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THE KIMBERLEY PROCESS AS A FRAMEWORK FOR REGULATING CONFLICT OIL AND GAS SOURCED FROM THE SOUTH CHINA SEA

JAMIE HUFFMAN*

INTRODUCTION

The South China Sea is one of, if not the most, contested territories in the world,¹ with China, Vietnam, Malaysia, Brunei, Indonesia, Taiwan, and the Philippines all advancing contradictory claims to the Sea.² Up to \$5 trillion in trade passes through the region each year,³ and it is thought to contain significant hydrocarbon reserves,⁴ both of which have helped to fuel continued controversy over control of the Sea. This is due to the fact that China claims roughly ninety percent of the region, an area that the government refers to as the “nine-dash line,” although this “line” is not recognized by international law.⁵ While, as aforementioned,⁶ numerous countries have laid claim to the South China Sea, in 2013 the Philippines unilaterally initiated an arbitration under the United Nations Convention on the Law of the Sea (“UNCLOS”) against China at the Hague, the latter of which refused to participate in the proceedings.⁷ Ultimately, one

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¹ Peter Greste et al., *‘Misunderstanding’ may lead to conflict between US and China over South China Sea, expert warns*, ABC NEWS (Oct. 2, 2016), <http://www.abc.net.au/news/2016-10-03/south-china-sea-us-china-misunderstandings-may-cause-conflict/7893012> [<https://perma.cc/28VE-YFZV>].

² Tiffany M. Lin, *Chinese Attitudes Toward Third-Party Dispute Resolution in International Law*, 48 N.Y.U. J. INT’L L. & POL. 581, 599 (2016).

³ Rosalind Mathieson, *Singapore Worried Most About Fishermen and Coast Guards in South China Sea*, BLOOMBERG (Oct. 2, 2016), <https://www.bloomberg.com/news/articles/2016-10-02/fishermen-coast-guards-worry-singapore-most-in-south-china-sea> [<https://perma.cc/4G5A-H7DR>]; David Tweed, *Territorial Disputes*, BLOOMBERG (Jan. 20, 2017), <https://www.bloomberg.com/quicktake/territorial-disputes> [<https://perma.cc/L8R6-C5AR>].

⁴ *Full unclosure?*, THE ECONOMIST (Mar. 24, 2012), <http://www.economist.com/node/21551113> [<https://perma.cc/5RT6-4396>].

⁵ Tom Phillips et al., *Beijing rejects tribunal’s ruling in South China Sea case*, THE GUARDIAN (July 12, 2016), <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china> [<https://perma.cc/6RUB-J88F>].

⁶ See Lin, *supra* note 2.

⁷ TRAN TRUONG THUY & LE THUY TRANG, *POWER, LAW, AND MARITIME ORDER IN THE SOUTH CHINA SEA* 5 (2015); Phillips et al., *supra* note 5.

of the major issues that factored into the Hague Tribunal's decision was the environmental degradation caused by the Chinese government.⁸

In addition to its geopolitical importance, the South China Sea is also significant both environmentally and ecologically. The reefs in the South China Sea are considered to be "some of the most biodiverse on Earth," and approximately ten percent of the entire reef (more than "60 square miles") has been destroyed throughout the conflict.⁹ These reefs also contain significant portions of the earth's coral- and reef-fish species, seventy-six percent and thirty-seven percent respectively.¹⁰ China, in an attempt to better assert its sovereignty and control over the Sea, has conducted island-building processes in the Spratly Islands, including dredging and covering existing reefs with sand to create new landmasses.¹¹ Nonetheless, the Chinese government asserts that this island building only constitutes "minimal, recoverable damage."¹² Additionally, illegal poaching of endangered giant clams was allowed—and even encouraged—for a time by the Chinese government, further compounding the environmental destruction in the Sea.¹³

As was previously mentioned, much of the Hague Tribunal's decision centered around environmental destruction in the Sea that was directly encouraged or tacitly authorized by the Chinese government.¹⁴ The Tribunal found that China did not have any historical rights to the majority of the South China Sea, as the Chinese government has often

⁸ Jackie Northam, *One Result of China's Buildup in South China Sea: Environmental Havoc*, NAT'L PUB. RADIO (Sept. 1, 2016), <http://www.npr.org/sections/parallels/2016/09/01/491395715/one-result-of-chinas-buildup-in-south-china-sea-environmental-havoc> [https://web.archive.org/web/*/http://www.npr.org/sections/parallels/2016/09/01/491395715/one-result-of-chinas-buildup-in-south-china-sea-environmental-havoc].

⁹ Rachel Bale, *Critical Reefs Destroyed in Poachers' Quest for World's Biggest Clams*, Nat'l Geographic (Aug. 30, 2016), <http://news.nationalgeographic.com/2016/08/wildlife-giant-clam-poaching-south-china-sea-destruction/> [https://perma.cc/3WMS-B8WN].

¹⁰ Akshat Rathi, *The most ignored aspect of the South China Sea brawl might be the key to solving it*, QUARTZ (July 26, 2016), <https://qz.com/741989/the-most-ignored-aspect-of-the-south-china-sea-brawl-might-be-the-key-to-solving-it/> [https://perma.cc/6V4Q-GBXT].

¹¹ Bale, *supra* note 9.

¹² Johnny Langenheim, *Preventing Ecocide in South China Sea*, THE GUARDIAN (July 15, 2015), <https://www.theguardian.com/environment/the-coral-triangle/2015/jul/15/preventing-ecocide-in-south-china-sea> [https://perma.cc/2SRG-PWEA].

¹³ *See* Bale, *supra* note 9 (coastal waters over fished so fishermen turned to the illegal giant clam market in the South China Sea for supplemental income) ("The government helped [these fishermen] out with a special fuel subsidy to travel . . . [t]o the Spratly Islands.").

¹⁴ *See id.*; Hannah Beech, *The Environment Is the Silent Casualty of Beijing's Ambitions in the South China Sea*, TIME (May 31, 2016), <http://time.com/4353292/south-china-sea-environment-destruction-coral-giant-clams/> [https://perma.cc/96PQ-8VLP].

claimed.¹⁵ Further, the Tribunal also found that “China had violated international law by causing ‘irreparable harm’ to the marine environment, endangering Philippine ships and interfering with Philippine fishing and oil exploration.”¹⁶ Thus, even though China did not actually participate in the arbitration, many of the claims it had previously made publicly were still struck down by the Hague Tribunal.¹⁷

Nonetheless, China’s reaction to the Tribunal’s ruling was less than favorable. Xi Jinping, the president of China, stated that his country’s “territorial sovereignty and marine rights” to the South China Sea would remain unaltered by the Tribunal’s decision, stating that his country was “committed to resolving disputes” with neighboring countries.¹⁸ Further,

Xinhua, the country’s official news agency, hit out at what it described as an “ill-founded” ruling that was “naturally null and void.” The Communist party mouthpiece newspaper the People’s Daily said in an editorial that the tribunal had ignored “basic truths” and “trampled” on international laws and norms. “The Chinese government and the Chinese people firmly oppose [the ruling] and will neither acknowledge it nor accept it,” it added.¹⁹

Thus, the Chinese government has made it abundantly clear that it will not comply with the Tribunal’s ruling and does not consider it to be in any way binding.

Nonetheless, the Hague’s decision is *technically* binding, although it is not actually enforceable in practice.²⁰ Further, even though China has ratified UNCLOS,²¹ under which the arbitration was initiated, China

¹⁵ Jane Perlez, *Tribunal Rejects Beijing’s Claims in South China Sea*, N.Y. TIMES (July 12, 2016), https://www.nytimes.com/2016/07/13/world/asia/south-china-sea-hague-ruling-philippines.html?_r=0 [https://web.archive.org/web/*/https://www.nytimes.com/2016/07/13/world/asia/south-china-sea-hague-ruling-philippines.html?_r=0].

¹⁶ *Id.*

¹⁷ Phillips et al., *supra* note 5.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Euan Graham, *The Hague Tribunal’s South China Sea Ruling: Empty Provocation or Slow-Burning Influence?*, COUNCIL OF COUNCILS (Aug. 18, 2016), http://www.cfr.org/councilofcouncils/global_memos/p38227 [https://perma.cc/6YLN-THBT]; Brian McGarry, *Enforcing an Unenforceable Ruling in the South China Sea*, THE DIPLOMAT (July 16, 2016), <http://thediplomat.com/2016/07/enforcing-an-unenforceable-ruling-in-the-south-china-sea/> [https://perma.cc/AA8U-GQU2]; Perlez, *supra* note 15.

