

# “LAWCRAFT”: CHINA’S EVOLVING APPROACH TO INTERNATIONAL LAW AND THE IMPLICATIONS FOR AMERICAN NATIONAL SECURITY

*Captain Matthew H. Ormsbee\**

## INTRODUCTION

As enthusiasm for the modern *Pax Americana*<sup>1</sup> budded, bloomed, and now, by many accounts, withers, the United States must grudgingly reckon with its waning influence in a world that turns increasingly to China as a rising superpower.<sup>2</sup> The coming years will likely provide an answer to the burning question of whether China will outpace the United States as a superpower, and, if so, how the United States can safeguard its national security in an environment in which it is no longer the uncontested world leader. The 2018 U.S. National Defense Strategy orients defense

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\* Captain Matthew H. Ormsbee is a commissioned officer in the United States Air Force Judge Advocate General’s Corps, currently serving as the Area Defense Counsel at Misawa Air Base, Japan; J.D., Benjamin N. Cardozo School of Law; B.A., Hendrix College. Opinions, conclusions, and recommendations expressed are solely those of the author and do not necessarily represent the views of the U.S. Government, the Department of Defense, or any of its components.

1. See, e.g., Christopher Layne, *The End of Pax Americana: How Western Decline Became Inevitable*, ATLANTIC (Apr. 26, 2012), <https://www.theatlantic.com/international/archive/2012/04/the-end-of-pax-americana-how-western-decline-became-inevitable/256388/> [https://perma.cc/WE2H-ZDQS] (defining *Pax Americana* as “the post-1945 international order . . . in which the United States employed its overwhelming power to shape and direct global events”).

2. See, e.g., Dan Balz, *America’s Global Standing is at a Low Point. The Pandemic Made It Worse.*, WASH. POST (July 26, 2020), <https://www.washingtonpost.com/graphics/2020/politics/reckoning-america-world-standing-low-point/> [https://perma.cc/2XGN-QHGQ] (noting that, “[i]n this climate, China’s leadership has gained a larger advantage in the ‘great power competition,’ and the other player, Russia, is now on a more even level with the U.S.”); see also STRATEGIC ASSESSMENT 2020: INTO A NEW ERA OF GREAT POWER COMPETITION 186 (Thomas F. Lynch III ed. 2020) (describing the shift in the global balance of power, in particular: “While major aims have remained consistent, the power differential between Washington and Beijing has changed over the past 20 years. It has moved in Beijing’s favor in terms of economic influence and selected measures of conventional military power, most notably in areas near China.”); ANONYMOUS, THE LONGER TELEGRAM: TOWARD A NEW AMERICAN CHINA STRATEGY 16 (ATL. COUNCIL 2021) [hereinafter “THE LONGER TELEGRAM”], <https://www.atlanticcouncil.org/wp-content/uploads/2021/01/The-Longer-Telegram-Toward-A-New-American-China-Strategy.pdf> [https://perma.cc/9KHZ-5PN8] (stating that “[t]here is a subtle yet corrosive force that has been at work in the United States’ national psychology for some time now, raising doubt about the nation’s future and encouraging a sense that, as a country, America’s best days may now be in the past”).

professionals toward long-term strategic measures as adversaries' capabilities gradually match or exceed American capabilities.<sup>3</sup> In this context, the United States is in a tug-of-war with China as our primary pacing challenge.<sup>4</sup>

As China's economy and military swell, the U.S. Department of Defense can view strategic competition through the traditional lens of military maneuvers. Yet, strategic competition in the form of *legal* maneuvers deserves much greater attention. The Chinese Communist Party will continue to use lawfare against adversaries; but, increasingly, it will rely on "lawcraft," a more threatening offshoot of lawfare that is characterized by conjured interpretations of law more akin to witchcraft than statecraft.<sup>5</sup> China's embrace of lawcraft denotes the use of law as a tool of subterfuge to mislead and coerce adversaries, particularly in clashes over territorial rights, maritime entitlements, and anti-access/area denial abilities.<sup>6</sup> In this respect, China will wield international law as a sword to extend its might, justify its rise, and outdo the United States, while engaging in conflict just below the threshold of traditional war.<sup>7</sup> How exactly China does so and how the United States can use law as a shield will determine how robustly the United States can compete long-term to achieve its national security objectives.

This Article confronts a key question of our time: as the United States's global power slowly ebbs and China's power incrementally grows without resort to armed conflict, is the international system for peaceful dispute

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3. See U.S. DEP'T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA: SHARPENING THE AMERICAN MILITARY'S COMPETITIVE EDGE 1 (expressly stating that "[i]nter-state strategic competition, not terrorism, is now the primary concern in U.S. national security").

4. WHITE HOUSE, INTERIM NATIONAL SECURITY STRATEGIC GUIDANCE 6 (2021) (underlining the challenges inherent in a "growing rivalry with China").

5. "Lawfare" is a term popularized by Major General Charles J. Dunlap, Jr., U.S.A.F. (Ret.), to describe "the use of law as a weapon of war." See *The Meaning of Lawfare*, LAWFARE, <https://www.lawfareblog.com/topic/meaning-lawfare> [https://perma.cc/9MPS-3TC7] (last visited Nov. 22, 2021); see also Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st [Century] Conflicts* (Nov. 29, 2001), <http://people.duke.edu/~pfeaver/dunlap.pdf> [https://perma.cc/T2KD-BRRH]; see also Robert Williams, *International Law with Chinese Characteristics: Beijing and the "Rules-Based" Global Order*, BROOKINGS INST. (Oct. 2020), [https://www.brookings.edu/wp-content/uploads/2020/10/FP\\_20201012\\_international\\_law\\_china\\_williams.pdf](https://www.brookings.edu/wp-content/uploads/2020/10/FP_20201012_international_law_china_williams.pdf) [https://perma.cc/8E3F-6CUK] (stating that "China exhibits a flexible and functional approach to international law that enables it to benefit from and exploit the international order without the need to advocate fundamental changes to the letter of the law in most areas").

6. Anti-access/area denial (A2/AD) "is an attempt to deny an adversary's freedom of movement on the battlefield. Anti-access—of enemy military movement into an area of operations—utilizes attack aircraft, warships, and specialized ballistic and cruise missiles designed to strike key targets. Area denial—denial of enemy freedom of action in areas under friendly control—employs more defensive means such as air and sea defense systems." *China's Anti-Access Area Denial*, MISSILE DEF. ADVOC. ALL. (Aug. 24, 2018), [https://missiledefenseadvocacy.org/missile-threat-and-proliferation/todays-missile-threat/china/china-anti-access-area-denial/#\\_edn1](https://missiledefenseadvocacy.org/missile-threat-and-proliferation/todays-missile-threat/china/china-anti-access-area-denial/#_edn1) [https://perma.cc/XH7J-FVJ7].

7. See Michael J. Mazarr, *This Is Not a Great Power Competition: Why the Term Doesn't Capture Today's Reality*, FOREIGN AFFS. (May 29, 2019), <https://www.foreignaffairs.com/articles/2019-05-29/not-great-power-competition> [https://perma.cc/6H25-YUJH].

resolution resilient enough to contain potential Chinese abuses and preserve American values? Part I provides background on the liberal world order following World War II and China's special status as an increasingly assertive autocracy. Part II addresses dispute settlement in the context of respect for rule of law, particularly as it relates to a high-profile arbitration proceeding that the Philippines brought against China. Finally, Part III puts forth several solutions to combat lawcraft and secure U.S. national security interests in an increasingly Sinocentric world.

## I. CHINA'S POWER GAINS AS AMERICA'S AUTHORITY WANES

### A. *Relative American Atrophy*

Following World War II, the United States relished in its historic victory and emerged as the flagbearer of a new international order.<sup>8</sup> The United States was largely unchallenged as a great power for decades during the *Pax Americana*, enabling it to establish a norms-based liberal world order based on democratic legal principles.<sup>9</sup> The post-Cold War era of international relations, coinciding roughly with President Bill Clinton's first term, is commonly dubbed a unipolar moment in history in which the United States was the unquestioned world power.<sup>10</sup> From 2006 to 2008, however, this chapter started to near its end, and by 2014, the United States found itself in a fundamentally different situation of great power competition with China and Russia.<sup>11</sup> In the following years, China has repeatedly questioned and weakened the American-led international order that has flourished since World War II.<sup>12</sup>

If the United States's international might and influence is indeed waning as many experts believe, then our national security apparatus should increasingly rely on a sturdy architecture of international law and dispute resolution to uphold global norms and rights.<sup>13</sup> This should take center stage as a vital part of U.S. grand strategy, thereby curbing potential legal abuses

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8. See generally Thomas Wright, *The Return to Great-Power Rivalry Was Inevitable*, ATLANTIC (Sept. 12, 2018), <https://www.theatlantic.com/international/archive/2018/09/liberal-international-order-free-world-trump-authoritarianism/569881> [https://perma.cc/U3ED-HZMA].

