclusive Economic Zone (EEZ) or continental shelf.<sup>20</sup> Further, the Tribunal ruled that building on a feature, like a reef, to make it resemble an island or a "rock" would not change its status or the

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<sup>12</sup> See Award ¶1.

<sup>13</sup> See UNCLOS (setting out the circumstances and procedures for opting out of mandatory dispute resolution proceedings).

<sup>14</sup> *Id.* at art. 298, ¶2.

<sup>15</sup> *Id.*

<sup>16</sup> See Award at ¶144 (explaining how the Tribunal used statements made by the Chinese government both publicly and privately to ensure fairness despite China's non-participation).

<sup>17</sup> *Id.* at ¶154 (explaining how the submissions by the Philippines do not implicate sovereignty, which is beyond the jurisdiction of UNCLOS); see also *Id.* ¶155 (distinguishing maritime entitlements from maritime delimitation, which China has opted to negotiate outside of UNCLOS).

<sup>18</sup> *Id.* at ¶280.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

legal entitlements associated with it, as artificial islands are afforded no rights.<sup>21</sup>

Similar issues could present themselves in the Arctic. The ice in the Arctic has shrunk by thirty-two percent since the 1960's, and there is an average loss of 70,000 square kilometers of ice per year.<sup>22</sup> Therefore, economic development and commercial activity in the Arctic is increasing.<sup>23</sup> This will lead to opportunities to ship through northern routes and exploit potential oil and gas reserves, along with the challenges of environmental protection.<sup>24</sup> These developments have led to an increased need to establish maritime delimitation and the extent of the continental shelf in the region by Arctic countries.

This comment seeks to take a new look at United States (U.S.) policy with respect to the Arctic and UNCLOS, through the lens of the arbitration award in the South China Sea. The first section of this comment will discuss the background of UNCLOS. Section two will discuss the arbitration award, from the South China Sea Arbitration Decision. Section three will examine the issues facing the Arctic region. Finally, this comment will conclude with an analysis of whether the ruling in the arbitration award should change U.S. policy with respect to UNCLOS, particularly in regards to Arctic interests.

## II. HISTORY AND BACKGROUND

### A. United Nations Convention on the Law of the Seas

As mentioned above, UNCLOS is an international agreement that defines the rights and responsibilities states have with regard to

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<sup>21</sup> Ryan Mitchell, Article, *An International Commission of Inquiry for the South China Sea?: Defining the Law of Sovereignty to Determine the Chance for Peace*, 49 VAND. J. TRANSNAT'L L. 749, 762 (2016).

<sup>22</sup> Peter G. Pamel, Robert C. Wilkins, *Challenges of Northern Resource Development and Arctic Shipping*, 29 JERL 333 (2011).

<sup>23</sup> Jeanne L. Amy, Comment, *Historically Iced Out: Calling on the United States To Resolve Its International Law Disputes in the Arctic Ocean*, 40 TUL. MAR. L. J. 137, 137 (2015) (quoting Koji Sekimizu, Secretary General, International Maritime Organization).

<sup>24</sup> *Id.* at 138-39.

the oceans.<sup>25</sup> Both the Philippines and China are parties to the Convention. Furthermore, all the Arctic states, except for the U.S., are parties to UNCLOS. The Convention can provide a framework for the Arctic states to set boundaries and regulations in the Arctic.<sup>26</sup> Additionally, the Convention also provides an avenue for dispute resolution, as displayed in the arbitration between the Philippines and China.

UNCLOS is the culmination of many years of negotiating a uniform law of the seas. The law of the seas is traced to the ancient civilizations of Phoenicia, Carthage, India, and China.<sup>27</sup> The custom of freedom of the seas was influenced by major maritime powers following several disputes in the 16<sup>th</sup> and 17<sup>th</sup> centuries, and solidified in the 19<sup>th</sup> century by British naval supremacy.<sup>28</sup> Along with freedom of the seas, it was also traditionally recognized that a coastal state could claim sovereignty over some coastal waters as territorial seas.<sup>29</sup> Concerns over access to offshore resources and improved technology in the mid-20<sup>th</sup> century led to states extending territorial jurisdiction further from their coasts, eventually leading to efforts for a codified law of the seas.<sup>30</sup>

The first conference on the law of the seas was held in 1958 in Geneva.<sup>31</sup> This dealt with the territorial seas and contiguous zone, the high seas, fishing and conservation on the high seas, and the continental shelf, though they failed to define the continental shelf.<sup>32</sup> Two years later, the second conference was held to decide the breadth of the territorial sea.<sup>33</sup> The U.S. and Canada proposed a

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<sup>25</sup> Wallace, *supra* note 2, at 135.

<sup>26</sup> Lieutenant Commander Joan L. Malik, Article, Essay & Note, *United States Environmental Law Applied in The Arctic Ocean: Frustrating The Balance of the Law of the Sea, National Sovereignty, and International Collaboration Efforts*, 60 NAVAL L. REV. 41, 43 (2010).

<sup>27</sup> Louis B. Sohn, John E. Noyes, Erik Franckx, Kristen G. Juras, CASE MATERIALS ON THE LAW OF THE SEA 1 (2d ed. 2014).

<sup>28</sup> *Id.* at 1-2.