²¹ Perlez, *supra* note 15.

included a reservation after ratification stating that it would not submit to the mandatory dispute settlement provided for under the treaty.²²

However, the Philippines still has other mechanisms by which to pressure China into compliance with the decision, particularly as pertains to environmental harm. Specifically, the Philippines should consider collaboration with other governments and private industry in the creation of an international certification scheme for any oil or gas that China may attempt to extract from the South China Sea, much like the schemes that have been employed to regulate trade in conflict diamonds and other natural resources.²³ The rights to the hydrocarbons²⁴ in the South China Sea were granted to the Philippines by the Hague Tribunal, yet China nonetheless still claims sovereignty over the regions that hold these hydrocarbon reserves.²⁵ Thus, this Note argues that one of the alternative means by which to enforce the substance of the Tribunal's decision is to create a certification scheme for oil and gas from the South China Sea. This would effectively ensure that any hydrocarbons that are sourced from the region are not extracted illegally, i.e., by the Chinese government in waters outside of their sovereign control. The creation of such a certification scheme could thus incentivize China to avoid violation of the Tribunal's ruling in the first place by refraining from exploring and extracting oil and gas from the Sea. Or, alternatively, a certification scheme could act as a form of punishment if China does conduct drilling, in that Chinese companies would effectively be unable to bring any of the oil and gas that they extract to the international market.

This type of solution is particularly useful considering the fact that the Philippines is currently presented with a natural resource curse, in that its valuable natural resources—here, the hydrocarbons—have in fact exacerbated the larger conflict over the territory in the South China Sea. This conflict is fueled by the valuable nature of the hydrocarbon

²² Graham, *supra* note 20.

²³ See generally FOOD & AGRIC. ORG. OF THE U.N., *The broad range of certification schemes*, <http://www.fao.org/docrep/010/ai388e/AI388E09.htm> [<https://perma.cc/A5AR-T7SE>] (last visited Nov. 12, 2017); KIMBERLEY PROCESS, *About*, <https://www.kimberleyprocess.com/en/about> [<https://perma.cc/4SSQ-5ZKB>] (last visited Nov. 12, 2017).

²⁴ Hydrocarbons are “organic chemical compound[s]” of which oil and gas are predominantly constructed. INVESTOPEDIA, *Hydrocarbon*, <http://www.investopedia.com/terms/h/hydrocarbon.asp> [<https://perma.cc/V53B-K76T>] (last visited Nov. 12, 2017).

²⁵ *Despite Legal Victory in South China Sea, Philippines' Oil Remains in Troubled Waters*, FORTUNE (July 21, 2016), <http://fortune.com/2016/07/22/despite-legal-victory-in-south-china-sea-philippines-oil-remains-in-troubled-waters/> [<https://perma.cc/V7SA-A3GS>] [hereinafter *Despite Legal Victory in South China Sea*].

reserves, particularly for China, which has experienced significant growth and industrialization in recent decades.²⁶ Additionally, the Philippines will be in dire need of alternative domestic fuel sources in the coming decade due to an impending domestic oil shortage.²⁷ Thus, the Philippines can effectively deter China from drilling for these hydrocarbon reserves (or, alternatively, retaliate against any illegal Chinese drilling) by coordinating with other national governments as well as private actors in a certification scheme to ensure that any oil or gas that is sourced from the region in dispute does not go to market.

A variety of effective certification schemes already exists for goods from areas in conflict.²⁸ Specifically, the Kimberley Process Certification Scheme (“the Kimberley Process”), which regulates trade in conflict diamonds, can provide a useful model for a certification framework for any oil and gas extracted from the South China Sea.²⁹ By relying on an already established framework, the Philippines’ partners in other national governments and private industry will be more likely to accept a new certification scheme as it is based on a tried and tested method. An additional benefit of relying on an already established framework is also that the Kimberley Process has been in existence for long enough that its flaws have become apparent and can be accounted for in establishing a new scheme for hydrocarbons from the Sea.³⁰

First, this Note will generally discuss the relevant background information on the dispute, as well as the details of the Hague Tribunal’s decision and how this relates to the rights to the hydrocarbon reserves in the Sea. It will then discuss the concept of resource curses generally, as well as how this theory is applicable to the conflict over these hydrocarbon reserves. This will then be followed by an introduction to natural resource certification schemes, as well as a discussion of the Kimberley Process, both in general and also as a model for alleviating natural resource curses. Subsequently, this Note will discuss the means by which a new certification

²⁶ WORLD BANK, *GDP (current US\$)*, <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=CN> [<https://perma.cc/5JRQ-MQFA>] (last visited Nov. 12, 2017); WORLD BANK, *Population, total*, <http://data.worldbank.org/indicator/SP.POP.TOTL?locations=CN> [<https://perma.cc/9GNA-TT9H>] (last visited Nov. 12, 2017).

²⁷ *Despite Legal Victory in South China Sea*, *supra* note 25.

²⁸ *See, e.g.*, FOOD & AGRIC. ORG. OF THE U.N., *supra* note 23 (examples include the “Organic Farming—EC Control System” in the European Union, the Agriculture Biologique logo in France, and the Organic Foods Production Act in the United States).

²⁹ KIMBERLEY PROCESS, *supra* note 23.

³⁰ *Id.* (negotiations began in 2002, entered force in 2003, and changes made in 2010, 2011, and 2013).

scheme could be tailor-made for oil and gas from the South China Sea by accounting for the inherent weaknesses in the Kimberley Process.

I. HISTORY OF THE SOUTH CHINA SEA DISPUTE

The waters of the South China Sea, as well as the hydrocarbons, reefs, and other maritime features contained therein, have been embroiled in conflict for decades.³¹ Multiple Asian countries lay claim to the Sea and its various features—most significantly for the purposes of this discussion, China and the Philippines.³² Each year up to \$5 trillion in trade passes through the Sea, making the region of high importance not only in Asia, but also to trading partners around the world.³³ China claims the vast majority of the territory within the South China Sea, at around roughly ninety percent of the region.³⁴ The Chinese government describes this area as being within the “nine-dash line,”³⁵ in reference to a line drawn on maps from the 1940s and from which China draws its claims of ownership and sovereignty over the Sea.³⁶ The nine-dash line, however, has “no basis in international law.”³⁷

One of the major controversies surrounding the South China Sea concerns what is thought to be significant hydrocarbon resources underneath the Sea.³⁸ Exploration in the Sea has been minimal to this point and estimates vary as to how much of these hydrocarbons may actually exist.³⁹ Further, it is believed that much of these hydrocarbon reserves are in fact natural gas (roughly sixty to seventy percent, according to some estimates), rather than oil.⁴⁰ It is also important, for the purposes

³¹ BBC NEWS, *Why is the South China Sea Contentious?* (July 12, 2016), <http://www.bbc.com/news/world-asia-pacific-13748349> [https://perma.cc/2EDA-GTUT].

³² Lin, *supra* note 2; Greste et al., *supra* note 1.

³³ Mathieson, *supra* note 3; Tweed, *supra* note 3.

³⁴ Phillips et al., *supra* note 5.

³⁵ Greste et al., *supra* note 1.

³⁶ THE ECONOMIST, *supra* note 4.

³⁷ *Id.*

³⁸ *See generally* The South China Sea Arbitration Award of 12 July 2016, In the Matter of the South China Sea Arbitration (Perm. Ct. Arb. July 12, 2016) (No. 2013-19) [hereinafter South China Sea Arbitration Award].

³⁹ Jeremy Maxie, *The South China Sea Dispute Isn't About Oil, At Least Not How You Think*, FORBES (Apr. 25, 2016), <http://www.forbes.com/sites/jeremymaxie/2016/04/25/the-south-china-sea-dispute-isnt-about-oil-at-least-not-how-you-think/#6875d84a7275> [http://web.archive.org/web/*/http://www.forbes.com/sites/jeremymaxie/2016/04/25/the-south-china-sea-dispute-isnt-about-oil-at-least-not-how-you-think/#6875d84a7275].