9. See *id.*

10. See RONALD O'ROURKE, CONG. RSCH. SERV., RL43838, RENEWED GREAT POWER COMPETITION: IMPLICATIONS FOR DEFENSE—ISSUES FOR CONGRESS 1 (Oct. 7, 2021), <https://fas.org/sgp/crs/natsec/R43838.pdf> [https://perma.cc/RK42-KLPA].

11. See *id.*

12. See generally Eric Sayers, Commentary, *Thoughts on the Unfolding U.S.-Chinese Competition: Washington's Policy Towards Beijing Enters Its Next Phase*, WAR ON THE ROCKS (Feb. 9, 2021), <https://warontherocks.com/2021/02/thoughts-on-the-unfolding-u-s-chinese-competition-washingtons-policy-towards-beijing-enters-its-next-phase> [https://perma.cc/2CJA-AWFB] (stating that "China's predatory and coercive behavior under President Xi Jinping has increased rapidly in recent years, targeted against Uighur Muslims, Hong Kong, Taiwan, India, Australia, Japan, and others").

13. See *id.*

by China and “preventing the emergence of regional hegemons in Eurasia.”<sup>14</sup> Should China achieve regional hegemony, American policymakers might take solace in the fact that unarmed disputes could conceivably be resolved in favor of the United States on the basis of legal arguments rather than resorting to armed conflict. This issue is all the more vital as China’s priorities often conflict with the United States’s priorities, and China grows more comfortable dictating the terms of the global agenda.<sup>15</sup>

### B. Chinese Ascendancy

Central to China’s ascendancy is its economic engine.<sup>16</sup> Its economy has expanded exponentially for decades, notching nearly 10 percent gross domestic product (GDP) growth per year since 1978.<sup>17</sup> In terms of GDP, China has become the second largest global economy behind only the United States, accounting for 18 percent of global GDP.<sup>18</sup> At least one expert believes that China will surpass the United States as the largest global economy in the near future.<sup>19</sup> Today, China is the largest merchandise trading partner of sixty-four countries, including Germany; the United States counts only thirty-eight countries.<sup>20</sup> In addition, since the global financial crisis of 2008, China has exceeded all other countries in terms of contributions to world economic growth, seizing headlines and burnishing its image as a benevolent economic overseer.<sup>21</sup> Although the COVID-19 pandemic momentarily dampened the Chinese economy, within a year it came back stronger than ever.<sup>22</sup>

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14. See CONG. RSCH. SERV., IF10485, DEFENSE PRIMER: GEOGRAPHY, STRATEGY, AND U.S. FORCE DESIGN 1 (Nov. 5, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF10485/12> [<https://perma.cc/6ZQM-UBTW>].

15. See THE LONGER TELEGRAM, *supra* note 2, at 31 (“If this is an accurate account of Xi’s core interests, then it is a separate exercise to determine which of them are compatible with US interests, which potentially overlap, and which are now in fundamental conflict. Prima facie, most of these core interests of Xi’s Communist Party would now fall in the ‘conflict’ category.”).

16. See, e.g., *How to Deal with China*, ECONOMIST (Jan. 9, 2021), <https://www.economist.com/leaders/2021/01/09/how-to-deal-with-china> [<https://perma.cc/GUC8-GJ5X>].

17. *The World Bank in China: Overview*, WORLD BANK, <http://www.worldbank.org/en/country/china/overview> [<https://perma.cc/R668-C9R4>] (last visited Nov. 22, 2021).

18. See *id.*; see also *How to Deal with China*, *supra* note 16.

19. See, e.g., Katie Holliday, *China to Become Largest Economy by 2024*, CNBC (Sept. 9, 2014, 6:32 PM), <https://www.cnbc.com/2014/09/07/china-to-become-largest-economy-by-2024.html> [<https://perma.cc/FX25-VY4R>].

20. See *How to Deal with China*, *supra* note 16.

21. See *The World Bank in China: Overview*, *supra* note 17.

22. Alexandra Stevenson, *China’s Economy Surges, and So Does Its Currency*, N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2021/01/12/business/china-renminbi-yuan-strong.html> [<https://perma.cc/NGG2-5Z2S>] (“China is a rare bright spot in an otherwise ravaged global economy. The coronavirus has been tamed within China’s borders, at least for now. The nation’s factories are charging ahead full steam. The world’s shoppers—many of them stuck at home or unable to buy plane or cruise ship tickets—are buying all the Chinese-made computers, televisions, selfie ring lights, swivel chairs, gardening tools and other

Economic growth nurtures other forms of national power, feeding a Chinese nation that has steadily expanded its military power.<sup>23</sup> By one estimate, China's military capabilities may be on par with the United States's military capabilities by 2035, and China may be able to overcome the United States in a military conflict by midcentury.<sup>24</sup> For this reason, China has been dubbed a near peer of the United States and a "rising power," as opposed to a "status quo power."<sup>25</sup> For its part, the 2017 U.S. National Security Strategy labels China a "revisionist" state.<sup>26</sup> China has shown that it is committed to creating a "post-West" global order that prioritizes Chinese interests and is conducive to authoritarian rule.<sup>27</sup> As great power competition reenters the lexicon of policymakers and military strategists, Chinese exceptionalism will receive renewed attention, setting the stage for conflict between a ruling state and a rising state.<sup>28</sup>

More and more, China demonstrates that it is not a standard developing country, but rather a special developing country and an economic powerhouse with the potential to emerge as a great power.<sup>29</sup> Similar to Russia, China seeks to create a multipolar world in which China moves to

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accouterment of nesting that they can. China's share of world exports rose to a record 14.3 percent in September, according to data compiled by Jefferies & Company.").

23. See Steven Lee Myers, *China, Its Military Might Expanding, Accuses NATO of Hypocrisy*, N.Y. TIMES (June 15, 2021, 1:34 PM), <https://www.nytimes.com/2021/06/15/world/asia/china-nato-military.html> [https://perma.cc/YD55-5T24] (stating that "[w]hile China poses virtually no direct military threat to Europe, which is NATO's home field, it can now flex its military power in ways that were unimaginable only a few years ago – not only in Asia, but also globally"); see also *China's Military Strategy (English)*, ST. COUNCIL INFO. OFF. OF THE PEOPLE'S REP. OF CHINA (May 26, 2015), <http://www.scio.gov.cn/zfbps/ndhf/2015/Document/1435159/1435159.htm> [https://perma.cc/A4SR-WJLD].

24. Nancy A. Youssef, *China Aims to Outpace U.S. Militarily, American Commander Says*, WALL ST. J. (Dec. 8, 2020, 3:36 PM), <https://www.wsj.com/articles/china-aims-to-outpace-u-s-militarily-american-commander-says-11607459776> [https://perma.cc/B36C-Z4PL] ("China is seeking to invest its economic growth into equaling American military capabilities by 2035 and aims to be able to defeat the U.S. in an armed conflict by midcentury, the top U.S. military commander said. 'They are on a path to try to do that,' Army Gen. Mark Milley said of Beijing's ambitions in an interview at The Wall Street Journal's CEO Council summit on Tuesday. 'It is certainly a significant security challenge for the United States now and in the years to come.' To defend against a rising China, the U.S. must develop its own economic and military power, Gen. Milley said. He warned, 'We don't want great-power competition to turn into great-power war. That would be a disaster.'").

25. See generally Wang Jisi, *China's Search for a Grand Strategy: A Rising Great Power Finds Its Way*, FOREIGN AFFS., Mar./Apr. 2011, at 68; see also THE LONGER TELEGRAM, *supra* note 2, at 6 ("[China] is no longer a status quo power. It has become a revisionist power.").

26. WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 25 (2017).

27. See generally Angela Stent, *Russia and China: Axis of Revisionists?*, BROOKINGS INST. (Feb. 2020), [https://www.brookings.edu/wp-content/uploads/2020/02/FP\\_202002\\_russia\\_china\\_stent.pdf](https://www.brookings.edu/wp-content/uploads/2020/02/FP_202002_russia_china_stent.pdf) [https://perma.cc/LV8F-SCVQ].

28. See Lionel Beehner & Liam Collins, *Dangerous Myths: How the Crisis in Ukraine Explains Future Great Power Conflict*, MODERN WAR INST. AT W. POINT (Aug. 18, 2020), at 5.

