

Artificial islands, Artificial Highways and Pirates: An East African Perspective on the South China Sea Disputes

Abstract

The United States promotes freedom of navigation in the South China Sea while China constructs artificial islands in the same area to bolster up its territorial claims. Both countries utilize their navies similarly but for opposed legal reasons. This reflects a geopolitical contest with the United States championing a sea open to global navigation and commerce while China builds a primarily land based 'New Silk Road' linking it to critical markets and natural resources. That struggle between land and sea, similarly as it were with piracy, encompasses both the law of the sea and international criminal law. Reading Carl Schmitt's *Land and Sea* in light of Johann Wolfgang Goethe's *Faust* in the context of the various South China Sea disputes provides the opportunity to evaluate whether it may clarify geo-strategic issues at stake that Schmitt himself did not have the opportunity to consider when elaborating his notion of *Nomos*.

Keywords: Carl Schmitt, Faust, Land and Sea, *Nomos*, Piracy, Rules Based Order, South China Sea, United Nations Convention on the Law of the Sea

And tempests in contention roar
From land to sea, from sea to land;
And, raging, weave a chain of power,

JW Goethe *Faust*

World history is a history of land powers against sea powers.

Carl Schmitt *Land and Sea*

I.	Introduction: Challenging Legal Rules versus Challenging Legal Orders	2
II.	Innocent Passage through Territorial Sea and Freedom of Navigation on the High Seas	3
III.	Carl Schmitt's Land and Sea: A World-Historical Meditation	14
IV.	Competing Visions of the World? A Global Rules Based Order	22
V.	Conclusion	25

I. Introduction: Challenging Legal Rules versus Challenging Legal Orders

The precise phrase ‘rules based order’ does not appear anywhere in the text of the United Nations Convention on the Law of the Sea (UNCLOS).¹ What its preamble does recognise though is the desire to establish ‘a legal order for the seas’ and its contribution to ‘a more just and equitable international economic order’.² UNCLOS establishes and maintains ‘the current marine legal order in the world.’³ It is even referred to as a constitution for the seas.⁴ Alongside but quite distinct with its order creating function UNCLOS ‘has incorporated almost all previously existing conventional and customary rules and norms concerning the oceans’.⁵ What then is at stake in the contemporary South China Sea disputes? The content, effect and application of legal *rules*? The *basis* for those rules? The *order* within which those rules exist? Or is it *order* in another sense, that of an implied hierarchy with room for only one right at the very top? This paper argues it is the latter and invokes Johann Wolfgang von Goethe’s version of the Faust myth with an eye on, and in the context of, the South China Sea but from the removed if not quite neutral perspective of the East African Coast. Specifically, how would the struggle look like to a Somali pirate figure with a passing knowledge of *Faust*? This follows the example in Niccolò Machiavelli’s famous dedication of *The Prince* to the Magnificent Lorenzo di Piero de’ Medici that one needs to be down in the plains to study mountains and in the mountains to study plains.

The paper though starts, rather conventionally, with the factual and legal background to outline what presents as the legal dispute at hand. This is in order to demonstrate that given the facts legal analysis is not quite up to the task of explaining the entirety of the dispute - particularly due to the historical as well as contemporary political context - and its global implications. This is principally because UNCLOS emphatically does *not* address the sovereignty of States over land territory. Elsewhere in this Special Issue Isabella Rebellato and Bin Li canvass the relevant law

¹ The *United Nations Convention on the Law of the Sea*, adopted 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) (UNCLOS).

² Preamble to UNCLOS.

³ Z. Keyuan, ‘Disrupting or Maintaining the Marine Legal Order in East Asia?’ (2002) 1 *Chinese Journal of International Law* 449-497, at 449.

⁴ United Nations Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *The United Nations Convention on the Law of the Sea (A historical perspective)*, (1998) available at http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm.