<sup>29</sup> *Id.* at 2.

<sup>30</sup> *Id.* at 2-3.

<sup>31</sup> *Id.* at 3.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

compromise of a six nautical mile territorial sea, but failed; leading many states to declare a twelve nautical mile breadth.<sup>34</sup> This led to the final conference on the law of the seas, which is UNCLOS.<sup>35</sup>

UNCLOS provides for sets of rights that belong to a coastal state. To understand these rights, it is necessary to determine how UNCLOS defines territorial seas, the exclusive economic zone (EEZ), and the continental shelf. First, the baseline is the normal low water mark as it is marked on an officially recognized chart.<sup>36</sup> As such, it is the coastal state that determines the baseline.<sup>37</sup> The coastal state can designate their territorial seas extending outward from the baseline up to twelve nautical miles.<sup>38</sup> The coastal state has sovereignty over their territorial seas and the airspace above it.<sup>39</sup> The EEZ can extend up to two hundred nautical miles from the baseline.<sup>40</sup> Within the EEZ, the coastal state has exclusive rights for exploring, exploiting, conserving, and managing resources.<sup>41</sup> The continental shelf comprises the seabed and subsoil of the area beyond the territorial sea, through the “natural prolongation of its land territory to the outer edge of the continental margin.”<sup>42</sup> If this prolongation extends less than two hundred nautical miles from the baseline, the continental shelf will extend out to two hundred miles.<sup>43</sup> For cases where the continental shelf extends beyond two hundred miles from the baselines, the United Nations (UN) set up the Commission on the Limits of the Continental Shelf (CLCS), which will decide whether to extend continental shelf jurisdiction to the coastal state based on evidence from the coastal state.<sup>44</sup> The coastal

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 3-5.

<sup>36</sup> UNCLOS, *supra* note 7, art. 5.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at art. 3.

<sup>39</sup> *Id.* at art. 2.

<sup>40</sup> *Id.* at art. 57.

<sup>41</sup> *Id.* art. 56(1)(a).

<sup>42</sup> *Id.* at art. 76.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at art. 76(8).



state has exclusive rights to the seabed and subsoil rights, but these rights have no effect on the rights to the water and air above.<sup>45</sup>

Going hand in hand with the above distinctions are the definitions and rights attached to features such as islands and reefs. UNCLOS defines an island as “a naturally formed area of land, surrounded by water, and above water at high tide.”<sup>46</sup> Islands can entitle the state having sovereignty over it to the full maritime rights described above.<sup>47</sup> However, the Convention distinguishes rocks from islands. UNCLOS defines rocks as high-tide features that cannot sustain human habitation or an economic life of their own.<sup>48</sup> Rocks get no EEZ or continental shelf, though they do retain a territorial sea.<sup>49</sup> Lastly are low-tide elevations, those above water at low tide, but submerged at high tide. UNCLOS provides these features may be used in forming the baseline when in the territorial sea of the coastal state, but otherwise get no territorial sea of their own.<sup>50</sup>

Archipelagic states (states who are entirely made up of a series of islands) get some different guidelines for establishing baselines, allowing the state to draw the baseline around the whole of the islands comprising the state, instead of each island separately, while include limitations on how much ocean territory can be claimed. UNCLOS defines archipelagic states as comprised wholly of one or more archipelagos.<sup>51</sup>

Along with the rights given to coastal states, all states possess the right of innocent passage through other states’ territorial seas.<sup>52</sup> The purpose of innocent passage is to traverse territorial seas without entering internal waters or proceeding to or from internal waters.<sup>53</sup> Passage must be “innocent,” meaning a ship cannot fish, do research,

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<sup>45</sup> *Id.* at art. 76, 77.

<sup>46</sup> UNCLOS, *supra* note 7, art. 121(1).

<sup>47</sup> *Id.* at art. 121(2).

<sup>48</sup> *Id.* at art. 121(3).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at art. 13.

<sup>51</sup> *Id.* art. 46.

<sup>52</sup> *Id.* at art. 17.

<sup>53</sup> *Id.* at art. 18(1).

or show threat of force upon the coastal state.<sup>54</sup> While the coastal state can regulate innocent passage with regards to environmental protection and maritime safety, the state cannot hamper passage.<sup>55</sup> A corollary to innocent passage is transit passage. All ships have the right of passage through international straits (passages of water between two areas of high seas).<sup>56</sup> A state can only restrict passage between an island and the mainland where there is another available route around island.<sup>57</sup> Ships also have the right of passage through sea-lanes traversing archipelagic waters.<sup>58</sup>

UNCLOS also provides for responsibilities of states. The Convention provides that all states have an obligation to protect and preserve the marine environment.<sup>59</sup> Coastal states must use all practicable means to prevent pollution when exploiting resources within their jurisdiction and take all measures necessary to prevent pollution from activities within their jurisdiction from affecting the marine environment of another state.<sup>60</sup> Coastal states have the right to impose regulations for environmental protection within their EEZ.<sup>61</sup>

#### B. The Arbitration Award

In 2013, the Philippines brought several issues to the Permanent Court of Arbitration under UNCLOS. Among the issues brought to the Tribunal, the Philippines sought rulings on the legality of China's claims of historic right, the status of certain features of the Spratlys, and the legality China's actions surrounding those features, including: island building, over-fishing, prevention of Filipino fisherman from fishing, and prevention of oil exploration.<sup>62</sup>

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<sup>54</sup> *Id.* at art. 19.