29. See CONGYAN CAI, THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY 85 (2019).

center stage.<sup>30</sup> This is particularly worrisome as Beijing employs intimidation tactics to erode the sovereign rights of neighboring states in the South China Sea, bullying others out of offshore resources, asserting unilateral dominion, and replacing international law with the mantra of “might makes right.”<sup>31</sup> Still, until China’s military powers equal that of the United States, China will likely pursue its national objectives in ways that are unarmed but no less adversarial to U.S. interests.<sup>32</sup>

## II. “LAWCRAFT” IN THEORY AND APPLICATION

While China’s economic engine revs, the Chinese Communist Party’s leadership quietly builds up the nation’s military and postures to peacefully overtake the United States as a global leader.<sup>33</sup> Until that time, however, armed conflict with the United States would almost certainly be detrimental to China, and the two nations will remain locked in a “[c]ontest for [a]lliance, [n]ot [s]urvival.”<sup>34</sup> Key to China’s posturing is an evolving approach to international law and international dispute settlement, which represents a sharp departure from China’s historic aversion to transnational dispute resolution.<sup>35</sup> Pundits once agreed that China was “highly critical of the international legal order led by the West” from the time that the People’s Republic of China was founded in 1949 through the initiation of the Reforming and Opening-Up Policy in the late 1970s.<sup>36</sup> In this time period, China was viewed as a revolutionary state that had little to do with the outside

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30. See generally Eugene Rumer, *Russian Strategic Objectives: It’s About the State, in CURRENT RUSSIA MILITARY AFFAIRS: ASSESSING AND COUNTERING RUSSIAN STRATEGY, OPERATIONAL PLANNING, AND MODERNIZATION* 1, 1–5 (John R. Deni ed., 2018).

31. Press Statement, Michael R. Pompeo, Sec’y of State, U.S. Position on Maritime Claims in the South China Sea (July 13, 2020), <https://2017-2021.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/index.html> [<https://perma.cc/V5ZU-3275>].

32. See Beehner & Collins, *supra* note 28, at 2 (“After several decades of US/NATO dominance following the fall of the Soviet Union, the world appears to have returned to a period of great power competition that includes limited conflict. And while it may not have the same fear of nuclear escalation or periphery conflict, there remain new methods of conflict that need to be understood.”).

33. See WHITE HOUSE, *supra* note 4, at 8 (“[China] has rapidly become more assertive. It is the only competitor potentially capable of combining its economic, diplomatic, military, and technological power to mount a sustained challenge to a stable and open international system.”).

34. John Sullivan, *Trapped by Thucydides? Updating the Strategic Canon for a Sinocentric Era*, WAR ON THE ROCKS (Dec. 28, 2020), <https://warontherocks.com/2020/12/trapped-by-thucydides-updating-the-strategic-canon-for-a-sinocentric-era> [<https://perma.cc/9MNF-AWBD>]; see also THE LONGER TELEGRAM, *supra* note 2, at 11 (“China remains for the time being highly anxious about military conflict with the United States, but that this attitude will change as the military balance shifts over the next decade. If military conflict were to erupt between China and the United States, and China failed to win decisively, then—given the party’s domestic propaganda offensive over many years proclaiming China’s inevitable rise—Xi would probably fall and the regime’s overall political legitimacy would collapse.”).

35. See generally JEROME ALAN COHEN & HUNGDAH CHIU, *PEOPLE’S CHINA AND INTERNATIONAL LAW* (1974).

36. *Id.*

international legal order.<sup>37</sup> However, as China gradually opened up to the outside world since the late 1970s, China's approach to international law became (and remains) an important concern among international lawyers.<sup>38</sup>

China has voluntarily adopted legal constraints on its autonomy, partly as a result of membership in international organizations, but also partly because Chinese leaders are concerned that international law could become an impediment to the country's rise.<sup>39</sup> Thus, until now, Chinese leaders have never attached such "great importance to international law, even though it might be rhetorical."<sup>40</sup> Importantly, the emerging global system has become more interconnected and regulated as China steps increasingly into the international legal framework after several years of insular development, leading to speculation over how exactly China will interpret and embrace international law.<sup>41</sup> This is critical because the trigger for a great power war could be a legal dispute based on China's stubborn belief in a historical right to islands or shoals in the South China Sea.<sup>42</sup> As recently as 2020, the United States and Australia published official opinions that China's claims in the South China Sea are unlawful, posturing for potential future conflict.<sup>43</sup>

#### A. "Lawcraft": China's Evolving Approach to International Law

China's approach to international law and its use of international dispute settlement has long been unclear.<sup>44</sup> For many years, China eschewed international adjudication—with its open and transparent proceedings and

37. *See id.*

38. *See id.*

39. *See* Xi Jinping, President of the People's Republic of China, Remarks at the Opening Ceremony of the Second World Internet Conference (Dec. 16, 2015), [http://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/zyjh\\_665391/t1327570.shtml](http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1327570.shtml) [<https://perma.cc/4S5W-DSD5>] (calling for a "global Internet governance system" to place potential limits on states, while ensuring overall accountability from all state actors); Xi Jinping, President of the People's Republic of China, Speech at the United Nations Office at Geneva (Jan. 18, 2017), <http://iq.chineseembassy.org/eng/zygx/t1432869.htm> [<https://perma.cc/XA5A-WUWG>] (stating that President Xi sounds the alarm of a "double standard[]" application of international law).

40. Xi Jinping, President of the People's Republic of China, Carry Forward the Five Principles of Peaceful Coexistence to Build a Better World Through Win-Win Cooperation (June 28, 2014), [http://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/zyjh\\_665391/t1170143.shtml](http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1170143.shtml) [<https://perma.cc/3D3T-JH7N>] ("In the international society, there should be just one law that applies to all. There is no such law that applies to others but not oneself, or vice versa. There should not be double standards when applying the law. We should jointly uphold the authority and sanctity of international law and the international order.").

41. CHINA'S SOCIALIST RULE OF LAW REFORMS UNDER XI JINPING xxiii (John Garrick & Yan Chang Bennett eds., 2016).

42. *See generally* Beehner & Collins, *supra* note 28, at 6.

43. *See* Oriana Skylar Mastro, *How China is Bending the Rules in the South China Sea*, INTERPRETER (Feb. 17, 2021, 3:00 PM), <https://www.lowyinstitute.org/the-interpreter/how-china-bending-rules-south-china-sea> [<https://perma.cc/NAG5-RZFX>] (noting that in 2020, "both the United States and Australia risked China's wrath by officially stating that China's claims in the South China Sea are unlawful. Other claimants were pleased by this change of policy, but none voiced it prominently").

44. *See* CAI, *supra* note 29, at 267.

written judgments—in favor of private negotiation and consultation, tools which offer China the benefits of excluding outside observers and keeping the nation’s invocation of international law a secret.<sup>45</sup> This risk-averse approach to dispute resolution has been explained by China’s unique Confucian-inspired culture, the nation’s historically marginal involvement in international lawmaking, and the sensitivity of its disputes that frequently concern human rights abuses and territorial disputes.<sup>46</sup> Thus, China had long been uncomfortable submitting to the voluntary jurisdiction of an international arbitration tribunal with the power to mandate transparent proceedings and hand down a binding award that could publicly harm Chinese interests.<sup>47</sup>

However, China’s admission to the World Trade Organization (WTO) in 2001 signaled an evolving approach by China to international dispute resolution, since WTO membership necessitates a dispute settlement authority with mandatory jurisdiction over all WTO members.<sup>48</sup> Notably, China has appeared several times before the WTO Dispute Settlement Body as both complainant and respondent.<sup>49</sup> China turned heads once again—renewing questions over its shifting approach to international law—as the

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45. *See id.*

46. *Id.* at 283 (explaining that “[t]he Confucian litigation-unfriendly culture can perhaps be considered the first factor” and “the litigation-unfriendly culture is a major reason for China’s reluctance to submit itself to international adjudication”); *see, e.g.,* Vishnu Som, *Exclusive: China Has Built Village in Arunachal, Show Satellite Images*, NDTV (Jan. 18, 2021, 7:42 PM IST), <https://www.ndtv.com/india-news/china-has-built-village-in-arunachal-pradesh-show-satellite-images-exclusive-2354154> [<https://perma.cc/F8Z5-2KW2>] (“China has constructed a new village in Arunachal Pradesh, consisting of about 101 homes, show satellite images accessed exclusively by NDTV. The same images, dated November 1, 2020, have been analysed by several experts approached by NDTV, who confirmed that the construction, approximately 4.5 kms within Indian territory of the de facto border, will be of huge concern to India. Though this area is Indian territory, according to official government maps, it has been in effective Chinese control since 1959. However, earlier only a Chinese military post existed, but this time a full-fledged village that can house thousands has been built.”).