⁴⁰ Tim Daiss, *Why The South China Sea Has More Oil Than You Think*, FORBES (May 22, 2016), <http://www.forbes.com/sites/timdaiss/2016/05/22/why-the-south-china-sea-has-more>

of this discussion, to distinguish between hydrocarbon reserves and resources. Hydrocarbon reserves are defined as

oil or gas assets remaining in place that are fairly well known, and have been discovered by exploratory drilling. Reserves must also be extractable at a net profit at market prices with current technology . . . Resources on the other hand are deposits that do not meet one or more of the criteria for reserves.⁴¹

Thus, while the Sea has both reserves and resources, the fact that the Sea likely contains significant reserves is of crucial importance, as it is actually possible to extract reserves at a profit in the near future.⁴²

The China National Offshore Oil Company, which is owned by the Chinese government, has estimated that the South China Sea has roughly “125 billion barrels of oil and 500 trillion cubic feet of gas in undiscovered areas”; however, this has not been independently confirmed.⁴³ A USGS study from 2010, nonetheless, found that “there is a ninety-five percent chance that there is [sic] at least 750 million barrels of oil in the South China Sea Platform, a median chance of around 2,000 million barrels, and a low probability (5%) of over 5,000 million barrels.”⁴⁴ Thus, while it is difficult to definitively ascertain just how much oil and gas lies beneath the sea without conducting further exploration, the fact remains that all estimates indicate that there are significant hydrocarbon reserves under the Sea. Therefore, because the South China Sea has “over 500 million barrels of oil,” it is considered “one of the world’s major oil fields.”⁴⁵

The Philippine government has attempted to license and contract with private industry in order to conduct further exploration for oil and

-oil-than-you-think/#4215abc13a3f [http://web.archive.org/web/*/http://www.forbes.com/sites/timdaiss/2016/05/22/why-the-south-china-sea-has-more-oil-than-you-think/#4215abc13a3f].

⁴¹ *Id.*

⁴² Jude Clemente, *U.S. Oil Reserves, Resources, and Unlimited Future Supply*, FORBES (Apr. 2, 2015), <https://www.forbes.com/sites/judeclemente/2015/04/02/u-s-oil-reserves-resources-and-unlimited-future-supply/#3dc398f857e1> [http://web.archive.org/web/*/https://www.forbes.com/sites/judeclemente/2015/04/02/u-s-oil-reserves-resources-and-unlimited-future-supply/#3dc398f857e1]. See also *Reserves Definitions*, SOC’Y OF PETROLEUM EN’RS, http://petrowiki.org/Reserves_definitions [https://perma.cc/2F3F-46J7] (last visited Nov. 12, 2017).

⁴³ Daiss, *supra* note 40.

⁴⁴ *Id.*

⁴⁵ *Id.*

gas within the Sea,⁴⁶ but has been met with strong opposition from the Chinese government, which continues to assert their “indisputable sovereignty”⁴⁷ in the region. The Philippines argued to the Hague Tribunal that “China’s interference with oil and gas exploration and exploitation, and the measures adopted to prevent fishing in the Philippines’ EEZ [Exclusive Economic Zone] and continental shelf, constitute . . . continuing violations of . . . Articles 56, 58, 61, 62, 73, 77 and 81” of UNCLOS, causing this issue to become a major part of the Tribunal decision.⁴⁸

II. THE HAGUE TRIBUNAL DECISION

The Chinese government has repeatedly repudiated the Hague Tribunal proceedings and contested its jurisdiction.⁴⁹ Further, in 2006, China made a declaration that stated, “the Government of the People’s Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1(a) (b) and (c) of Article 298 of the Convention.”⁵⁰ This means that, essentially, China has formally taken all of the exceptions that they possibly can under UNCLOS, therefore the scope of their obligations and responsibilities under UNCLOS are as minimal as they can possibly be while the country still remains a party.⁵¹ The Declaration stated that China “revoked the jurisdiction of the Tribunal over disputes regarding maritime boundaries, historic titles and military activities,” which the Chinese government has argued deprives the Hague Tribunal of jurisdiction.⁵²

Nonetheless, under UNCLOS, The Hague arbitration was, strictly speaking, binding.⁵³ Consequently, while technically enforceable under UNCLOS Article 296⁵⁴ and also UNLCOS Article 2 of Annex VII,⁵⁵ there

⁴⁶ South China Sea Arbitration Award, *supra* note 38, ¶¶ 652, 660–61, 666.

⁴⁷ *Id.* ¶ 654.

⁴⁸ *Id.* ¶ 684.

⁴⁹ Phillips et al., *supra* note 5; Donald Rothwell, *Cause for optimism in the South China Sea*, EAST ASIA FORUM (July 25, 2016), <http://www.eastasiaforum.org/2016/07/25/assessing-the-damage-the-south-china-sea-arbitration/> [<https://perma.cc/7J9P-67DK>].

⁵⁰ Sienho Yee, *The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections*, CHINESE J. INT’L L. 663, 664–65 (2014).

⁵¹ *Id.*

⁵² Rothwell, *supra* note 49.

⁵³ Tweed, *supra* note 3.

⁵⁴ Rothwell, *supra* note 49.

⁵⁵ Richard J. Heydarian, *The Philippines’ Post-Ruling Options in the South China Sea*, ASIA TIMES (July 16, 2016), <http://www.atimes.com/article/the-philippines-post-ruling-options-in-the-south-china-sea/> [<https://perma.cc/YPK7-MDVP>].

is no way for any international actor to actually enforce the ruling.⁵⁶ Despite all of this, under UNCLOS Article 9 of Annex VII, if one of the parties to the arbitration refuses to be involved, the ultimate decision is still binding—the arbitration simply goes on with or without that party,⁵⁷ as “the [a]bsence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.”⁵⁸ Thus, even though China chose not to be involved with the arbitration, the proceedings continued without input from the Chinese government, as is prescribed under UNCLOS.⁵⁹ Further, under Article 288 of UNCLOS, all disagreements surrounding jurisdiction must be decided by the tribunal (or court) in question, which was done in part by the Hague Tribunal in July 2015.⁶⁰

Turning now to the substance of the proceeding, the Tribunal’s final decision describes numerous actions on the part of the Chinese government that have caused continual environmental degradation in the Sea dating back to 1998.⁶¹ Indeed, this destruction was so drastic that the Philippines argued to the Tribunal that the actions constituted a breach of “Articles 123, 192, 194, 197, 205, and 206” of UNCLOS.⁶² Over the years, Chinese fishermen poached “endangered sea turtles, sharks, and corals” throughout the Sea,⁶³ as well as endangered giant clams.⁶⁴ Chinese fishermen also utilized explosives during fishing⁶⁵ and destroyed reefs.⁶⁶ Further, the Chinese government has “under[taken] some construction and land reclamation” on various reefs in the Sea, including constructing buildings and other structures.⁶⁷ The island building that has been undertaken by the Chinese government has also occurred on a “massive” scale, often involving dredging, which is detrimental to the marine environment.⁶⁸ Indeed, according to the Tribunal

⁵⁶ Tweed, *supra* note 3.

⁵⁷ Heydarian, *supra* note 55.

⁵⁸ United Nations Convention on the Law of the Sea art. 28, Dec. 10, 1982, 1833 U.N.T.S. 3. *See also* Press Release at 4, South China Sea Arb. (Phil. v. China) (Perm. Ct. Arb. July 12, 2016), *available at* <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf> [<https://perma.cc/7XU6-UCLL>].

⁵⁹ *See* Press Release, *supra* note 58, at 4.

⁶⁰ *Id.* at 1.

⁶¹ South China Sea Arbitration Award, *supra* note 38, ¶ 827.

⁶² *Id.* ¶ 906.

⁶³ *Id.* ¶ 950.

⁶⁴ *Id.*

⁶⁵ *Id.* ¶ 845.

⁶⁶ *Id.* ¶ 847.

⁶⁷ South China Sea Arbitration Award, *supra* note 38, ¶ 853.

⁶⁸ *Id.* ¶ 855.

the conclusions of the Tribunal-appointed independent experts are unequivocal with respect to the more recent construction activities, which they say have “impacted reefs on a scale unprecedented in the region.” They cite a 2016 study analysing satellite imagery that found up to 60 percent of the shallow reef habitat at the seven reefs has been directly destroyed.⁶⁹

Ultimately, according to the Tribunal, the Chinese government has caused significant environmental degradation in the Sea, both by allowing Chinese fisherman to conduct destructive activities on an individual scale, as well as through state-directed construction efforts.