⁵ Keyuan, *supra* note 3, at 449.

with regard to this in detail.⁶ Consequent upon these outlined limitations of a strictly doctrinal analysis, the paper next reviews Carl Schmitt's *Land Sea* to broaden the temporal and geographic scope through and beyond the internally codified rules of the law of the sea and the present day South China Sea. That extends the analysis enough to highlight the contribution as well as inadequacies of the preceding approach to explaining the basis of the rules earlier invoked. That sets the stage to once more shift registers on to a traditionally non-legal text *Faust* to use its explanatory power in explaining how and why a geopolitical order could be disputed in the South China Sea. Given that the legal rules in themselves are not the last word on all of the issues, can Goethe's literary genius help us begin to appreciate, understand and explain the vistas opened up by the disputed waters and land of the South China Sea? The paper concludes that yes indeed it can and that all of the protagonists display Faustian characteristics. This is additional evidence, if any were needed, that the Faustian motif is a particularly German instantiation of a universal feature of the human condition. That is to say that we are all Faust and Faust is all of us.

II. Innocent Passage through Territorial Sea and Freedom of Navigation on the High Seas

On 22 December 2015 then US Secretary of Defense Ashton Carter sent a letter to Arizona Senator John McCain explaining a freedom of navigation operation (FONOP) conducted in the South China Sea 56 days earlier:

On October 27, 2015, the U.S. Navy destroyer USS Lassen (DDG-82) conducted a FONOP in the South China Sea by transiting inside 12 nautical miles of five maritime features in the Spratly Islands — Subi Reef, Northeast Cay, Southwest Cay, South Reef, and Sandy Cay — which are claimed by China, Taiwan, Vietnam, and the Philippines. No claimants were notified prior to the transit, which is consistent with our normal processes and with international law.⁷

This FONOP was consistent with both the right of innocent passage and with the freedom of the

⁶ Isabella Rebellato and Bin Li 'Part XV of the United Nations Convention On the Law of the Sea: A Dispute Settlement Mechanism Left Wanting' (2017) 2 (1) *Asia Pacific Journal of Ocean Law and Policy*.

⁷ A. Carter, 'Document: Secdef Carter Letter To McCain On South China Sea Freedom Of Navigation Operation', *United States Naval Institute News* (5 January 2016), copy of letter available at <https://news.usni.org/2016/01/05/document-secdef-carter-letter-to-mccain-on-south-china-sea-freedom-of-navigation-operation>

high seas.⁸

Through its Foreign Ministry Spokesman Kang Lu, China in turn resolutely opposed ‘any country using freedom of navigation and over flight as a pretext for harming China’s national sovereignty and security interests’.⁹ On the face of it, this *presents* as a dispute pitting freedom of navigation against territorial sovereignty over ocean areas, islands (the Paracels as well as the Spratlys), rocky outcrops, atolls, sandbanks and reefs, including the Scarborough Shoal.¹⁰

The importance of the area should not be underestimated, according to media reports more than \$5 trillion of world trade passes through the area annually.¹¹ China has backed its territorial claims through a combination of building artificial islands and conducting naval patrols; while the US continues to oppose any restrictions on freedom of navigation and sovereignty claims using naval means.¹² In a recent speech in Australia the Commander of US Pacific fleet said: China is building a ‘great wall of sand’ to create artificial land in disputed waters by pumping sand on to live coral reefs and paving them with concrete.¹³

The Philippines even launched and won an arbitral decision (in China’s absence) with the Annex VII arbitration under UNCLOS on its territorial dispute with China over the islands.¹⁴ The thing to note though is that the decision itself notes that its Award should *not* be understood as implying ‘a view with respect to questions of land sovereignty’.¹⁵ What is more China had

⁸ Carter, *supra* note 7.