47. *See Understanding China’s Position on the South China Sea Disputes*, INST. FOR SEC. AND DEV. POL’Y, <https://isdpl.se/publication/understanding-chinas-position-south-china-sea-disputes> [<https://perma.cc/LE84-FGN6>] (last visited Nov. 22, 2021) (stating that “[i]n terms of conflict resolution, China states that it prefers to resolve disputes peacefully with individual claimant states on a bilateral level rather than through arbitration provided by the UN or other forms of what it sees as ‘imposed’ dispute settlement”).

48. Nicholas R. Lardy, *Issues in China’s WTO Accession*, BROOKINGS INST. (May 9, 2001), <https://www.brookings.edu/testimonies/issues-in-chinas-wto-accession/> [<https://perma.cc/3A79-BZJ8>] (noting that “China’s membership commits it to comply with the principles and rules of the international trading system”).

49. *See Map of Disputes Between WTO Members*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_maps\\_e.htm?country\\_selected=CHN&sense=e](https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm?country_selected=CHN&sense=e) [<https://perma.cc/DV7R-3GW8>] (last visited Nov. 22, 2021); *see also Disputes by Member*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) [<https://perma.cc/6ENL-ERS7>] (last visited Nov. 22, 2021) (citing twenty-four cases in which China has been the complainant and forty-seven cases in which China has been the respondent).



*Philippines v. China*<sup>50</sup> arbitration unfolded. In this high-stakes dispute over rightful territorial access to the Nansha (Spratly) Islands in the South China Sea (among other claims), China made clear that it would not always take a reliable approach to international law in international adjudications.<sup>51</sup> Beijing asserted that it would not participate in the hearing, nor would it enforce the award rendered by the tribunal in favor of the Philippines.<sup>52</sup> Thus, it is unclear whether China fully and unquestionably ascribes to the constraints of binding international law for dispute resolution, particularly when a tribunal threatens to hand down a decision adverse to Chinese national interests.<sup>53</sup> More worrisome, China's approach to international law has historically featured flagrant legal violations held up by a flimsy façade of legitimacy.<sup>54</sup>

China's refusal to even consider arbitration is particularly concerning because transnational disputes will routinely be settled by tribunals seeking to enforce international law.<sup>55</sup> Particularly, as China seeks greater involvement in the global fabric of international organizations, it will find itself increasingly enmeshed in adjudicative forums over disputes large and small.<sup>56</sup> As it gains clout, however, China may also have greater sway in shaping international adjudication proceedings.<sup>57</sup> More importantly, as China has grown as a global power, so too has international adjudication grown as a popular method of dispute resolution.<sup>58</sup> And while less powerful countries have limited alternatives in international disputes, more powerful states enjoy numerous means to address conflicts, giving states like China a method to potentially flout international adjudication.<sup>59</sup>

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50. See *In the Matter of the South China Sea Arbitration (Phil. v. China)*, Case No. 2013-19, (Perm. Ct. Arb. 2016).

51. Isaac B. Kardon, *China Can Say "No": Analyzing China's Rejection of the South China Sea Arbitration*, 13 U. PA. ASIAN L. REV., no. 2, 2018, at 1, 45, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1037&context=alr> [<https://perma.cc/89UF-JZJ5>] (noting that "this arbitration is not the final Chinese statement on legal dispute resolution. While there are few reasons to think PRC will abandon a long-standing principle of preferring bilateral 'negotiation and consultation' to third party adjudication, there are many reasons to think it is adaptive").

52. See Tom Phillips et al., *Beijing Rejects Tribunal's Ruling in South China Sea Case*, GUARDIAN (July 12, 2016, 1:21 PM), <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china> [<https://perma.cc/L9VV-3ENA>].

53. See *id.* (in which one expert noted that China would find the arbitration ruling "unacceptable to the regime" and a Chinese tabloid attacked the ruling as "more radical and shameless than many people had ever expected"). See generally Julian Ku, *China and the Future of International Adjudication*, 27 MD. J. INT'L L. 154 (2012).

54. See Mastro, *supra* note 43 (stating that the "issue, however, is not that China flagrantly violates international law—it is that it does so while simultaneously creating a veneer of legal legitimacy for its position").

55. See Phillips, *supra* note 52.

56. See *id.*

57. See Ku, *supra* note 53, at 171–73.

58. See *id.* at 155.

59. See CAI, *supra* note 29, at 268.

China's evolving approach to international law is aptly described as "lawcraft," a new term in the lexicon that builds on the term lawfare.<sup>60</sup> Lawcraft refers to quasi-magical interpretations of the law that go one step further than lawfare in which a state not only wields law against adversaries, but also uses it as an instrument of subterfuge cloaked as gospel.<sup>61</sup> Under this theory, China's use of law is akin to medieval witchcraft, which was once accepted as truth but has long ago been discredited. China views its interpretations of international law as scripture; but some of its legal opinions are better characterized as bluster and pure subversion of the rule of law.

### B. *Philippines v. China Arbitration*

The *Philippines v. China* arbitration offers one of the starkest examples of China's use of lawcraft to contest jurisdiction, rebuff aggrieved neighboring states, and flout unfavorable tribunal awards. This arbitration concerned entitlements in the South China Sea, a massive 3.5 million-square-kilometer body of water and land features that is of extraordinary geostrategic value due to the sea's fishing stock, energy resources, trade routes, and prime location in the Indo-Pacific Region.<sup>62</sup> The sea has become a focal point for territorial and rights disputes with escalating rhetoric in recent years between China and several members of the Association of Southeast Asian Nations (ASEAN), such as the Philippines, Vietnam, and Malaysia.<sup>63</sup> China claims sovereignty over "virtually all South China Sea islands and their adjacent waters."<sup>64</sup> While China argues its sovereignty is historically established and uncontested (its so-called "historical territory"), the Philippines firmly contested absolute Chinese claims and maritime entitlements to various islands.<sup>65</sup>

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60. See LAWFARE, *supra* note 5.

61. See Malcolm Jorgensen, *China is Overturning the Rules-Based Order from Within*, INTERPRETER (Aug. 12, 2020), <https://www.lowyinstitute.org/the-interpreter/china-overturning-rules-based-order-within> [<https://perma.cc/YP2F-J8C9>] (stating that "[b]y subverting the meaning of the most foundational rules on which the order is based, China may already be overturning the order from within").

62. 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, MINISTRY OF FOREIGN AFFS. OF THE PEOPLE'S REP. OF CHINA (Dec. 7, 2014) [hereinafter MFA], [https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/t1368895.htm](https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm) [<https://perma.cc/E2A6-JJDQ>].

63. See Beehner & Collins, *supra* note 28, at 6; WHITE HOUSE, *supra* note 4, at 10 (stating that the United States "will reinforce our partnership with Pacific Island states" while "[r]ecognizing the ties of shared history and sacrifice").

64. *China's Claims in the South China Sea*, INST. FOR MAR. AND OCEAN AFFS., <https://www.imoa.ph/chinas-claims-in-the-south-china-sea/> [<https://perma.cc/Q78T-DKR6>] (last visited Nov. 22, 2021).

65. *Id.*; *Understanding China's Position on the South China Sea Disputes*, *supra* note 47 (referring to Beijing's designation of the Spratly Islands as part of "China's historical territory"); see also CAI, *supra* note 29, at 295; State Council Info. Off. of the People's Rep. of China, *White Paper: China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea*, CHINA.ORG.CN (July 13, 2016) [hereinafter Statement of China on Negotiations on the Settlement of the South

Thus began several rounds of negotiations and an unwritten arrangement between China and the Philippines to resolve this dispute between themselves.<sup>66</sup> China complained bitterly in 2013 when the Philippines later initiated arbitration before the Permanent Court of Arbitration (PCA), filing fifteen discrete claims and, most notably, seeking a decision entitling the Philippines to maritime entitlements to the Spratly Islands.<sup>67</sup> China argued that the United Nations Convention on the Law of the Sea (UNCLOS) mandates that if disputing parties to the convention have agreed to settle a dispute by any means “of their own choice,” the dispute settlement proceeding under UNCLOS can only apply “where no settlement has been reached” by such means.<sup>68</sup> Manila countered that its filings with the PCA were justified and that no settlement had indeed been reached between the two states, nor were their bilateral talks binding.<sup>69</sup> Beijing construed Manila’s decision to commence arbitration as lawfare, alleging breach of an unspoken agreement not to turn to a third party for dispute resolution.<sup>70</sup> Indeed, China later issued a Position Paper on December 7, 2014, arguing that the arbitration had no jurisdiction over China.<sup>71</sup> Beijing stated that it would “neither accept nor participate in” the arbitration proceeding, consistent with its rejection of all international tribunals ruling on China’s territorial sovereignty over maritime delimitation in the South China Sea.<sup>72</sup>

Nevertheless, the tribunal found on October 29, 2015, that it had jurisdiction over the dispute and the parties, and accepted seven out of the fifteen submissions from the Philippines.<sup>73</sup> China again protested the decision and claimed that the tribunal’s award would be “null and void.”<sup>74</sup>

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China Sea Disputes], [http://www.china.org.cn/chinese/2016-07/13/content\\_38870185.htm](http://www.china.org.cn/chinese/2016-07/13/content_38870185.htm) [https://perma.cc/PX8W-7563].