Additionally, in 2012, the Chinese government (through the China National Offshore Oil Corporation) “issued a notice of open blocks for petroleum exploration adjacent to the western edge of the ‘nine-dash line.’”⁷⁰ However, as was pointed out by the Tribunal in its final decision, parts of at least one of these blocks are outside of the 200 nautical mile radius of the features claimed by the Chinese government,⁷¹ and features must be within 200 nautical miles to be within a country’s exclusive economic zone (discussed further below) under UNCLOS.⁷² Additionally, this portion is also outside of the Chinese continental shelf.⁷³ Under Article 77 of UNCLOS, a coastal state “exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources,” and these rights are exclusive to the coastal state.⁷⁴ Therefore, the Tribunal held that, due to the unambiguous nature of the language of UNCLOS, the right to the resources on the floor of the Sea belong only to the Philippines (or, alternatively, any other country that is given express permission by the Philippines).⁷⁵ Ultimately, however, the Tribunal held that only one of China’s actions (specifically, where Chinese ships forced a Philippine boat to stop its activities and leave the area, despite the fact that they were within the Philippines’ continental shelf) constituted an actual violation of Article 77 of the Convention.⁷⁶

⁶⁹ *Id.* ¶ 978 (footnotes omitted).

⁷⁰ *Id.* ¶ 208.

⁷¹ *Id.*

⁷² United Nations Convention on the Law of the Sea, *supra* note 58, at art. 57.

⁷³ South China Sea Arbitration Award, *supra* note 38, ¶ 208.

⁷⁴ United Nations Convention on the Law of the Sea, *supra* note 58, at art. 77.

⁷⁵ South China Sea Arbitration Award, *supra* note 38, ¶ 698.

⁷⁶ *Id.* ¶ 708.

It would appear that China's protests against Philippine hydrocarbon exploration⁷⁷ originate from what China views to be its historic rights to the Sea.⁷⁸ Historic rights are defined as "title created in derogation of international law through historical processes by which one State has asserted a jurisdiction originally illegal, and this has been acquiesced in by the community of nations"⁷⁹ In line with this, the Tribunal ultimately held that in order to assert any sort of historical rights to the Sea, China would have to demonstrate "that China had historically sought to prohibit or restrict the exploitation of such resources by the nationals of other States and that those States had acquiesced in such restrictions."⁸⁰ The Tribunal ultimately found that there was no such historical evidence to suggest that this had been the case with the Sea, particularly with respect to the oil and gas reserves within it.⁸¹ This is because, at the time of the UNCLOS negotiations, the technology related to deep water oil drilling was still in its beginning phases.⁸² For these reasons, the Tribunal found that because the Chinese government had not historically been engaged in any such activities, China had no historical rights in the South China Sea.⁸³

Alternatively, the rationale behind China's claims to the hydrocarbon reserves of the Sea could also be based on what China claims to be its exclusive economic zones emanating from "high-tide feature[s] claimed by China."⁸⁴ Under UNCLOS Article 57, exclusive economic zones do not exceed "200 nautical miles from the baselines from which the breadth of the territorial sea is measured."⁸⁵ Importantly, under Article 56(1)(a) of UNCLOS, coastal states have the exclusive sovereign right to explore and extract both living and non-living natural resources within their exclusive economic zone.⁸⁶ This is crucial in that, were China to have a legitimate exclusive economic zone extending to this portion of

⁷⁷ *Id.* ¶ 209.

⁷⁸ *Id.* Due to the fact that China was not a party to the dispute it is unclear what they would have asserted as their grounds for sovereignty had they assented to the Tribunal's jurisdiction. Rothwell, *supra* note 49.

⁷⁹ JOHN P. GRANT & CRAIG BARKER, PARRY & GRANT ENCYCLOPÆDIC DICTIONARY OF INTERNATIONAL LAW 260 (Oxford Univ. Press, 3d ed. 2009) (quoting D.P. O'CONNELL, INTERNATIONAL LAW 496–97 (1968)).

⁸⁰ South China Sea Arbitration Award, *supra* note 38, ¶ 270.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* ¶¶ 270–71, 692.

⁸⁴ *Id.* ¶ 465.

⁸⁵ United Nations Convention on the Law of the Sea, *supra* note 58, at art. 57.

⁸⁶ *Id.* at art. 56(1)(a).

the Sea, it would be allowed to legitimately “explor[e] and exploit[.]” the hydrocarbon reserves in the Sea.⁸⁷ However, the Tribunal nonetheless found that the “high-tide feature[s] in the Spratly Islands” that China had claimed were insufficient to constitute an exclusive economic zone or continental shelf.⁸⁸ The Tribunal therefore found contrary to China’s claims to the right to extract hydrocarbons from specific areas in the Sea.⁸⁹ Ultimately, the Tribunal “granted the Philippines sovereign rights to access offshore oil and gas fields, including the Reed Bank.”⁹⁰

III. RESOURCE CURSES

In many ways, the hydrocarbon reserves of the South China Sea constitute a natural resource curse, a scenario in which large quantities of natural resources lead to (or, alternatively, compound) issues involving governance.⁹¹ Indeed, “as global population and demand grow, the scarcity of natural resources, especially in oil and water, can be a large factor in creating conditions ripe for violent conflict.”⁹² In fact, oil and gas are two of the natural resources that are most often involved in civil conflict, along with diamonds (and other precious stones), drugs, and timber.⁹³

While the term “resource curse” is typically utilized to refer to poor economic growth and development in the context of developing states,⁹⁴ the concept can still be extrapolated to the dispute surrounding the South China Sea. Often the term is used to refer to scenarios in which an abundance of natural resources has led to governance problems, sometimes termed a “leadership curse,” where leaders are incentivized to accumulate resource wealth for themselves and not for the benefit of their people.⁹⁵ In many ways, this is analogous to the South China Sea conflict,

⁸⁷ *Id.*

⁸⁸ South China Sea Arbitration Award, *supra* note 38, ¶ 692.

⁸⁹ *Id.* ¶¶ 697–98, 700.

⁹⁰ *Despite Legal Victory in South China Sea*, *supra* note 25.

⁹¹ Lesley Wexler, *Regulating Resource Curses: Institutional Design and Evolution of the Blood Diamond Regime*, 31 CARDOZO L. REV. 1717, 1717–18 (2010).

⁹² Luke A. Whittmore, *Intervention and Post-Conflict Natural Resource Governance: Lessons from Liberia*, 17 MINN. J. INT'L L. 387, 392 (2008).

⁹³ Diane A. Desierto, *Leveraging International Economic Tools to Confront Child Soldiering*, 43 N.Y.U. J. INT'L L. & POL. 337, 353 (2011); *see, e.g., Despite Legal Victory in South China Sea*, *supra* note 25.

⁹⁴ Jonathan Bonnitcha, *Foreign Investment, Development and Governance*, J. INT'L DISP. SETTLEMENT 31, 37 (2016); *see also* Whittmore, *supra* note 92.

⁹⁵ Emeka Duruigbo, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT'L L. REV. 33, 33–34 (2006).

as the Chinese government has been effectively incentivized to appropriate as much of the hydrocarbon reserves as possible for the benefit of their domestic economy before the Philippines is able to do so for itself. The fact that there is likely so much oil and gas so close to home could likely serve as an inducement to the Chinese government to take whatever measures necessary—such as island building,⁹⁶ military drills,⁹⁷ and aiding Chinese fishermen⁹⁸—in order to assert its sovereign rights to this profitable resource.

Here, the valuable nature of the hydrocarbons under the South China Sea has complicated the dispute over the region even further, in addition to the concerns about environmental degradation⁹⁹ and the security of a monumentally important trade route.¹⁰⁰ This is primarily because the Philippines faces a domestic oil shortage within the coming decade,¹⁰¹ meaning that the possibility of significant oil reserves so close to home could potentially be a boon to the Philippine economy. The Malampaya project, an oilfield “that powers 40% of the main island of Luzon, home to the capital Manila . . . is approaching the end of its productive life,” leaving the hydrocarbons in the South China Sea as a major possible alternative source of fuel for the country.¹⁰²

IV. CERTIFICATION SYSTEMS IN GENERAL

Generally speaking, certification schemes for natural resources essentially certify that a good has met predetermined standards of sustainability.¹⁰³ These schemes often include “(1) establishment of standards;

⁹⁶ Derek Watkins, *What China has Been Building in the South China Sea*, N.Y. TIMES (Oct. 27, 2015), https://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea.html?_r=0 [http://web.archive.org/web/*/https://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea.html?_r=0].

⁹⁷ Tom Phillips, *South China Sea: Beijing begins military drills ahead of key territorial ruling*, THE GUARDIAN (July 5, 2016), <https://www.theguardian.com/world/2016/jul/05/south-china-sea-beijing-begins-military-drills-ahead-of-key-territorial-ruling> [<https://perma.cc/3S4C-NATW>].

⁹⁸ Rachael Bale, *One of the World's Biggest Fisheries Is on the Verge of Collapse*, NAT'L GEOGRAPHIC (Aug. 29, 2016), <http://news.nationalgeographic.com/2016/08/wildlife-south-china-sea-overfishing-threatens-collapse/> [<https://perma.cc/RE4R-2PXE>].