<sup>55</sup> *Id.* at art. 21, 24.

<sup>56</sup> UNCLOS, *supra* note 7, art. 38.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at art. 52.

<sup>59</sup> *Id.* at art. 192.

<sup>60</sup> *Id.* at art. 194.

<sup>61</sup> UNCLOS, *supra* note 7, art. 61.

<sup>62</sup> *See* Award, generally.

China objected to the jurisdiction of the Tribunal, claiming the dispute was really about sovereignty over the Spratlys (which is outside of UNCLOS) and maritime delimitation. China argued they that maritime delimitation was also outside UNCLOS jurisdiction, because they had reserved from UNCLOS's ability to subject delimitation to mandatory arbitration in 2006.<sup>63</sup> (This was a reservation provided by UNCLOS, and exercised by China).<sup>64</sup> While the Tribunal recognized those disputes exist between the two states, the Tribunal decided it could address the Philippines submissions without ruling on sovereignty or maritime delimitation.<sup>65</sup> China and the Philippines were a part of the 2002 China-ASEAN Declaration on the Conduct of Parties in the South China Sea. While China argued against arbitration, the Tribunal reasoned that the China-ASEAN Declaration was a political agreement with no mechanism for binding resolution; therefore, it would not preempt arbitration.<sup>66</sup>

The Philippines challenged the Chinese assertions to historical rights for most of the area of the South China Sea.<sup>67</sup> To the argument that this was about maritime delimitation, the Tribunal countered that it was about entitlements, and “[w]hile all sea boundary delimitations will concern entitlements, the converse is not the case.”<sup>68</sup> The Tribunal reasoned that since UNCLOS does not provide for freedom of navigation in territorial seas, and China has recognized that right within the South China Sea, along with other actions, that China's claims were not that the South China Sea was a territorial sea or its internal waters.<sup>69</sup> Therefore, China's claims are not of historic title, but historic rights that fall short of title.<sup>70</sup> In this, the Tribunal ruled that UNCLOS prevailed over historic rights that were incompatible with provisions of the Convention, specifically the

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at ¶153.

<sup>65</sup> *Id.* at ¶154, 155.

<sup>66</sup> *Id.* at ¶159.

<sup>67</sup> *Id.* at ¶169.

<sup>68</sup> *Id.* at ¶204.

<sup>69</sup> *Id.* at ¶213, 228.

<sup>70</sup> *Id.* at ¶229 (explaining how China's recognition of freedom of navigation and over-flight mean the China's claims are not of title, but some lesser right).

Philippines rights within their EEZ.<sup>71</sup> The Tribunal further added that historical navigation and fishing could not form the existence of a historical right. China would have to engage in behavior beyond what was allowed under the freedom of the high seas and had the other states acquiescence.<sup>72</sup>

Next, the tribunal addressed the status of certain features of the Spratlys. The Tribunal stated that by the phrase “naturally formed” in the definition of low tide elevation, UNCLOS meant that such a feature could not have its legal status changed through human modification.<sup>73</sup> The tribunal continued that low tide elevations are not land territory and “low tide elevations cannot be appropriated, although ‘a coastal state has sovereignty over low tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself.’”<sup>74</sup>

In the Tribunal’s discussion of islands and rocks, it focused on two main differentiating criteria: (1) the capability for “human habitation”; and (2) “economic life.” The Tribunal ruled that “human habitation” is more than human survival.<sup>75</sup> That it requires all the elements necessary to keep people alive, and the conditions that are conducive to human life and livelihood.<sup>76</sup> This would include food, water, and shelter. But, importantly, the tribunal noted that the Convention should not assume mode or culture, as forms of habitation vary.<sup>77</sup> Regarding “economic life,” any economic activity

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<sup>71</sup> *Id.* at ¶238 (cites four propositions for handling UNCLOS and other international agreements: (a) if the convention expressly permits or preserves other agreements they are unaffected; (b) if UNCLOS does not expressly permit an agreement, but the terms are not incompatible, the agreement is preserved; (c) when rights arise independently of the convention and are not incompatible, they are unaltered; and (d) all agreements incompatible with the convention are quashed); *Id.* at ¶247 (explaining that the convention supersedes historical rights to maritime areas that are in another state’s EEZ).

<sup>72</sup> *Id.* at ¶270.

<sup>73</sup> *See* Award. at ¶305.

<sup>74</sup> *Id.* at ¶309 (quoting *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, p. 624 at p. 641 para. 26).