66. See Statement of China on Negotiations on the Settlement of the South China Sea Disputes, *supra* note 65, ¶¶ 5, 80–83.

67. See *id.* ¶ 6.

68. United Nations Convention on the Law of the Sea, art. 281, Dec. 10, 1982, 1833 U.N.T.S. 397. *Settlement of Disputes by Any Peaceful Means Chosen by the Parties*, states: “Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.” *Id.*, art. 280.

69. See *Philippines Seeks U.N. Help to Resolve Maritime Row with China*, REUTERS NEWS (Jan. 22, 2013), <https://www.reuters.com/article/us-philippines-china-idUSBRE90L0C820130122> [https://perma.cc/QH4E-M4DK] (in which Secretary del Rosario told reporters “[t]he Philippines has exhausted almost all political and diplomatic avenues for a peaceful negotiated settlement of its maritime dispute with China”).

70. See Peter Kreuzer, *Dealing with China in the South China Sea: Duterte Changing Course*, PEACE RSCH. INST. FRANKFURT (2018), at 4, <https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-security-studies/resources/docs/PRIF-prif0318.pdf> [https://perma.cc/E69W-9BX5].

71. MFA, *supra* note 62.

72. *Id.*

73. Award on Jurisdiction and Admissibility (Phil. v. China), Case No. 2013-19 (Perm. Ct. Arb. 2015).

74. Statement 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, MINISTRY OF FOREIGN AFF. OF THE PEOPLE’S REPUBLIC OF CHINA (Oct. 30, 2015),

Unfazed, the tribunal proceeded and rendered a final award in favor of the Philippines on July 12, 2016.<sup>75</sup> The arbitrators found that China had no historic right to resources within the seas falling within its “Nine-Dash Line.”<sup>76</sup> While aggrieved by the decision, China reiterated its non-participation.<sup>77</sup> China again stated that the award was “null and void.”<sup>78</sup>

Interestingly, President Rodrigo Duterte won the Filipino presidential election held on May 9, 2016, only two months before the tribunal made its final award.<sup>79</sup> The Philippines soon issued a Joint Statement with China taking a softer approach to their dispute, promising renewed negotiations with them and choosing not to leverage the PCA award to the benefit of the Philippines.<sup>80</sup> President Duterte’s approach raises numerous questions about whether the new Filipino administration would discredit international tribunals; whether President Duterte was merely seeking to maintain stability early in his tenure; whether he worried that the award was unenforceable in practice; and whether all along the award was pursued as leverage to bring China to the table for more serious negotiations.<sup>81</sup>

In any event, the arbitral award in *Philippines v. China* was shocking and unprecedented as it levied substantial reputational costs on China.<sup>82</sup> If Manila had not taken a soft stance with Beijing after President Duterte took office, Beijing could have been forced to dig in its heels on its aggressive stance or publicly concede its loss to Manila, which is hardly conceivable.<sup>83</sup> Certainly, the looming threat of rising reputational costs was a reason for China’s positive response to President Duterte’s proposal, allowing the Chinese to save face.<sup>84</sup> Ultimately, the *Philippines v. China* arbitration provides several key insights into China’s evolving use of international law, but also offers potential methods to counteract Chinese abuses.

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[https://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1310474.shtml](https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml) [https://perma.cc/8UPN-Y6D3] [hereinafter Statement of China on the Award on Jurisdiction and Admissibility].

75. Award (Phil. v. China), PCA Case No. 2013-19, July 12, 2016.

76. See Cecilia Yap, *Philippines Says No Compromise on 2016 Sea Victory Against China*, BLOOMBERG (July 12, 2020, 6:41 AM), <https://www.bloomberg.com/news/articles/2020-07-12/philippines-says-no-compromise-on-2016-sea-victory-against-china> [https://perma.cc/SM5R-YFRT] (stating that the “Philippines will adhere without compromise to a 2016 court victory that nullified China’s claims in most of the South China Sea”); Mastro, *supra* note 43 (noting that a top Chinese official described the Nine-Dash Line as “swoop[ing] down past Vietnam and the Philippines, and towards Indonesia, encompassing virtually all of the South China Sea”).

77. Phillips, *supra* note 52.

78. See Statement of China on the Award on Jurisdiction and Admissibility, *supra* note 74.

79. See Harry Krejsa, *Rodrigo Duterte’s Turn in the South China Sea*, DIPLOMAT (July 15, 2016), <https://thediplomat.com/2016/07/rodrigo-dutertes-turn-in-the-south-china-sea/> [https://perma.cc/M8S4-RH53].

80. See Kavi Chongkittavorn, *ASEAN, China After the PCA Verdict: We’re Still Friends*, REPORTING ASEAN (July 23, 2016), <https://www.reportingasean.net/asean-china-pca-verdict-still-friends> [https://perma.cc/97K2-FAU2].

81. See Krejsa, *supra* note 79 (noting that President Duterte’s position on the South China Sea arbitral award remains “puzzlingly inconsistent”).

82. See Kreuzer, *supra* note 70, at 5.

83. See *id.*

84. See *id.*

## III. CHARTING THE BATTLEFIELD: SOLUTION TO COMBAT “LAWCRAFT”

The following solutions materialize as the United States gains a better understanding of how China approaches and uses international law to advance its ends, often in ways that are unfair or coercive.<sup>85</sup> When asked about great power competition, General Charles Q. Brown, Jr., U.S. Air Force Chief of Staff, stated: “When we think about our competitors, it may not require exquisite or expensive platforms or long-range missiles—it may be us just being able to outthink our adversaries. *And you can’t outthink them if you don’t understand them.*”<sup>86</sup> This statement is consistent with General Brown’s “Accelerate Change or Lose” campaign, in which greater understanding of our adversaries is required in order for the United States to remain competitive long-term.<sup>87</sup> General Brown is uniquely positioned to understand long-term competition with China, as he is the former Commander of the Pacific Air Forces, where he oversaw more than 46,000 Airmen in China’s regional backyard.<sup>88</sup>

In long-term conflicts with China and other near peers, headway must be made in influencing states’ behavior in a way that benefits the United States and stifles adversarial objectives.<sup>89</sup> A primary tool in the U.S. arsenal is influencing decision-making in the rules-based international order that was first organized by the United States and its allies.<sup>90</sup> In this way, the United States charts a battlefield for legal dispute resolution that favors U.S. interests.<sup>91</sup> The following solutions are not quick fixes but rather proposals to gradually counter Chinese lawcraft and maintain American preeminence. Ultimately, great power competition is unlikely to be measured in a few years but rather over generations.<sup>92</sup>

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85. WHITE HOUSE, *supra* note 4, at 20 (stating that “[i]n many areas, China’s leaders seek unfair advantages, behave aggressively and coercively, and undermine the rules and values at the heart of an open and stable international system”).

86. Oriana Pawlyk, *A New Fitness Culture and the Future of Force Design: Gen. CQ Brown Lays Out Way Ahead for the Air Force*, MILITARY.COM (Dec. 28, 2020) (emphasis added), <https://www.military.com/daily-news/2020/12/28/new-fitness-culture-and-future-of-force-design-gen-cq-brown-lays-out-way-ahead-air-force.html> [<https://perma.cc/4NE7-HVAN>].

87. GENERAL CHARLES Q. BROWN, JR., U.S.A.F., ACCELERATE CHANGE OR LOSE (Aug. 2020), [https://www.af.mil/Portals/1/documents/2020SAF/ACOL\\_booklet\\_FINAL\\_13\\_Nov\\_1006\\_WEB.pdf](https://www.af.mil/Portals/1/documents/2020SAF/ACOL_booklet_FINAL_13_Nov_1006_WEB.pdf) [<https://perma.cc/Z9JK-UE9A>].