⁹⁹ See Northam, *supra* note 8.

¹⁰⁰ See Mathieson, *supra* note 3; Tweed, *supra* note 3.

¹⁰¹ *Despite Legal Victory in South China Sea*, *supra* note 25.

¹⁰² *Id.*

¹⁰³ SUSTAINABLE PALM OIL, *Certification schemes*, <http://www.sustainablepalmoil.org/certification-schemes/> [<https://perma.cc/3PPS-9XCZ>] (last visited Nov. 12, 2017).

(2) certification assessment for compliance with the standards; (3) certification seal or label; (4) accreditation of the certifier by the certification body; and (5) compliance monitoring.”¹⁰⁴ Further, certification standards can be internal (i.e., set by the particular company or within the industry in question) or set externally, by organizations “such as a trade association, a supplier, a nongovernmental organization (NGO), a national government, or an international body.”¹⁰⁵ These standards can also be “systems-based” or “performance-based,” the former delineating only the “management systems” required, and the latter only stating what goals must be reached, without any requirements as to how this can or should be done.¹⁰⁶ Due to the fact that certification schemes allow for such flexibility in how they are created and enforced, they can easily be adapted to different goods as well as different markets.¹⁰⁷ Certification schemes also tend to be more efficient than other regulatory means because they allow consumers to directly target and boycott the offending product while not affecting other, ethically sourced products.¹⁰⁸

The primary benefit associated with certification systems is the fact that they effectively incentivize the legal extraction of natural resources, in that certification is only given to legally sourced commodities.¹⁰⁹ Therefore, even if the Chinese government were to drill for the hydrocarbon reserves and resources in the Sea, under a proper certification scheme, they would not be able to bring any of the oil or gas for which they drill to the international market.¹¹⁰ This is significant because the lack of an available market could effectively de-incentivize the Chinese government from ever drilling in the first place, thereby preventing any further environmental degradation.¹¹¹ Or, alternatively, a certification scheme could curb further drilling after it has begun.¹¹²

This approach does not, however, prevent the Chinese government from bringing this oil and gas to market domestically, and, as a highly populated and quickly industrializing country, it is likely that China would be able to make use of much of this oil and gas in its domestic market.¹¹³

¹⁰⁴ Pooja Seth Parikh, *Harnessing Consumer Power: Using Certification Systems to Promote Good Governance*, 34 ELR 10314, 10315 (2004).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 10314 (explaining the extensive uses for certification schemes).

¹⁰⁸ *Id.* at 10315–16.

¹⁰⁹ *Id.* at 10324.

¹¹⁰ *See, e.g.*, Parikh, *supra* note 104, at 10324.

¹¹¹ *See id.*

¹¹² *See id.*

¹¹³ *See GDP (current US\$), supra* note 26; *Population, total, supra* note 26.

Nonetheless, the inability to bring these resources to market in other countries and to be able to effectively profit off of it internationally could serve as a sufficient deterrent to the Chinese government, as their capability to profit off of these oil and gas reserves would necessarily be limited in scope. Indeed, widespread international condemnation in and of itself, via the threat alone of a certification scheme, could serve as a carrot that further incentivizes the Chinese government to abstain from drilling.¹¹⁴

V. THE KIMBERLEY PROCESS CERTIFICATION SCHEME

The international scheme by which conflict diamonds are regulated, The Kimberley Process Certification Scheme (“the Kimberley Process”), can provide a useful framework by which to establish a regulatory mechanism for the hydrocarbon reserves in the South China Sea. The Kimberley Process was essentially created by the United Nations in 2003¹¹⁵ in order to prevent conflict diamonds from going to the international market.¹¹⁶ Conflict, or “blood diamonds,” are defined by the United Nations as those that “originate from areas controlled by forces or factions opposed to legitimate and internationally recognized governments, and are used to fund military action in opposition to those governments, or in contravention of the decisions of the Security Council.”¹¹⁷ The Kimberley Process is thus the means by which trade in conflict diamonds is regulated by nation states, intergovernmental organizations, and private entities in an effort to restrict the sale of these resources.¹¹⁸

In a nutshell, the Kimberley Process:

encourages the national regulation of rough diamonds based on internationally agreed upon minimum standards. All state participants must ensure that every raw diamond shipment contains a Kimberley Process certificate and

¹¹⁴ See generally Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT’L & COMP. L. 1, 11 fn. 30 (2006).

¹¹⁵ David Rhode, *The Kimberley Process is a ‘perfect cover story’ for blood diamonds*, THE GUARDIAN (Mar. 24, 2014), <https://www.theguardian.com/sustainable-business/diamonds-blood-kimberley-process-mines-ethical> [https://perma.cc/876T-4AM9].

¹¹⁶ KIMBERLEY PROCESS, *What is the Kimberley Process?*, <https://www.kimberleyprocess.com> [https://perma.cc/VXN4-Y3QN] (last visited Nov. 12, 2017).

¹¹⁷ Paul Armstrong, *What are ‘conflict diamonds?’*, CNN (Dec. 5, 2011), <http://www.cnn.com/2011/12/05/world/africa/conflict-diamonds-explainer/> [https://perma.cc/2VW2-LP57].

¹¹⁸ Tracey Michelle Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINN. J. GLOBAL TRADE 1, 3–4 (2003).

that no shipment is imported from or exported to a non-participant. To fulfill these obligations, each participant is expected to: establish a system of internal controls; utilize tamper-resistant containers; enact implementing and enforcement legislation; and share import and export data. The Kimberley Process also directs participating states to self-report on their relevant laws, regulations, and practices. In addition to its reliance on state participation, this regulatory institution includes the diamond industry's voluntary self-regulation initiatives. These industry efforts provide for a warranty system, by which members commit to use an invoice system and "not [to] knowingly buy or sell or assist others to buy or sell conflict diamonds."¹¹⁹

Under the Kimberley Process, all of the states and governments involved consented to internal measures to meet all Kimberley Process standards, such as taking steps to track diamonds to their place of origin.¹²⁰ The parties also agreed to prohibit the export of diamonds without a government certificate, ensuring that the diamonds in question are conflict free.¹²¹ Under the Kimberley Process, "legally mined diamonds are those from areas of government control, produced through a chain of legally authorized transactions, including use of land, permission to mine, purchase by authorized dealers, and export by licensed exporters."¹²² There is even evidence to suggest that these licensing standards have been effective in increasing the amount of exported diamonds.¹²³

VI. THE KIMBERLEY PROCESS AS A FRAMEWORK FOR REGULATING SOUTH CHINA SEA OIL AND GAS RESERVES

As aforementioned, in many ways, the Kimberley Process presents a promising framework for regulating any possible trade in oil and gas from the South China Sea, thus effectively de-incentivizing any drilling on the part of the Chinese government.¹²⁴ Therefore, even if the

¹¹⁹ Wexler, *supra* note 91, at 1719–20.

¹²⁰ Ian Smillie, *Blood Diamonds and Non-State Actors*, 46 VAND. J. TRANSNAT'L L. 1003, 1012–13 (2013).

¹²¹ *Id.* at 1013.

¹²² Parikh, *supra* note 104, at 10325.

¹²³ *Id.*

¹²⁴ See Price, *supra* note 118, at 1–2; Wexler, *supra* note 91, at 1719.

Chinese government does not currently have any concrete plans to drill, the threat of not being able to find a market for any oil and gas they would obtain in contravention of the Tribunal's ruling could be a sufficient deterrent to prevent drilling from ever happening. For these reasons, a cooperative and collaborative effort between countries as well as the private sector and nongovernmental organizations—through the means of a certification scheme—is likely the most advantageous mechanism by which to regulate oil and gas extracted from the Sea. Certification schemes that involve action on both the public and private sector level provide the most efficient means of regulation, as “government is the actor that can provide the coercive authority necessary to resolve environmental collective action problems.”¹²⁵ Thus, in order to have the most effective system possible it is important to include both the public and private sector, as national governments are able to actually enforce any standards set, unlike private industry.

If a certification scheme similar to the Kimberley Process were to be employed with any oil or natural gas sourced from the Sea, both private entities and governments would necessarily have to collaborate in a similar way in order to avoid selling these conflict resources. Private industries would have to agree not to market or refine this oil and gas, although this would only work if all of the major players agreed, as a boycott by any one company would then just drive up prices and increase profits for their competitors.¹²⁶ Further, governments and other international entities would necessarily have to become involved by restricting the importation of any oil or natural gas that is sold by China and is certified to have originated from the Sea, effectively cutting off all available markets for the resources.