⁹ A. Greene And B. Birtles, ‘South China Sea: Audio Reveals RAAF Plane Issuing Warning To Chinese Navy During “Freedom Of Navigation” Flight’, *ABC News* (15 December 2015), available at www.abc.net.au/news/2015-12-15/audio-captures-raaf-challenging-chinese-navy-in-south-china-sea/7030076

¹⁰ ‘Q&A: South China Sea Dispute’, *Bbc News*, (12 July 2016), at para 5, available at www.bbc.com/news/world-asia-pacific-13748349

¹¹ Ankit Panda, ‘Everything You Wanted To Know About The USS Lassens FONOP In The South China Sea’, *The Diplomat* (06 January 2016), available at www.thediplomat.com/2016/01/everything-you-wanted-to-know-about-the-uss-lassens-fonop-in-the-south-china-sea

¹² *Ibid.*

¹³ Associated Press In Canberra, ‘Us Navy: Beijing Creating A “Great Wall Of Sand” In South China Sea’, *The Guardian* (31 March 2015), available at www.theguardian.com/world/2015/mar/31/china-great-wall-sand-spratlys-us-navy

¹⁴ *In the Matter of the South China Sea Arbitration (The Republic of the Philippines V. The People’s Republic of China)* The Permanent Court of Arbitration (PCA) Case No 2013-19, available at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/ph-cn-20160712-award.pdf>; See Also Lowy Institute, ‘South China Sea: Conflicting Claims And Tensions’, *Lowy Institute for International Policy* (Sydney, 20 May 2016), at para 8, available at www.lowyinstitute.org/issues/south-china-sea

¹⁵ *The South China Sea Arbitration (The Republic of the Philippines v The People’s Republic of China) (Award)* (Permanent Court of Arbitration, Case No 19, 12 July 2016) paragraph 5.

earlier excluded questions of maritime delimitation from the arbitration procedure.¹⁶ The subsequent Philippines administration moreover signalled its preference for a negotiated resolution to the dispute.¹⁷ Don R Rothwell and Tim Stephens make the point that territorial sea sovereignty is not equivalent to sovereignty over land or even territorial waters.¹⁸ Indeed Sreenivasa Rao Pemmaraju is of the view that issues surrounding sovereignty and maritime delimitation are beyond UNCLOS's purview.¹⁹ Yu Mincai speculated that the arbitration procedure above was 'a disguised maritime boundary delimitation dispute involving the unsettled sovereignty over islands and reefs in the South China Sea'.²⁰ This is perhaps why Liu Haiyang argues that this dispute between China and Philippines is about either sovereignty over islands, which is not governed by the UNCLOS, or concerns maritime delimitation, which China excluded through a 2006 declaration based on Article 298 of the Convention.²¹ Importantly the FONOP operation above 'did not challenge any country's claims of sovereignty over land features'.²²

Kenya, which has a maritime dispute of its own with its neighbour Somalia pending at the International Court of Justice (ICJ)²³ is one of a handful of countries that essentially supports China's position:

The Government of the Republic of Kenya believes that any disputes over the South China Sea should be peacefully resolved through consultations and negotiations in accordance with bilateral agreements and the Declaration on the Conduct of Parties in the South China

¹⁶ 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'. The Declaration of the People's Republic of China under Article 298 of the *United Nations Convention on the Law of the Sea*, dated 25 August 2006

¹⁷ Joint Statement of China and the Philippines available at http://news.xinhuanet.com/english/2016-10/21/c_135771789.htm

¹⁸ Donald R Rothwell and Tim Stephens, *The International Law of the Sea*, Hart Publishing 2010 Page 70.

¹⁹ Sreenivasa Rao Pemmaraju, 'The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility' (2016) 15 (2): *Chinese Journal of International Law* 265-307 paragraph 64.

²⁰ Yu Mincai, 'China's Responses to the Compulsory Arbitration on the South China Sea Dispute: Legal Effects and Policy Options' (2014) 45(1) *Ocean Development & International Law* at 12.

²¹ L Haiyang, 'The Lawfare over South China Sea: Exceptional Rules vs. General Rules', *Opinio Juris* (14 July 2016), available at <http://opiniojuris.org/2016/07/14/the-lawfare-over-south-china-sea-exceptional-rules-vs-general-rules>

²² Carter, *supra* note 7.

²³ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=SK&case=161&k=00>

Sea.