88. *See* Pawlyk, *supra* note 86.

89. *See id.*

90. *See* Michael Mazarr et al., *Understanding the Current International Order*, RAND CORP. (2016), at 53, [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR1500/RR1598/RAND\\_RR1598.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1598/RAND_RR1598.pdf) [<https://perma.cc/AM5S-W7XB>] (stating that U.S. strategy “seeks to *manage great power relations* by creating institutions, habits, practices, norms, and implicit or explicit rules that regulate competition and behavior and provide regularized avenues for cooperation”).

91. *See* Beehner & Collins, *supra* note 28, at 6.

92. Sullivan, *supra* note 34.

A. “Multilateralize” Disputes

The United States’s long-term competitive front with China will likely emerge on the fault lines of global legitimacy and territorial claims.<sup>93</sup> Micro-skirmishes over tangibles like territorial access and intangibles like reputation and credibility will move the needle in favor of the United States or China. No single dispute may prove decisive in maintaining a U.S.-centric view of the world, but legal mechanisms can play a vital role in achieving “combined critical mass” and preserving the U.S. competitive advantage.<sup>94</sup> To begin, U.S. national security stakeholders must acknowledge and accentuate a multilateral approach to disputes with China.<sup>95</sup> By embracing a community approach rather than an individualist approach, and by relying on historical alliances, the United States and its allies can isolate and discredit China in international disputes.<sup>96</sup>

In practice, the United States and its allies must master and leverage the rules applicable to disputes before the PCA, as one of the key forums in which future international disputes will be resolved. For example, Article 17(5) of the PCA Rules (governing procedures before the PCA) permits joinder of other interested or affected parties to a dispute.<sup>97</sup> In the *Philippines v. China* arbitration, for instance, Vietnam, Malaysia, and Taiwan might have joined the arbitration and bolstered the stance taken by the Philippines. While the Philippines won the arbitration even absent joinder, this is in large part due to the strength of the Philippines’s case and China’s non-participation.<sup>98</sup> In future disputes, however, joinder may prove to be the decisive factor. If interested parties do not qualify for joinder, then at the very least they may seek to file amicus briefs with the PCA, in much the same way that interested parties file amicus briefs in cases before the U.S. Supreme Court.

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93. See Beehner & Collins, *supra* note 28, at 6.

94. THE LONGER TELEGRAM, *supra* note 2, at 10 (stating that a U.S. strategy to combat China must be agreed upon in “sufficiently granular form with the United States’ major Asian and European treaty allies so that their combined critical mass (economic, military, and technological) is deployed in common defense of the US-led liberal international order”).

95. See Dan Lamothe, *In Japan, Top Biden Administration Officials Attempt to Set the Tone on China*, WASH. POST (Mar. 15, 2021, 9:36 AM), <https://www.washingtonpost.com/national-security/2021/03/15/blinden-austin-china-asia-allies> [<https://perma.cc/9G67-ZZZ8>] (“President Biden’s secretary of state and defense secretary began a multi-nation tour in Asia with a stop in Japan as they seek to address concerns about China with allies and partners in the region, and with Beijing directly.”).

96. WHITE HOUSE, *supra* note 4, at 10 (stating that America’s “democratic alliances enable us to present a common front, produce a unified vision, and pool our strength to promote high standards, establish effective international rules, and hold countries like China to account”).

97. PERM. CT. ARB., ARBITRATION RULES 2012, art. 17(5) (2012), <https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf> [<https://perma.cc/JS7G-C7FM>] (“The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.”).

98. See generally *supra* Part II.B.

The Philippines fully embraced a “community over individual” approach in its arbitration with China, arguing that non-parties to the arbitration still have a community interest in the outcome.<sup>99</sup> Indeed, the former Filipino Secretary of Foreign Affairs, Albert del Rosario, framed the arbitration in the spirit of a class action lawsuit: the maritime law the Philippines sought to clarify was important “to all coastal States that border the South China Sea, and even to all the States Parties to UNCLOS.”<sup>100</sup> Secretary del Rosario believed that the arbitration might enhance the “rule of law in international relations” and, in particular, the “legal order for the seas and oceans.”<sup>101</sup> Thus, a multilateral view to the dispute lent credibility to the Filipino stance in the arbitration.

Unsurprisingly, China—while standing by its non-participation—maintained that the disagreement with the Philippines remained fundamentally bilateral in nature and urged other states in the Indo-Pacific Region to remain neutral and uninvolved.<sup>102</sup> Effectively, China argued that the two parties to the pre-arbitration talks should remain the only two parties to the dispute.<sup>103</sup> China argued that any efforts by the Philippines to “multilateralize” the dispute were in bad faith.<sup>104</sup> Yet, China eventually conceded that the South China Sea is an enormous geographical feature that directly impacts many states, thus certain community interests in the South China Sea were inherent.<sup>105</sup>

Admittedly, a few states agreed with China that its dispute with the Philippines may have been a bilateral disagreement in essence.<sup>106</sup> China’s argument that the arbitration was not truly intended to defend an idealistic community interest, but rather for the Philippines to defend its own individualistic interests, resonated with some states.<sup>107</sup> Still, China’s stance could rightly be characterized as lawcraft, in which China cites a technicality or distracts from the main point in order to shirk responsibility to a weaker state and coerce a better outcome. In the future, a good-faith approach to community-based interests in international disputes may tip the scales in favor of U.S. allies.<sup>108</sup> This is critical because other states may yet pursue

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99. Alberto F. Del Rosario, Sec. of Foreign Affs., Repub. Of the Phil., *Why the Philippines Brought This Case to Arbitration and Its Importance to the Region and the World* (July 7, 2015) [hereinafter *Statement of Secretary del Rosario*], <https://tokyo.philembassy.net/02events/statement-before-the-permanent-court-of-arbitration> [https://perma.cc/RWZ2-HZZJ].

100. *Id.*

101. *Id.*

102. CAI, *supra* note 29, at 305.

103. *Id.*

104. *Id.*

105. *Id.* at 305–06.

106. *Id.* at 306.

107. See Wang Wen and Chen Xiaochen, *Who Supports China in the South China Sea and Why*, DIPLOMAT (July 27, 2016), <https://thediplomat.com/2016/07/who-supports-china-in-the-south-china-sea-and-why/> [https://perma.cc/3PTY-R7UN].

108. THE LONGER TELEGRAM, *supra* note 2, at 8 (maintaining that multilateral credibility is of high importance, as China will seek to “diminish the credibility of US power and

legal action against China. Vietnam, for example, is weighing this course of action.<sup>109</sup> If it does, multilateral support, especially from the United States and regional partners, will bolster its position and bargaining power.<sup>110</sup>

### B. Remove Politics from Law

In the context of the *Philippines v. China* arbitration, Secretary del Rosario repeatedly stated that the Philippines merely wanted to enforce the UNCLOS and clarify his country's maritime entitlements.<sup>111</sup> If China had shirked its legal obligations under UNCLOS, he wondered, "what value is there in the Convention for small States Parties as regards their bigger, more powerful and better armed neighbors?"<sup>112</sup> Thus, the Filipino government stated that it merely sought a legal judgment rather than a political maneuver to strengthen its bargaining power against China.<sup>113</sup>

China countered that the arbitration was motivated purely by politics, rendering the entire proceeding unlawful and illegitimate.<sup>114</sup> There is little to no evidence to support China's contention. After all, the UNCLOS expressly and legally undercuts China's primary political basis for claims to the South China Sea: "historic claims" to property going back to the Western Han Dynasty.<sup>115</sup>

China's second basis to allege that the tribunal was illegitimate may carry more weight. China argued that the tribunal was inherently biased because the United States and Japan were able to influence the appointment of arbitrators to the tribunal, thus allegedly stacking the odds in favor of the Philippines.<sup>116</sup> This claim is unsubstantiated, but even the appearance of

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influence sufficiently to cause [certain] states currently inclined to 'balance' against China to instead join the bandwagon with China").

109. James Pearson & Khanh Vu, *Vietnam Mulls Legal Action Over South China Sea Dispute*, REUTERS (Nov. 6, 2019, 4:57 AM), <https://www.reuters.com/article/us-vietnam-southchinasea/vietnam-mulls-legal-action-over-south-china-sea-dispute-idUSKBN1XG1D6> [<https://perma.cc/A6WV-QERB>] (noting that "a senior government official" stated that "Vietnam could explore legal action among various options in its territorial dispute with powerful neighbor China in the South China Sea").