Generally speaking, the Kimberley Process can effectively be utilized as a certification framework for a variety of other natural resources that are involved in some sort of dispute or conflict.¹²⁷ This model can be useful in situations in which a single nation state cannot independently regulate the activity in question, which, in the context of the South China Sea, is drilling for oil and gas. The Kimberley Process has already been successfully utilized as a model for regulating other natural resources in the European Union and also the Great Lakes region, and

¹²⁵ Michael Vandenberg, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 144 (2013).

¹²⁶ See BARRY SCHWARTZ, *THE BATTLE FOR HUMAN NATURE: SCIENCE, MORALITY AND MODERN LIFE* 62 (W. W. Norton & Company, 1986).

¹²⁷ Wexler, *supra* note 91, at 1720.

therefore can also provide a useful framework for regulating oil and gas from the Sea.¹²⁸

VII. ACCOUNTING FOR WEAKNESSES WITHIN THE KIMBERLEY PROCESS

One of the most glaring issues as pertains to the effective operation of certification schemes pertains to gaps in coverage, as, “the experience with conflict diamonds indicates that such country-specific sanctions alone may not be sufficiently effective—and that a global certification system may be needed to effectively curb the trade in conflict resources.”¹²⁹ Essentially, in order to be most efficacious, it is necessary that certification schemes incorporate *all* major players, here meaning all large oil and gas importing countries, as well as the large oil and gas refiners and producers. If one significant oil-consuming country does not enter into the certification scheme, they will simply enjoy unfettered access to cheaper oil from China, a benefit not enjoyed by every other country that does enter into the certification scheme. In many ways, this constitutes a traditional collective action problem;¹³⁰ this means that each country is effectively incentivized *not* to enter into the certification scheme so that they can get access to this cheaper source of oil and natural gas.¹³¹ The same is also true for individual oil companies. Ultimately, a certification scheme like the Kimberley Process will only work if all major players agree to enter into the agreement (and, as discussed later, there is a legitimate enforcement mechanism). This universal agreement can be difficult to obtain, particularly when governments with vastly different domestic economies, values, and needs are involved, but it is not impossible. Such a far reaching agreement is not, by any means, unheard of in international law, as is exemplified by the Kimberley Process itself,¹³² as well as the WTO,¹³³ and the United Nations.¹³⁴ For these reasons, it is

¹²⁸ See *id.* at 1720–21.

¹²⁹ Parikh, *supra* note 104, at 10322.

¹³⁰ Katharina Holzinger, *The Problems of Collective Action: A New Approach* at 2 (2003), https://www.coll.mpg.de/pdf_dat/2003_02online.pdf [<https://perma.cc/DF7Y-R2BQ>].

¹³¹ See generally Yvonne Rydin & Mark Pennington, *Public Participation and Local Environmental Planning: the collective action problem and the potential of social capital*, 5 *LOC. ENV'T* 153, 158 (2000) (explaining that collective action is a common problem in “environmental planning”).

¹³² KIMBERLEY PROCESS, *List of Participants—status 2017*, <https://www.kimberleyprocess.com/en/2016-kp-participants-list> [<https://perma.cc/W35C-DDT5>] (last visited Nov. 12, 2017).

¹³³ WTO, *Members and Observers of the WTO*, https://www.wto.org/english/thewto_e/countries_e/org6_map_e.htm [<https://perma.cc/V5EV-C763>] (last visited Nov. 12, 2017).

¹³⁴ U.N., *Member States*, <http://www.un.org/en/member-states/> [<https://perma.cc/F4AS-4RUL>] (last visited Nov. 12, 2017).

important to craft an agreement that involves and is palatable to all major players in both the public and private sectors. This can certainly be achieved through extensive and inclusive negotiations.

Further, when there is no real means of enforcing compliance with certification schemes, this leads to the exact problem facing the Philippines in light of the recent Hague Tribunal decision: what if one party simply chooses not to comply?¹³⁵ Often, one of the main issues that arises with international law is enforcement,¹³⁶ as is evidenced by the unenforceability of the Hague Tribunal decision itself.¹³⁷ Countries may be loathe to surrender any of their sovereignty by acquiescing to demands by Intergovernmental Organizations (“IGOs”), often for domestic political reasons.¹³⁸ Certification schemes essentially incentivize compliance through the threat of consumer backlash and boycotts (along with the accompanying “carrots” of being able to charge higher prices and gaining market access), but companies, and in this case, governments, may simply choose not to abide by a voluntary certification scheme.¹³⁹

Nonetheless, even a voluntary, non-binding agreement can still be effective in deterring trade in conflict resources. One of the strengths of the Kimberley Process is that it requires countries “to enact the requisite legislation and import controls to support such national systems.”¹⁴⁰ It is crucial that the Kimberley Process provides some leeway for the countries involved, as this flexibility makes it significantly more likely that countries will voluntarily assent to the scheme in the first place. Countries are often hesitant to take part in treaties and other international agreements that could in any way limit their sovereignty—or could at least have that appearance domestically—and, therefore, allowing for some domestic adaptability, would likely make such an agreement all the more palatable to individual states.¹⁴¹ By providing minimum standards

¹³⁵ See Parikh, *supra* note 104, at 10316.

¹³⁶ Frederic L. Kirgis, *Enforcing International Law*, AM. SOC'Y OF INT'L L. (Jan. 22, 1996), <https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law> [<https://perma.cc/7RUZ-8WGA>].

¹³⁷ See, e.g., South China Sea Arbitration Award, *supra* note 38.

¹³⁸ See generally Oona Hathaway, *International Delegation and Domestic Sovereignty*, YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY 115, 115 (2007), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1858&context=fss_papers [https://web.archive.org/web/*/http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1858&context=fss_papers].

¹³⁹ Parikh, *supra* note 104, at 10316.

¹⁴⁰ *Id.* at 10321.

¹⁴¹ See generally Hathaway, *supra* note 138, at 128–32.

and then allowing countries to enforce these by the means of their choosing, an oil and gas certification scheme would be much more likely to gain widespread assent in the first place, as well as compliance once instituted. Essentially, if the individual states themselves are choosing the means of compliance that are best for them, they will be significantly more likely to abide by these standards, particularly compared to a system imposed by outsiders without intimate knowledge of each country's individual domestic economy. Thus, by systematically incorporating flexibility at the national level, a voluntary certification scheme could avoid many of the enforcement problems that are inherent when dealing with international actors.¹⁴² Indeed, all WTO countries have already agreed to minimum standards in treaties that cover a variety of industries anyway, such as The Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").¹⁴³ Another example of a treaty that incorporates minimum standards and flexibility on the national level, and yet still has almost universal membership,¹⁴⁴ is the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").¹⁴⁵

Another alternative solution for the certification scheme enforcement problem would be to make compliance binding and non-voluntary, although this is much more difficult to achieve in the international setting with diverse countries with diverse motivations.¹⁴⁶ Binding international agreements do nonetheless exist, such as the World Trade Organization ("WTO") Dispute Resolution Understanding,¹⁴⁷ although the Kimberley Process is itself non-binding.¹⁴⁸ Perhaps one of the advantages of a binding certification scheme in the context of the South China Sea is that it

¹⁴² See generally Oona Hathaway & Scott Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 255–56 (2011).

¹⁴³ WTO, *Overview: the TRIPS Agreement*, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm [<https://perma.cc/WBE7-75W2>] (last visited Nov. 12, 2017).

¹⁴⁴ CITES, *List of Contracting Parties*, <https://cites.org/eng/disc/parties/chronolo.php> [<https://perma.cc/8HZ4-WNRZ>] (last visited Nov. 12, 2017).

¹⁴⁵ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243.

¹⁴⁶ See generally *Why is a global agreement so difficult to achieve?*, MEI, <http://www.iedm.org/56529-why-is-a-global-agreement-so-difficult-to-achieve> [<https://perma.cc/YN2X-25G4>] (last visited Nov. 12, 2017).

¹⁴⁷ WTO, *Dispute settlement*, https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm [<https://perma.cc/ET4F-JBW6>] (last visited Nov. 12, 2017).