<sup>75</sup> *Id.* at ¶489 (defining human habitation as used in UNCLOS art. 121(3)).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at ¶490.

relating to the EEZ or continental shelf must be excluded, since rocks are not entitled to either. However, economic activity in the territorial sea is considered.<sup>78</sup>

The tribunal ruled that none of the disputed features in the Spratlys were fully entitled islands, as some were rocks and others low-tide elevations.<sup>79</sup> Since there was no legal basis for historic rights beyond those provided in UNCLOS, and none of the features in the Spratlys are fully entitled islands, no feature was capable of generating an EEZ or continental shelf.<sup>80</sup>

Following the ruling on the legal status of the various features of the Spratlys, the Tribunal turned to Chinese efforts to prevent Filipino fisherman from fishing near some of the features and efforts to prevent companies, with contracts with the Philippines, from exploring for oil in those areas. The disputed features in these submissions are all within the EEZ or continental shelf of the Philippines. The coastal state has sovereign rights to explore, exploit, and manage resources in the EEZ.<sup>81</sup> In regards to the prevention of oil exploration, the Tribunal found that China was aware of the differing views on the parties' rights, but sought to enforce the view instead of seeking resolution, and thereby breached UNCLOS Article 77.<sup>82</sup> While the Tribunal decided there was not enough evidence that China actively interfered with Filipino fishermen, the adoption of legislation or the promulgation of a fishing moratorium that would apply within the Filipino EEZ, would create the realistic prospect that Filipinos could face punitive measures, and that constituted a breach of UNCLOS Article 56.<sup>83</sup> The Tribunal also ruled on the activities of Chinese fisherman in the EEZ of the Philippines. The Tribunal decided that while China is not responsible for the actions of its fishermen, it can be responsible for a failure to control them if

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<sup>78</sup> *Id.* at ¶502, 513.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at ¶692.

<sup>81</sup> *Id.* at ¶700 (citing UNCLOS art. 56).

<sup>82</sup> *Id.* at ¶708.

<sup>83</sup> *Id.* at ¶712.

the state did not conduct due diligence to prevent them from fishing inside another state's EEZ.<sup>84</sup>

Finally, the Tribunal turned to allegations of environmental degradation by China inside the Philippine's EEZ. First, the obligations in Part XII of the Convention apply irrespective of sovereignty over any feature.<sup>85</sup> In regards to the assertion that island building activities damage the environment, the Tribunal said, "[s]tates have a positive 'duty to prevent, or at least mitigate, significant harms to the environment when pursuing large-scale construction projects.'"<sup>86</sup> Further, UNCLOS Article 92 requires states "ensure their activities within their jurisdiction and control respect the environment of other states . . ."<sup>87</sup>

### C. The Arctic

A major issue facing the Arctic is the freedom of the seas for shipping. Some have predicted that between 2040 and 2059, shipping lanes through the Northwest Passage, connecting the U.S. east coast and the Pacific, by route north of Canada, could have open shipping lanes without an icebreaker ship escort for part of the year.<sup>88</sup> The Nordic Orion, a Danish vessel completed the passage already, and saved 1,000 miles of transit by avoiding the Panama Canal. Additionally, the Orion was able to carry twenty five percent more coal, since they did not have to be concerned with the canal's limitations.<sup>89</sup> The issue is that Canada has long thought of the Northwest Passage as the internal waters of Canada, granting them complete sovereignty. This sentiment was clearly expressed to the

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<sup>84</sup> See Award at ¶728-744.

<sup>85</sup> *Id.* at ¶927 (referencing UNCLOS art. 192).

<sup>86</sup> *Id.* at ¶941 (quoting *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Partial Award, 18 February 2013, PCA Award Series (2014), para. 451; quoting *Arbitration Regarding the Iron Rhine ("IJzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Award of 24 May 2005, PCA Award Series (2007), RIAA Vol. XXVII p. 35 at pp. 66-67, para. 59).

<sup>87</sup> *Id.* (citing *Legality and Threat of Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, p. 226 at pp. 240-242, para. 29).

<sup>88</sup> Simpson-Ward, *supra* note 4, 1240-41.

<sup>89</sup> *Id.*

U.S. following a U.S. icebreaker made the crossing in 1985.<sup>90</sup> The U.S., on the other hand, believes that the passage is an international waterway.<sup>91</sup> This view is shared by Japan and the European Union.<sup>92</sup> If the Northwest Passage is considered internal waters, Canada has complete sovereignty over the waters and can allow or prohibit anybody they wish.<sup>93</sup> An analog can be found in the Northern Sea Route, the equivalent of the Northwest Passage, but north of Russia, where Russia has designated the route as internal waters and created a permitting system to allow some shipping through the route to begin.<sup>94</sup> Territorial waters, on the other hand, imbue on shippers the right of innocent passage, meaning they can pass so long as they do not fish, pollute, spy, or present themselves as a threat.<sup>95</sup> UNCLOS has a similar provision for archipelagic waters, which may apply to the route through the islands north of Canada through which the Northwest Passage flows.<sup>96</sup>

Another issue that could potentially become a problem is resource exploration. Historically, ocean resources beyond territory have been free for whoever can exploit them.<sup>97</sup> However, UNCLOS has sought to regulate mining in the seabed, through the International Seabed Authority (ISA).<sup>98</sup> While this was originally designed to regulate the mining of manganese nodules, the framework in the convention could be applied to any seabed mining.<sup>99</sup> This provision is largely why the U.S. has failed to ratify the

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<sup>90</sup> Caitlin O'Leary, *The New Ice Age: The Dawn of Arctic Shipping and Canada's Fight for Sovereignty Over the Northwest Passage*, 46 U. MIAMI INTER. AM. L. REV. 117, 119-124 (2014); See also Melissa Renee Pegna, *U.S. Arctic Policy: The Need to Ratify a Modified UNCLOS and Secure a Military Presence in the Arctic*, 44 J. MAR. L. & COM. 169, 177 (2013).