110. See David E. Sanger & Michael Crowley, *As Biden and Xi Begin a Careful Dance, a New American Policy Takes Shape*, N.Y. TIMES (Oct. 6, 2021), <https://www.nytimes.com/2021/03/17/us/politics/us-china-relations.html> [<https://perma.cc/8ED4-PUKA>] ("President Biden is engineering a sharp shift in policy toward China, focused on gathering allies to counter Beijing's coercive diplomacy around the world and ensuring that China does not gain a permanent advantage in critical technologies.").

111. See CAI, *supra* note 29, at 312.

112. Statement of Secretary del Rosario, *supra* note 100.

113. See *id.*

114. CAI, *supra* note 29, at 312.

115. See Mastro, *supra* note 43 ("[S]cholars have meticulously catalogued the dubious nature of this history. And besides, the UN Convention for the Law of the Sea (UNCLOS) does not grant signatories the right [sic] make claims based on historical legacy, and the concept of 'historic claims' lacks a clear basis in international law.").

116. MINISTRY OF FOR. AFFS. OF THE PEOPLE'S REP. OF CHINA, *Yang Jiechi Gives Interview to State Media on the So-called Award by the Arbitral Tribunal for the South China Sea Arbitration* (July 15, 2016), [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1381740.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1381740.shtml) [<https://perma.cc/3KEC-ENKK>] (noting that the individual who appointed many of the arbitrators, Shunji Yanai, the jurist and then president of the International Tribunal for the



partiality tends to sap legitimacy from the tribunal's award and tarnishes the image of the tribunal. In theory, American and Japanese officials might be motivated to abet the Philippines by selecting a favorable arbitral panel, thereby containing a rising China.<sup>117</sup>

International lawmakers and practitioners must take the wind out of China's sails by addressing the argument that the *Philippines v. China* arbitration and future arbitrations may be biased (or even appear to be biased). The only way to encourage China and similar states to participate in future arbitration proceedings that could benefit the United States and its allies is to appoint fair and unbiased arbitrators to the PCA and other similar dispute resolution bodies. All parties should desire "clean" panels and unbiased decision-makers, who would guarantee a fair process. More to the point, unbiased panels will legitimize future arbitral awards against China.

After ensuring that there is not even the appearance of an unfair panel, states can then shift the focus to China's blatant methods of lawcraft. For example, states can underscore China's repeated reliance on the "historical territory" argument (with absolutely no basis in international law) or its utter refusal to participate in the *Philippines v. China* arbitration, which China could have participated in even while maintaining its objection to the forum.<sup>118</sup> This is an explicit Chinese attempt to delegitimize international legal standards and norms that are hostile to China's interests—yet another example of Chinese lawcraft.<sup>119</sup> China was not able to show any bias from the selection of arbitrators that ruled in favor of the Philippines and many of its claims appear to be wholly lacking in evidentiary support.<sup>120</sup> Rather than entertain fanciful claims from China that do not find any support in law or the factual record, U.S. allies must cast the spotlight on China's politically-motivated lawcraft to hold China's feet to the fire.<sup>121</sup>

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Law of the Sea (ITLOS), is "a right-wing Japanese intent on ridding Japan of post-war arrangements").

117. *See id.* (noting that "[c]ertain countries outside the region have attempted to deny China's sovereign rights and interests in the South China Sea through the arbitration").

118. PERM. CT. ARB., ARBITRATION RULES 2012, (2012), <https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf> [<https://perma.cc/S2KG-YFYJ>] (holding that an arbitration may go forward pending a challenge to the Court's jurisdiction under Article 23 of the Court's Rules).

119. THE LONGER TELEGRAM, *supra* note 2 ("[China] is no longer a status quo power. It has become a revisionist power.").

120. *See* CAI, *supra* note 29, at 313 (describing concerns with the possible partiality of judges on the Permanent Court of Arbitration, but citing no actual evidence to support the claim).

121. *See* THE LONGER TELEGRAM, *supra* note 2, at 8 (stating that China will try to "use China's growing influence within international institutions to delegitimize and overturn initiatives, standards, and norms perceived as hostile to China's interests—particularly on human rights and international maritime law—while advancing a new, hierarchical, authoritarian conception of international order under Xi's deliberately amorphous concept of a 'community of common destiny for all mankind'").

*C. Embrace Third Party Involvement*

China alleged that when the Philippines unilaterally initiated an arbitration proceeding overseen by a third party, the Philippines violated what was supposedly a binding commitment not to do so.<sup>122</sup> Namely, China argued that the Philippines had entered bilateral Sino-Philippine agreements and was bound to settle all relevant disputes through bilateral negotiation to the exclusion of third parties.<sup>123</sup> Accordingly, Beijing stated that “the compulsory third-party dispute settlement procedures under UNCLOS would not apply.”<sup>124</sup> Manila would have no right to seek third-party involvement.<sup>125</sup> Beijing thus claimed that Manila’s submission to the PCA constituted a “deliberate act of bad faith,” despite evidence to the contrary.<sup>126</sup>

To be clear, the Philippines made a defensible showing to support its resort to the PCA, which the PCA itself reviewed and ultimately supported.<sup>127</sup> After all, the agreement relating to negotiations between the Philippines and China was intended to be informal and non-binding.<sup>128</sup> More importantly, the *Philippines v. China* arbitration could stand as a watershed moment in which the Philippines and similarly situated states in the Indo-Pacific Region acknowledge the benefits of non-binding private negotiations that include the express right to resort to binding arbitration if negotiations eventually break down. Indeed, bilateral negotiations can even include terms to show implied consent of the parties to arbitration if initial negotiations are unfruitful. In this way, states will not be hamstrung if years of private negotiations are unproductive while other avenues of dispute resolution would be helpful but are off the table.

Additionally, states can take steps to soften terms that bind parties to bilateral negotiations unless no settlement has been reached. To this point, parties can peg the test for abandoning bilateral negotiations to a good faith standard, deflating any argument that a party is prematurely resorting to arbitration. It is plainly to China’s advantage to exert its power one-on-one with opposing states and insist that all bilateral talks indefinitely remain bilateral. Breaking this outdated paradigm will benefit U.S. allies in the long-term and preclude Chinese arguments that ongoing talks remain private and well-guarded.

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122. CAI, *supra* note 29, at 316.

123. *Id.*

124. *Id.*

125. MINISTRY OF FOREIGN AFFS. OF THE PEOPLE’S REP. OF CHINA, *China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea* (July 13, 2016), [https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/t1380615.htm](https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1380615.htm) [<https://perma.cc/FJ6K-XFR3>] (stating in Part III that China and the Philippines “have reached consensus on settling their relevant disputes in the South China Sea” through bilateral negotiation).

126. *Id.*

127. Award on Jurisdiction and Admissibility (*China v. Phil.*), PCA Case No. 2013-19, Oct. 29, 2015.

128. Statement of China on Negotiations on the Settlement of the South China Sea Disputes, *supra* note 625, ¶¶ 5, 80–83.

*D. Clarify Entitlements and Sovereignty*

The Chinese Communist Party has also insisted that the Philippines “camouflaged its submissions” to the PCA in the *Philippines v. China* arbitration by offering its submissions as isolated, non-sovereignty-related issues requiring narrow legal interpretation in relation to UNCLOS provisions, when they were actually related to issues of territorial sovereignty and maritime delimitation between Manila and Beijing.<sup>129</sup> China’s Position Paper of December 7, 2014, for example, states: “China believes that the nature and maritime entitlements of certain maritime features in the South China Sea cannot be considered in isolation from the issue of sovereignty.”<sup>130</sup>

Yet, states must be free to voice all good faith allegations, knowing that some of them may later be struck. Ultimately, the Filipino submissions to the PCA were indeed partly extrajudicial and partly properly before the tribunal.<sup>131</sup> This is largely reflected in the PCA’s acceptance of seven out of fifteen submissions to the PCA.<sup>132</sup> Certain portions of the PCA’s award regarding, for example, the “Nine-Dash Line” and China’s claim to the maritime areas of the South China Sea, can properly be characterized as related to territorial sovereignty. However, the majority of the other claims before the PCA relate to non-territorial entitlements in the South China Sea, including high- and low-tide features, rights to the exclusive economic zone and continental shelf near certain banks, rights to exploit living resources (such as fishing), preservation of the environment, construction activities on uninhabited reefs, and operation of vessels in a dangerous manner.<sup>133</sup>

Complaining states must first separate out disputed entitlements from pure questions of state sovereignty. States will incrementally determine the demarcation line between the two categories through precedent and customary international law, as further arbitration cases are decided and cited in future disputes.<sup>134</sup> Next, states must understand the proper forum for various complaints, avoiding filing sovereignty-related claims while unabashedly filing entitlement claims. In this way, they can avoid diluting their overall complaint by inadvertently including claims that cannot be heard by a particular tribunal. Doing so would disarm China before it is able to use lawcraft to potentially discredit genuine claims that are properly before tribunals.