¹⁴⁸ Ian Smilie, *Comparative Case Study 1: The Kimberley Process Certification Scheme for Rough Diamonds*, OVERSEAS DEV. INST. 1, 3 (2005), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4470.pdf> [<https://perma.cc/6EB6-B2F8>] (last visited Nov. 12, 2017).

would be so narrowly tailored that it would not affect the average consumer directly and thus would not be as controversial for countries to join in the first place. This is because the average consumer will likely not feel as though an embargo on oil and natural gas from the South China Sea directly affects them (although world oil supply does, in fact, directly affect us all to some degree). For these reasons, there is less cause to believe that there would be domestic resistance which could give national governments pause when entering into such a binding international agreement, although all of these factors remain true with a voluntary scheme as well. Further, it is also much less likely that the average citizen would feel that such an embargo presents an existential threat to national sovereignty in the same way that, for example, Americans might react to a gun control measure put forth by the United Nations. In many ways, this issue would probably be less inflammatory to domestic audiences because it is a more indirect economic issue. Consequently, while it would likely be quite difficult to obtain widespread assent to a binding international agreement, it can be done, and certainly has been done in the past. The fact that this is a relatively non-controversial issue domestically for many countries would likely make passage of such an agreement significantly easier.

Another major issue with the Kimberley Process is that it does not regulate each step of the supply chain, in that it “does not require participants to regulate the flow of diamonds from the mine or field to the point of first export.”¹⁴⁹ This lack of licensing for mines thus opens the door for conflict diamonds to enter the market, effectively bypassing certification.¹⁵⁰ Indeed, the United States—which “consumes more than one-half of the world’s diamonds”—only requires certification from the country that exports to the United States, and *not* the country of origin.¹⁵¹ This leads to the obvious problem that conflict diamonds can avoid regulation through the Kimberley Process if they are simply routed to a third country before being exported to the United States.¹⁵² This issue could be addressed in the context of oil and gas from the South China Sea simply by requiring certification from the country of origin in addition to the country of export, effectively imposing regulation in each link of the supply chain. As aforementioned, significant incentives (access to cheaper oil, essentially) exist to circumvent the rules of such a certification scheme,

¹⁴⁹ Parikh, *supra* note 104, at 10321.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 10320.

¹⁵² *Id.* at 10321.

so it is necessary to include proper safeguards to ensure that the system is not abused, i.e., through corruption.

Additionally, under the Kimberley Process, the chain of custody of the diamonds in question is monitored only on a *voluntary* basis once the diamonds reach the country to which they are exported, meaning that conflict diamonds could penetrate the market at this point.¹⁵³ The solution to this problem, in terms of oil and gas, is, again, to require mandatory monitoring of the chain of custody at each step, ensuring that any oil and gas that is extracted from the South China Sea by China cannot enter the market. As discussed previously, the certification scheme in question, if voluntary, could set minimum standards and allow each state to decide on an individual level how they intend to enforce these standards, allowing for domestic flexibility.

Nonetheless, this gap in coverage as pertains to the chain of custody presents a more practical problem in the regulation of oil and gas from the South China Sea; unlike diamonds, which are only mined en masse from a few specific regions in the world,¹⁵⁴ oil and gas are more plentiful worldwide.¹⁵⁵ Thus, it would be inherently more difficult to enact a licensing scheme that would cover every region and country that drills for oil and gas. For these reasons, when the goods at issue are of a nature such that it is impossible for the consumer to easily tell whether or not the commodity was legally sourced (as is the case with oil and gas), the certification system involved must be rigorous and must require certification at each step in the supply chain.¹⁵⁶ Often, the difference between certified and non-certified products is communicated to consumers via labeling, however this is practically nonfeasible as relates to oil and gas.¹⁵⁷ While the containers in which the commodities are shipped can be labeled, it is impossible to communicate to the everyday user at the gas pump that his or her gas was legally sourced and certified. For these reasons, it is even more important to require stringent regulation at each point in the supply chain, which can certainly be achieved by setting minimum standards for all parties to the scheme.

¹⁵³ *Id.*

¹⁵⁴ *Which Countries Produce the Most Gem Diamonds?*, GEOLOGY.COM, <http://geology.com/articles/gem-diamond-map/> [<https://perma.cc/5YSR-7UKQ>] (last visited Nov. 12, 2017).

¹⁵⁵ Hilmar Rempel, *Geographical Distribution of Oil and Natural Gas Deposits—Different Means of Transportation to the Consumption Centers*, PIPELINE TECHNOLOGY 2006 CONFERENCE, <https://www.pipeline-conference.com/sites/default/files/papers/1%20Rempel.pdf> [<https://perma.cc/Y5ZJ-36H7>] (last visited Nov. 12, 2017).

¹⁵⁶ Parikh, *supra* note 104, at 10330.

¹⁵⁷ *Id.*

Further, certifications schemes are significantly easier to implement in a single country, with a single, discrete resource, and with a centralized national government.¹⁵⁸ It could be practically difficult to impose such stringent restrictions globally through a certification system that is not binding, as some countries may not appreciate such an intrusion into their sovereignty, as discussed previously.¹⁵⁹ Nonetheless, as aforementioned, one requirement of the certification scheme for conflict oil and gas could be that each nation must utilize a licensing standard that must incorporate certain criterion, but that leaves much of the regulation up to the individual state. This flexibility on the national level, as discussed previously, could be crucial to addressing the issue of regulation of such diffuse parties.

Another negative aspect of the Kimberley Process is that it can, in some ways, incentivize corruption, in that the certificates that are necessary for export could be forged or acquired by bribery relatively easily.¹⁶⁰ There are ways to address these concerns however; case in point, in Sierra Leone, confiscated conflict diamonds are auctioned off by the government, and forty percent of the total sale is given to the person “responsible for confiscation.”¹⁶¹ In fact, this scheme has actually led to higher profits in diamond rich countries, such as Sierra Leone.¹⁶² This system effectively incentivizes government officials to report corruption and avoid engaging in such behaviors themselves.¹⁶³ These types of solutions are more aptly applied on the individual country level, however, rather than to the larger international system. Nonetheless, in order to extrapolate these measures out to the international system, such safeguards against corruption could be incorporated into the minimum standards that each country in the certification scheme must adopt.¹⁶⁴ Additionally, countermeasures (in the form of additional duties, and the like) could be levied against countries where significant corruption is found, thereby incentivizing national governments to keep their own houses in order. However, any countermeasures that constitute barriers to trade imposed against other countries bear the risk of running afoul of WTO obligations.¹⁶⁵ Therefore, if

¹⁵⁸ EDWARD BARBIER ET AL., *THE ECONOMICS OF THE TROPICAL TIMBER TRADE* 153 (Earthscan Publications Limited 1994).

¹⁵⁹ See Hathaway, *supra* note 138, at 127.

¹⁶⁰ Parikh, *supra* note 104, at 10325.

¹⁶¹ *Id.* at 10333.

¹⁶² MATS BERDAL & ACHIM WENNMANN, *ENDING WARS, CONSOLIDATING PEACE: ECONOMIC PERSPECTIVES* 130 (Mats Berdal, Achim Wennmann eds., 2012).

¹⁶³ Parikh, *supra* note 104, at 10333.

¹⁶⁴ *Id.*

¹⁶⁵ For example, it is a violation of the most favoured nation principle to “discriminate between . . . trading partners,” and levying countermeasures against a specific noncompliant

countermeasures are adopted, they would have to be carefully crafted such that they do not implicate any WTO obligations.¹⁶⁶

Generally speaking, another major hurdle to the implementation of a scheme like the Kimberley Process is that it runs the possibility of infringing upon WTO obligations (including, but not limited to, national treatment and most favored nation status).¹⁶⁷ This is particularly important given the fact that most of the countries in the world—164—are WTO members,¹⁶⁸ and thus have WTO obligations. Therefore, if the certification scheme created is voluntary, it is less likely to raise any concerns under the WTO, whereas one that involves binding actions by a national government will have to tread more carefully.¹⁶⁹ However, states that take part in the Kimberley Process have been granted a waiver of certain obligations by the WTO General Council,¹⁷⁰ and it is therefore feasible that the General Council would be willing to extend such exceptions for a certification scheme for oil and gas from the South China Sea, although this would have to be negotiated in depth before any such scheme could be implemented. Nonetheless, the possibility still exists that an exception could be made for such a certification scheme.

The Kimberley Process also does not have any requirements for “independent third-party monitoring,”¹⁷¹ which would be a useful oversight mechanism in ensuring that oil and gas from the Sea are not brought into countries through illicit means (i.e., breaks in a supervised supply chain). In implementing a certification system, it is imperative to have concrete, clearly established standards; therefore, including provisions for independent monitoring is crucial in enforcing compliance.¹⁷² By not including any form of external reporting system, individual states and private actors are effectively incentivized to bring oil and gas from the Sea via more circuitous means in order to circumvent regulation. For these reasons, incorporating some sort of mandatory third-party reporting system would ensure that individual actors are meeting their minimum obligations under the scheme. However, if this external monitoring system only

country could certainly violate this. WTO, *Principles of the trading system*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm [<https://perma.cc/VE89-KR9B>] (last visited Nov. 12, 2017).