<sup>91</sup> O'Leary, *supra* note 91, at 119.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 122.

<sup>94</sup> *Id.* at 126.

<sup>95</sup> *Id.* at 122.

<sup>96</sup> O'Leary, *supra* note 91, at 122.

<sup>97</sup> Kevin V. Cook, *The Discovery of Lunar Water: An Opportunity to Develop a Workable Moon Treaty*, 11 GEO. INT'L. ENVTL. L. REV. 647, 679 (1999).

<sup>98</sup> *Id.* at 680.

<sup>99</sup> *Id.*

convention.<sup>100</sup> The U.S. is already in dispute with Canada over maritime delimitation in the Beaufort Sea, which may hold large deposits of oil and natural gas.<sup>101</sup>

Also, while the territorial sea and contiguous zone designations confer rights upon the coastal state both to the sea and the sea bed, the EEZ offers only limited rights to the sea itself, but offers more rights to the seabed and resources within.<sup>102</sup> Beyond that, UNCLOS has created rights attached to the continental shelf. This would increase seabed mining rights up to 350 nautical miles.<sup>103</sup> However, this is not just a given right. The UN established the UNCLOS.<sup>104</sup> Once a coastal state has ratified UNCLOS, they have ten years to submit to the commission their territorial claim to the seabed, which must scientifically show that their claim is part of their continental shelf.<sup>105</sup> In the arctic, ice coverage has limited the ability to complete the necessary studies. Russia submitted their claim, which purported that their continental shelf reached the North Pole, but it was denied by the commission, and they are in the process of preparing another. Canada has not submitted, but it is expected to be as expansive as Russia's first claim. These overlapping claims could create contention in the search for oil. Both Canada and the U.S. are oil-importing countries with limited ability to drill for oil terrestrially. Russia has large quantities of known oil and natural gas, but most of their deposits are in territory with significant Muslim populations, leaving them with terrorism related challenges.<sup>106</sup> The fact that Russia's primary exports are resources, including large amounts of natural gas and petroleum, makes Arctic potential important.<sup>107</sup>

Environmental protection is also an important issue. Increased vessel traffic and oil exploration pose threats to a delicate

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<sup>100</sup> *Id.*

<sup>101</sup> Malik, *supra* note 23, at 55.

<sup>102</sup> *Id.* at 59.

<sup>103</sup> *Id.*

<sup>104</sup> O'Leary, *supra* note 91, at 121.

<sup>105</sup> *Id.*

<sup>106</sup> Dr. Eric Engle, *A New Cold War? Cold Peace. Russia, Ukraine, and Nato*, 59 ST. LOUIS L.J. 97, 121 (2014).

<sup>107</sup> *Id.*



ecosystem. However, the Arctic nations have created the Arctic Council, which includes the Arctic nations and indigenous populations.<sup>108</sup> While national security topics are off limits for the council and it has had limited success with other major disagreements, the council has worked with the International Maritime Organization towards sustainable development.<sup>109</sup>

Following the award in the matter of the South China Sea, is the U.S. better ratifying UNCLOS? Yes. While the U.S. has maintained that most UNCLOS is customary international law and as such has followed it, the U.S. is failing to take advantage of the provisions relating to the continental shelf. Also, they are losing out on an important dispute resolution tool. While the U.S. enjoys strong relationships with most arctic states, Russia is a notable exception. Russia has been increasingly aggressive worldwide, but they have no history of violating the law of the sea. By not acceding to UNCLOS, the U.S. has removed itself from the body of international law Russia seems to respect.

Often overlooked, but used by both Russia and Canada to support their regulations over their respective sea routes, is Article 234 of UNCLOS. This provision allows for unilateral action by the coastal state to protect the environment of ice-covered areas within that coastal state's EEZ.<sup>110</sup> For an area to be within the purview of Article 234, it must be covered in ice for at least six months of the year, ice must present an exceptional hazard to navigation, the area must be particularly susceptible to irreversible damage from pollution, and the laws in place must have due regard for navigation.<sup>111</sup> While both the Northwest Passage and Northern Sea Route are covered in ice a majority of the year and the frailty of the Arctic well known, ice is becoming less of a hazard every year, and it is questionable whether the laws in place show due regard for navigation. Canada has begun a mandatory ship reporting and vessel

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<sup>108</sup> Malik, *supra* note 26, at 43.

<sup>109</sup> *Id.* at 44, 45.

<sup>110</sup> Stanley P. Fields, *Article 234 of the United Nations Convention on the Law of the Sea: The Overlooked Linchpin for Achieving Safety and Security in the U.S. Arctic?*, 7 HAR. NAT'L SEC. J. 55, 72-73 (2016).

<sup>111</sup> *Id.*

traffic service system (NORDREG).<sup>112</sup> This has essentially required Canadian permission to navigate the Northwest Passage.<sup>113</sup> While this action is legal under the Canadian proposition that the waters of the passage are the internal waters of Canada, it would not cover UNCLOS Article 234 if the passage were defined as an international sea route.