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129. See CAI, *supra* note 29, at 315–16.

130. MFA, *supra* note 62.

131. Award on Jurisdiction and Admissibility (China v. Phil.), PCA Case No. 2013-19, Oct. 29, 2015.

132. *Id.*; see also CONG. RSCH. SERV., R44555, ARBITRATION CASE BETWEEN THE PHILIPPINES AND CHINA UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS) 1 (2016), <https://crsreports.congress.gov/product/pdf/R/R44555/4> [<https://perma.cc/WRA4-72UB>] (“The tribunal considered China’s arguments and in October 2015 found that it had jurisdiction to rule on 7 of the Philippines’ 15 submissions.”).

133. Award (Phil. v. China), PCA Case No. 2013-19, July 12, 2016.

134. See CAI, *supra* note 29, at 315–16 (noting the dangers of packaging a complaint to skirt jurisdictional hurdles).

*E. Nudge Rather Than Shove*

Finally, the United States and its allies will benefit from a gentler approach to enforcing international law. Absent such an approach, China may reflexively rebuff legal proceedings that would put smaller states, many of them U.S. allies, on surer footing. The uncompromising Chinese stance in the *Philippines v. China* arbitration reflects the fundamental Sino-Western division over the application of international law and agreements to issues affecting territory and resources.<sup>135</sup> Further, this rejection signifies that efforts from the United States or other powers to pressure China may be hard-fought or may even exacerbate existing tensions in the South China Sea.<sup>136</sup>

A crucial lesson from past dynamics is that premature and unilateral efforts at conflict resolution through the application of disputed legal instruments or proceedings may harden China's resistance and thereby escalate conflict dynamics.<sup>137</sup> This holds especially true if China perceives the invocation of international arbitration as a Machiavellian strategy aimed at winning a conflict through law that cannot otherwise be won in other forums. Under such circumstances, the Philippines and similarly situated states can expect heightened resistance from China if the Chinese interpret legal proceedings as the calculated use of lawfare.<sup>138</sup>

Unquestionably, states should welcome efforts at dispute resolution through international legal instruments as an alternative to potentially zero-sum armed conflict. However, in conflicts over core interests of the contestants, a hard approach may backfire and contribute to further escalation if this form of conflict settlement is sought too eagerly by only one party. The Philippines made a legally shrewd decision to turn to compulsory arbitration under UNCLOS and submit a case to the PCA that partially touched upon territorial questions, perhaps knowing that any ruling could have vast consequences. However, this decision was risky, as it was likely that this action would engender heightened resistance and confrontation with a major neighboring state.

Still, it is encouraging that China is trending toward greater acceptance of outside dispute resolution as tribunals ease many of China's worst fears.<sup>139</sup>

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135. *See id.* at 316 (intimating that territorial sovereignty and maritime features are beyond the jurisdiction of the Permanent Court of Arbitration).

136. *See* Michael D. Swaine, *Chinese Views on the South China Sea Arbitration Case Between the People's Republic of China and the Philippines*, CHINA LEADERSHIP MONITOR, (Aug. 30, 2016), at 1, 7–8, <https://www.hoover.org/sites/default/files/research/docs/clm51ms.pdf> [<https://perma.cc/BLW5-X9F6>].

137. THE LONGER TELEGRAM, *supra* note 2, at 8 (maintaining that multilateral credibility is of high importance, as China will seek to “diminish the credibility of US power and influence sufficiently to cause [certain] states currently inclined to ‘balance’ against China to instead join the bandwagon with China”).

138. *See* Kreuzer, *supra* note 70, at 5.

139. Harriet Moynihan, *China's Evolving Approach to International Dispute Settlement*, CHATHAM HOUSE (March 2017), at 1, <https://www.chathamhouse.org/sites/default/files/publications/research/2017-03-29-chinas-evolving-approach-international-dispute-settlement-moynihan-final.pdf>

Since China's economic debut on the world stage, international law has steadily expanded in both scope and content.<sup>140</sup> International relations are thus governed much more by legal regulation today than they ever were before.<sup>141</sup> In addition, the number of international tribunals with compulsory jurisdiction have significantly increased, which augments the role of the judiciary in international law.<sup>142</sup> By rendering binding decisions and conducting their proceedings in a transparent way, international tribunals "enhance the effectiveness and legitimacy of the process of international dispute settlement."<sup>143</sup>

In the past, China has preferred to settle international disputes through private negotiation.<sup>144</sup> However, since the 1990s, China has begun to embrace international regimes, which include dispute settlement mechanisms with compulsory jurisdiction, such as the UNCLOS and WTO agreements.<sup>145</sup> As a result, China is increasingly involved in international adjudication, whether it likes it or not. As mentioned above, China has become very confident in bringing complaints before the WTO Dispute Settlement Body. As an illustration, in 2007, a total of thirteen disputes were filed in the WTO, five of which involved China; in 2008, China was involved in one-third of WTO disputes; and in 2009, China was involved in half of all WTO disputes.<sup>146</sup>

Even when China is not a complainant or respondent, the country appears as a third party before the WTO Dispute Settlement Body, the International Court of Justice, or the International Tribunal for the Law of the Sea, by submitting statements or presenting oral statements in advisory cases.<sup>147</sup> And while experts may argue that China has only embraced the WTO's Dispute Settlement Body because it fears hampering trade with its partners—thus impacting its all-important economic growth—presumably China cares just as much about fishing and drilling claims near the islands, reefs, and shoals of the South China Sea.<sup>148</sup>

The *Philippines v. China* arbitration is a historic decision because it signifies smaller states' growing willingness to exert their rights in a legal forum against a rising Chinese state. Even if China avoided responsibility in this arbitration, China will find itself increasingly enmeshed in mandatory arbitration clauses by virtue of its treaty obligations and growing involvement in international bodies. The *Philippines v. China* arbitration is also noteworthy because China completely rebuffed the arbitration process,

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[<https://perma.cc/FU85-TMZ7>] (noting that China "is increasingly prepared to accept adjudicative methods of dispute settlement").

140. CAI, *supra* note 29, at 317.

141. *Id.*

142. *Id.*

143. *Id.* at 317–18.

144. *Id.* at 267.

145. *See id.* at 182–83 (noting China's gradual acceptance of international organizations).

146. YENKONG NGANGJOH HODU & ZHANG QI, *THE POLITICAL ECONOMY OF WTO IMPLEMENTATION AND CHINA'S APPROACH TO LITIGATION IN THE WTO* 133 (2016).

147. CAI, *supra* note 29, at 290.

148. Beehner & Collins, *supra* note 28, at 55.

even as it grows more and more accustomed to settling international disputes in a judicial forum. The solutions in this Article should provide fodder to the United States and its allies to ensure that this arbitration proceeding will stand out as a historic anomaly for China—one in which China used lawcraft to dodge its legal obligations and lodge unfounded claims. In this way, the United States can bolster a dispute resolution system that will be maximally immune to lawcraft and conducive to third party claims to curb potential Chinese abuses.

#### CONCLUSION

China rises as a non-Western power within an international system created largely by Western powers.<sup>149</sup> The Chinese Communist Party's agenda is at odds not just with the U.S. agenda, but with a Western-oriented system that is open, integrated, and rule-based, with sturdy political foundations.<sup>150</sup> In short, today's international order is "hard to overturn and easy to join."<sup>151</sup> The current framework appears able to withstand challenges from Chinese lawcraft. Yet, as demonstrated by Chinese military exercises in the South China Sea in early 2021, disputed waters in the Indo-Pacific Region are turbulent in both the literal sense and the figurative sense.<sup>152</sup> By taking appropriate measures, the United States and its allies can do much more to force China to clarify its approach to international law and stamp out any future lawcraft.

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149. CAI, *supra* note 29, at 98.

150. THE LONGER TELEGRAM, *supra* note 2, at 9 ("The overriding political objective [of the United States] should be to cause China's elite leadership to collectively conclude that it is in the country's best interests to continue to operate within the existing US-led liberal international order rather than build a rival order, and that it is in the party's best interests, if it wishes to remain in power at home, not to attempt to expand China's borders or export its political model beyond China's shores.").

151. G. John Ikenberry, *The Rise of China and the Future of the West: Can the Liberal System Survive?*, FOREIGN AFFS., Jan./Feb. 2008, at 23–24.

152. Mastro, *supra* note 43 ("Chinese exercises in the South China Sea last month, and the strong US response, show these disputed waters will not soon be calm.").