¹⁶⁶ *Id.*

¹⁶⁷ Desierto, *supra* note 93, at 351.

¹⁶⁸ WTO, *Members and Observers*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [<https://perma.cc/9WP8-9NUG>].

¹⁶⁹ Parikh, *supra* note 104, at 10335.

¹⁷⁰ Desierto, *supra* note 93, at 365.

¹⁷¹ *See* Parikh, *supra* note 104, at 10321.

¹⁷² *Id.* at 10327.

relies on self-reporting from each state, it would be difficult to ensure accuracy, as states could easily manipulate their reports without the third party's knowledge. Therefore, it might be necessary to also incorporate some system of checks on individual countries' reporting schemes, such as third-party inspections, in order to ensure compliance.

The Kimberley Process also has "weak provisions for monitoring and enforcement," in general, an issue that necessarily would have to be addressed as pertains to any potential certification scheme, particularly in light of the fact that this conflict came into being because of China's noncompliance with international law.¹⁷³ One of the main drawbacks of the Kimberley Process is that it cannot impose any sanctions or countermeasures against non-compliant states, with the exception of expulsion from membership (although this is certainly counterproductive to the mission of the Kimberley Process in the first place, and is thus not particularly effective as a remedy).¹⁷⁴ Monitoring could be achieved, as aforementioned, by incorporating independent, third-party review, yet these evaluations would ultimately mean nothing if there is no real means of enforcement. Submission to binding arbitration in international tribunals is frequently utilized in the context of enforcing international agreements, and could be a potential remedy here.¹⁷⁵ Nonetheless, parties may be more hesitant to sign on to an agreement that includes a binding arbitration clause, or may attempt to circumvent these clauses through the means of reservations, much as China did with UNCLOS.¹⁷⁶ Many treaties, however, rely simply on a "naming and shaming" of noncompliant parties in the hope that the reputational harms of evading one's international obligations will be enough bring errant parties in line.¹⁷⁷ In the context of international law, reputation, particularly for compliance with international obligations, can often be a successful enforcement mechanism.¹⁷⁸

Certification schemes in general center around providing consumers with enough information to make an informed decision as to which products they purchase,¹⁷⁹ which is, in many ways, a weakness as pertains to

¹⁷³ See *id.* at 10322. See also Desierto, *supra* note 93, at 365.

¹⁷⁴ Desierto, *supra* note 93, at 367.

¹⁷⁵ *International Treaties and Local Statutes*, N.Y. INT'L ARB. CTR., <http://nyiac.org/resources/treaties-statutes/> [<https://perma.cc/55QE-3HYQ>] (last visited Nov. 12, 2017).

¹⁷⁶ Graham, *supra* note 20.

¹⁷⁷ GEIR ULFSTEIN ET AL., *MAKING TREATIES WORK, HUMAN RIGHTS, ENVIRONMENT, AND ARMS CONTROL* 12 (Geir Ulfstein ed. 2007).

¹⁷⁸ George W. Downs, *Reputation, Compliance, and International Law* 31, *J. LEGAL STUD.* S95, S95 (2002).

¹⁷⁹ Parikh, *supra* note 104, at 10315.

oil and gas certification. This system works best for well-known conflict resources such as blood diamonds; the conflict over the South China Sea is probably not as well known to the average consumer, and the dispute is more complex than that surrounding blood diamonds.¹⁸⁰ Further, oil and gas goes through a much different consumption process than diamonds, as individuals do not purchase oil and gas simply for the sake of owning it, as they do with diamonds. Oil and gas are, in many ways, more of a tool than a consumer good, unlike diamonds. Thus, a certification scheme may not be as effective as consumers may not know or care about the South China Sea dispute as much as they might care about ethical sourcing for other goods.¹⁸¹ For example, the average consumer is much more likely to have heard about blood diamonds, or garments and electronics that are manufactured under poor work safety standards, as these issues often make the news (for example, the Bangladesh factory collapse and the controversy surrounding the FoxConn plant in China).¹⁸² The South China Sea dispute, however, is not as widely covered in the media and also does not have as much of a direct effect on consumers outside of Asia, thus lowering the efficacy of a certification scheme that relies on consumer choices.¹⁸³ Additionally, diamond extraction primarily affects the producing country, whereas oil extraction has a greater effect on the end user, in that economies are dependent upon oil and gas importation¹⁸⁴ to a much greater extent than luxury goods like diamonds. Therefore, due to the fact that oil and gas are much more necessary to

¹⁸⁰ Aryn Baker, *Blood Diamonds*, TIME, <http://time.com/blood-diamonds/> [<https://perma.cc/G82W-VDHK>] (last visited Nov. 12, 2017).

¹⁸¹ See generally CHARTERED INSTITUTE OF PROCUREMENT & SUPPLY, *Ethical Sourcing, Organisations, and Brands* (2013), https://www.cips.org/Documents/Knowledge/Procurement-Topics-and-Skills/4-Sustainability-CSR-Ethics/Sustainable-and-Ethical-Procurement/Ethical_Sourcing_Organisations_and_Brands-Knowledge_Now.pdf [<https://perma.cc/EPW8-EW79>].

¹⁸² Jay Greene, *Riots, suicides, and other issues in Foxconn's iPhone factories*, CNET (Sept. 25, 2012), <https://www.cnet.com/news/riots-suicides-and-other-issues-in-foxconn-iphone-factories/> [https://web.archive.org/web/*/https://www.cnet.com/news/riots-suicides-and-other-issues-in-foxconn-iphone-factories/]; Amy Westervelt, *Two years after Rana Plaza, have conditions improved in Bangladesh's factories?*, THE GUARDIAN (Apr. 24, 2015), <https://www.theguardian.com/sustainable-business/2015/apr/24/bangladesh-factories-building-collapse-garment-dhaka-rana-plaza-brands-hm-gap-workers-construction> [<https://perma.cc/4RF9-KN9H>].

¹⁸³ Dan Vermeer et al., *An Overview of Ecolabels and Sustainability Certifications in the Global Marketplace*, NICHOLAS INST. FOR ENVTL. POL'Y SOLS. 42 (Jay Golden ed. 2010).

¹⁸⁴ Brady Hummel, *What Lies Ahead for Oil-Dependent Economies?*, THE POLICY (July 15, 2016), <https://thepolicy.us/what-lies-ahead-for-oil-dependent-economies-b053a5656b91> [<https://perma.cc/SHA4-UPVS>].

the average consumer than diamonds, consumers may not be as inclined to boycott such an essential item. However, if countries are regulating this oil and gas at the point of importation, such that the choice never even reaches the consumer, the point is moot. Further, a certification scheme that regulates oil and gas on the national level would likely be palatable to many national governments as a less aggressive means by which to demonstrate to China other countries' unwillingness to allow China to assert its sovereignty however it chooses. Therefore, the fact that the conflict over the South China Sea is perhaps not terribly relevant to the average consumer will likely not be a bar to an effective enforcement mechanism. This is due to the fact that many countries would likely agree to such measures as they are effective, yet still less aggressive than other mechanisms, such as economic sanctions or the use of force.

CONCLUSION

As was made clear by the Hague Tribunal's decision, something must be done to curb environmental degradation in the South China Sea, and prevent this destruction from continuing. Ultimately, while the Tribunal's decision was certainly helpful to the Philippines' case regarding the prevention of further environmental degradation in the Sea, it still lacks any effective enforcement mechanism. It is for this reason that it is crucial to explore alternative means by which to prevent further environmental destruction in the Sea, in particular, one aimed at preventing and de-incentivizing the Chinese government from drilling for oil and gas.

Through the utilization of a certification scheme, much like the Kimberley Process, any oil or gas that is extracted by the Chinese government from the South China Sea can be prevented from going to the international marketplace, thus effectively making drilling that much less profitable for the Chinese government. This mechanism would, in effect, both de-incentivize China from exploration and drilling and, in case the Chinese government proceeds anyway, would automatically restrict the profit making capabilities of any oil and gas China extracts from the Sea. When creating such a certification scheme it will be of the utmost importance to account for the inherent weaknesses in the Kimberley Process, and to also make modifications to the process to make it more applicable to such an inherently different resource. Ultimately, through the creation of a certification or by some other means, it is of the utmost importance to prevent further environmental degradation in the South China Sea given its ecological importance worldwide.