### III. APPLYING THE LESSONS OF THE ARBITRATION TO THE ARCTIC

The tribunal in the arbitration between the Philippines and China considered many arguments over the law of the seas. Likewise, there are many issues coming to the fore with how to handle the opening of waters in the Arctic. At first blush, these two areas seem to have very little in common. The South China Sea is an oft-used sea route, used for more than half of global maritime commerce.<sup>114</sup> Further, it has been used since the beginning of human habitation in the area, and has supported millions of people who have exploited the natural resources.<sup>115</sup> On the other hand, the Arctic has been frozen and impassible since explorers first thought to transit the Northwest Passage, and only small groups of people have made societies existing in that part of the world.

However, there is much in common as well. Both bodies of water are bordered by several states with competing interests; they are both rich in resources; and they both are coveted as shipping routes. As such, the arbitration award can give insight into how to handle potential issues that may arise in the Arctic, particularly with respect to historic rights or title and maritime entitlements, the status of features, and dispute resolution.

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<sup>112</sup> James W. Houck, *The Opportunity Costs of Ignoring the Law of Sea Convention in the Arctic Hoover Institution: Arctic Security Initiative* (2013).

<sup>113</sup> Michael Sternheim, Comment, *Regulating the Northwest Passage*, 10 LOY. MAR. L. J. 173, 189 (2011).

<sup>114</sup> Wallace, *supra* note 2, at 130.

<sup>115</sup> Florian Dupuy and Pierre-Marie Dupuy, *Agora: The South China Sea: A Legal Analysis of China's Historic Claim in the South China Sea*, 107 A. J. I. L. 124, 126 (2013).

## A. Historic Rights and Title

As stated, Canada views the Northwest Passage as internal waters.<sup>116</sup> Their view as such was stated as early as 1957.<sup>117</sup> In 1985, Canada announced it would use provisions of UNCLOS to draw straight baselines around the outside of the Canadian archipelago in the Arctic, stating, “Baselines would merely trace the ‘outer limit of Canada’s historic internal waters.’”<sup>118</sup> This statement by Secretary Clark, Canada’s Secretary of State for External Affairs, both continued the argument that the waters were internal waters and also used a historic argument as justification. This statement was objected to by the U.S., stating that “there is no basis in international law to support the Canadian Claim.”<sup>119</sup>

The leading case in international law for historic rights is the *Anglo-Norwegian Fisheries case* heard by the International Court of Justice (ICJ). The case laid out a five-part test for claiming historic title: (1) jurisdiction as internal waters over claimed area; (2) a long period of time has passed; (3) there has been no opposition to claimed jurisdiction; (4) the claim has been continuously pursued; and (5) has been notoriously asserted.<sup>120</sup>

Likewise, China has long made claims to historic rights in the South China Sea. In 2001, China submitted two *notes verbales* declaring sovereignty over all the islands in the South China Sea and adjacent waters and submitted a map with the nine-dash line.<sup>121</sup>

This was the same claim China has made since the 1950’s, and it appears that China supports their claim of sovereignty through historical presence and displays of authority.<sup>122</sup> Unlike the Canadian

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<sup>116</sup> Houck, *supra* note 113.

<sup>117</sup> Sternheim, *supra* note 114, at 189.

<sup>118</sup> *Id.* (quoting Joe Clark, Secretary of State for External Affairs, on Canada’s decision to draw straight baselines).

<sup>119</sup> *Id.* at 180.

<sup>120</sup> Christopher Mirasola, *Historic Waters and Ancient Title: Outdated Doctrines for Establishing Maritime Sovereignty and Jurisdiction*, 47 J. MAR. L. & COM. 29, 42 (2016).

<sup>121</sup> Dupuy and Dupuy, *supra* note 116, at 124-125 (2013).

<sup>122</sup> *Id.* at 125.

claim, however, there is some ambiguity in what China has actually claimed.<sup>123</sup>

It is unclear whether China claims sovereignty over all the waters inside the nine-dash line or what the exact coordinates of the outer limits are.<sup>124</sup> China's Law on the Territorial Sea and the Contiguous Zone states, "The territorial sea of the People's Republic of China is the sea belt adjacent to the land territory and the internal waters of the People's Republic of China. The waters on the landward side of the baselines of the territorial sea of the People's Republic of China constitute the internal waters of the People's Republic of China."<sup>125</sup> China has followed with the statement:

China has indisputable sovereignty over the South China Sea Islands and the adjacent waters. China's sovereignty and relevant rights in the South China Sea, formed in the long historical course, are upheld by successive Chinese governments, reaffirmed by China's domestic laws on many occasions, and protected under international law including the United Nations Convention on the Law of the Sea (UNCLOS). . . .<sup>126</sup>

China has made laws affecting various maritime zones, all in line with UNCLOS, but has repeatedly invoked rights formed through history, which speaks to rights beyond those granted in UNCLOS.<sup>127</sup> The tribunal noted three instances where China seemed to claim rights beyond UNCLOS.<sup>128</sup> However, the tribunal noted that China also asserted its respect for freedom of navigation and over

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<sup>123</sup> See Award at ¶180.

<sup>124</sup> Dupuy and Dupuy, *supra* note 116, at 128.

<sup>125</sup> See Award-at ¶175.

<sup>126</sup> *Id* (quoting Ministry of Foreign Affairs, People's Republic of China, *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* (30 October 2015) (Annex 649)).

<sup>127</sup> *Id* at ¶207.

<sup>128</sup> *Id*.

flight in the South China Sea.<sup>129</sup> Neither of these features are part of a territorial sea or internal waters. This led the tribunal to determine that what China claimed was less than sovereignty over the sea.<sup>130</sup>

Canadian historical claims are quite different from the Chinese claims. First, the Canadian claim is spelled out exactly, where the Chinese have resisted spelling out exactly what rights they claim. Secondly, the Canadians have denied that there is any freedom of navigation of the Northwest Passage, where the tribunal looked at China's acknowledgement of such a right as dispositive proof that their claim was that of less than sovereignty. However, Canada's claim to historical right falls short of the test from *Anglo-Norwegian Fisheries*. There has been opposition, as stated from the U.S., as well as the United Kingdom and others. Further, the long period of time requirement is somewhat ambiguous. In *Anglo-Norwegian Fisheries* the period of time referred to activities spanning a couple hundred years.<sup>131</sup> Also, due to limitations of ice in the region, it would be difficult for Canada to show that they have continuously pursued sovereignty over the waters.

## B. Features

Another aspect of the arbitration in regard to the South China Sea was the issue of features and the maritime entitlements. The South China Sea contains several groups of features, which China claims and uses as a baseline for the Nine-dash line.<sup>132</sup> While the tribunal avoided the disagreements over sovereignty of these features, the tribunal did clarify the law over the maritime entitlements associated with the different types of features.<sup>133</sup>

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<sup>129</sup> *Id.* at ¶208.

<sup>130</sup> *Id.* at ¶213.

<sup>131</sup> Christopher Mirasola, *Historic Waters and Ancient Title: Outdated Doctrines for Establishing Maritime Sovereignty and Jurisdiction*, 47 J. MAR. L. & COM. 29, 42 (2016) (explaining the historical functions of historical rights and entitlements and discussing how such rights have been established and recognized in international law).

<sup>132</sup> Gao and Jia, *supra* note 9, at 99.

<sup>133</sup> Schoenbaum, *supra* note 1, at 451.

The geography of the arctic is different from that of the South China Sea. Where the features in the South China Sea include reefs and atolls, the Arctic has ice sheets and larger islands, particularly in the Canadian archipelago (see Figure 2). Particularly interesting was the Tribunal's ruling on the difference between a "rock" and an "island" when deciding what entitlement to attach to a feature. It ruled that to be an island the feature must be capable of sustaining human habitation.<sup>134</sup> The presence of resources alone is insufficient to make this determination; the feature must show a human capacity to use the resources.<sup>135</sup>

While the tribunal was referring to features that barely were above water at high tide, a similar ruling has the potential to affect maritime entitlements to some of Canada's northern most islands. It is far-fetched that this issue would be brought to an arbitral tribunal, but it could be argued that these Arctic islands are incapable of sustaining human habitation. Despite the size being significantly greater than that of the largest atolls at the center of the South China Sea Arbitration, the lack of warmth and vegetation would seem to make it impossible to live on the northern most islands.

### C. Dispute Resolution

In the matter of the South China Sea, both parties were parties to UNCLOS, which subjected them to compulsory jurisdiction. As stated, the U.S. is not party to UNCLOS, and therefore is not subject to jurisdiction for disputes under UNCLOS. Additionally, neither Canada nor the U.S. subscribes to compulsory jurisdiction of the ICJ.<sup>136</sup> So that leaves questions over how the two would or could solve disputes. If both consented, the ICJ could deliver a final judgment, but it would only be binding on the parties.<sup>137</sup> Also, since the U.S. is a member of the Arctic Council, and the council has subscribed itself to UNCLOS through the Ilulissat Declaration, the U.S. could seek to be heard in front of the

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<sup>134</sup> *Id.* at 467.

<sup>135</sup> *Id.*

<sup>136</sup> Sternheim, *supra* note 114, at 198-199.

<sup>137</sup> *Id.* at 198.

International Tribunal for the Law of the Seas.<sup>138</sup> However, the U.S. has no influence on who sits on the tribunal, since only parties to UNCLOS have that right.<sup>139</sup> On the other hand, a negative ruling is not binding on the U.S. This puts gives the U.S. a choice. They could assent to jurisdiction and risk a ruling against them or avoid a potential valuable means of dispute resolution. While there is a risk of losing in arbitration, having the dispute resolution tool at your disposal is highly valuable. First, you have a platform to state your case, and second, potential arbitration is a bargaining tool to use in political negotiations with the other party, so a positive outcome could be reached without resorting to arbitration.

#### IV. CONCLUSION

In the end, ratifying UNCLOS would make sense because the U.S. follows the convention as a matter of policy and customary law. By not ratifying UNCLOS, the U.S. has given up access to pursue an extended continental shelf and access to the convention's dispute resolution mechanisms. Nevertheless, the U.S. will still be held to most of the provisions as a matter of customary international law.

However, when approaching the question from the point of view of the country's Arctic interests, it appears inconsequential. As a member of the Arctic Council, and its declaration to follow UNCLOS as a group, the U.S. may have found a way into dispute resolution proceedings.

Applying the lessons from the South China Sea arbitration award to this question furthers the idea that signing UNCLOS would not serve to further the U.S. interests in the Arctic. While using the ruling on features to limit Canada's maritime entitlements in the Arctic is interesting, it is highly unlikely to ever come up. The main corollary between the ruling and real disagreements in the Arctic is the status of both the Northwest Passage and the Northern Sea Route. In each case, the ruling would aid the U.S.'s arguments that the routes are international passages. However, the Arctic Council

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<sup>138</sup> *Id.* at 201.

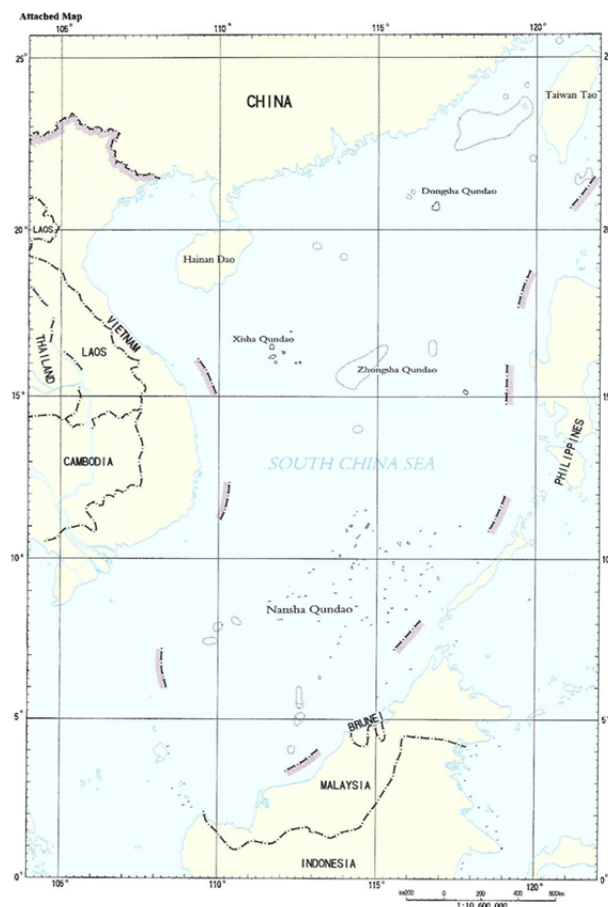
<sup>139</sup> *Id.*

provides its own mechanism for resolution, and may provide a window into UNCLOS mandatory proceedings.



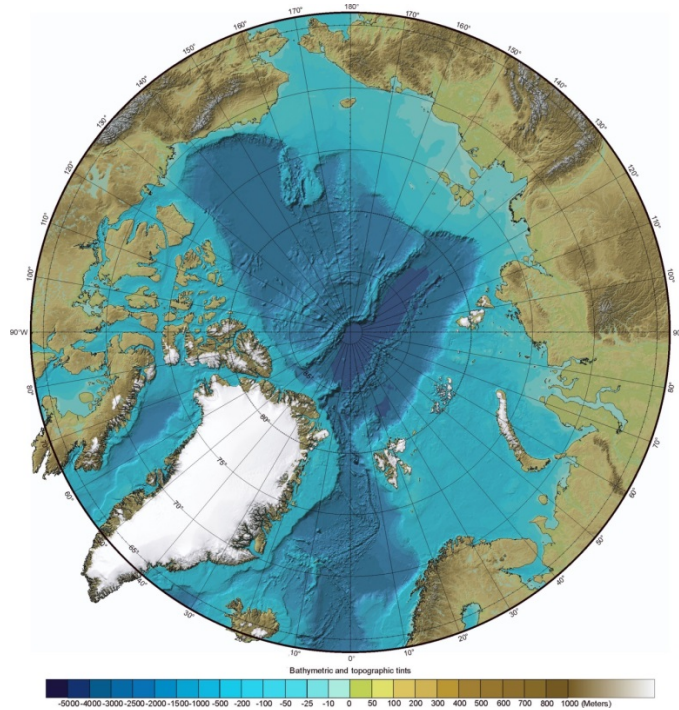
## APPENDIX

Figure 1



Source: Map attached to China's Notes to the UN Secretary-General<sup>140</sup>

<sup>140</sup> Map attached to China's 7 May 2009 Notes Verbales Attachment to Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009) (Annex 191); Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary - General of the United Nations, No. CML/18/2009 (7 May 2009) (Annex 192).

**Figure 2**

Source: National Oceanic and Atmospheric Administration<sup>141</sup>

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<sup>141</sup> International Bathymetric Chart of the Arctic Ocean, National Centers for Environmental Information, National Oceanic and Atmospheric Administration, found online at: [https://www.ngdc.noaa.gov/mgg/bathymetry/arctic/images/IB\\_CAO\\_ver1map\\_letter\\_low.jpg](https://www.ngdc.noaa.gov/mgg/bathymetry/arctic/images/IB_CAO_ver1map_letter_low.jpg)