The Government of the Republic of Kenya respects China's statement of optional exception in light of Article 298 of the United Nations Convention on the Law of the Sea (UNCLOS).

The international community should continue playing a constructive role in supporting the efforts made by the region to safeguard regional peace and stability.²⁴

In the event, China is widely interpreted as not just metaphorically creating facts on the ground to frustrate rival claims, but rather literally, 'creating the very ground itself'.²⁵ A Pentagon report stated that China had reclaimed 500 acres in 2014 at five of its outposts in the Spratly Islands and another 1,500 acres since then.²⁶ The report claims that the: 'ultimate purpose of the expansion projects remains unclear' but suggests the possibility that 'China is attempting to change facts on the ground by improving its defence infrastructure in the South China Sea'.²⁷

Additionally, there is an issue regarding the demand by China that foreign aircraft observe certain protocols for identification whilst in the area:

Originating at the height of the Cold War, Air Defense Identification Zones (ADIZs), i.e. non-territorial airspace unilaterally designated by States for aircraft identification, had not encountered substantial protests until China's declaration of the East China Sea ADIZ in November 2013.²⁸

The Chinese Navy has even engaged in live-fire exercises in the South China Sea.²⁹ Beijing's own legal formulation of the dispute was addressed to the Secretary-General of the United

²⁴ The Government of the Republic of Kenya 'Kenya's Statement on the South China Sea', available at <http://www.mfa.go.ke/?p=604>; see also 'Government of the Republic of Kenya statement on South China Sea', *China Daily*, 09 June 2016, available at http://www.chinadaily.com.cn/world/2016-06/09/content_25659530.htm

²⁵ Jonathan Marcus, 'US-China tensions rise over Beijing's "Great Wall of Sand"', *BBC News* (29 May 2015), at para 3, available at www.bbc.com/news/world-asia-32913899

²⁶ Office of the Secretary of Defense, *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China*, available at https://www.defense.gov/Portals/1/Documents/pubs/2015_China_Military_Power_Report.pdf, at 72.

²⁷ *Ibid.*

²⁸ S. Jinyuan, 'The East China Sea Air Defense Identification Zone and International Law' (2015) 14 *Chinese Journal of International Law*, 271-303 at 271.

²⁹ Ben Blanchard, 'China navy carries out more drills in disputed South China Sea', *Reuters* (13 December 2015), at para. 5, available at www.reuters.com/article/us-southchinasea-china-idUSKBN0TW01D20151213#4lceWmQbXGhM3QvL.97

Nations as follows:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence.³⁰

At least one commentator claims that China implicitly acknowledges that the artificial features do not support legal entitlement to any kind of territorial sea.³¹ Instead what the Chinese are attempting to do is 'make other actors treat the waters surrounding their features *as though* it were a territorial sea'.³² In this way consistent practice can become legally binding under customary international law, 'either through generally agreed norms of behaviour or a gradual solidification it into written law'.³³ Therefore it is crucial for countries wishing to prevent the high seas around the Chinese features from becoming a territorial reality to halt the norm-creation process before it can gather steam.³⁴ This power to create norms why the dispute at its very heart is not about the mere application or interpretation of law of the sea rules.

That is why UNCLOS is a good starting point but not the last word in beginning to resolve the issues. The United States is not a party. However, it accepts and acts in accordance with 'traditional uses of the oceans - such as navigation and overflight' as they are set out in the Convention as being reflective of customary international law.³⁵ On the one hand under Articles 2 and 3 UNCLOS provides that a country can only claim sovereignty beyond 'its land territory and internal waters' to its territorial sea to a breadth of up to *12 nautical miles* of sea

³⁰ Ban Ki-moon, Secretary General of the United Nations (Translation of a letter from the Permanent Mission of the People's Republic of China to the United Nations) (New York, 14 April 2011), available at http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf

³¹ Timothy Choi, 'Why the US Navy's First South China Sea FONOP Wasn't a FONOP', *The Diplomat* (04 November 2015), available at www.thediplomat.com/2015/11/why-the-us-navys-first-south-china-sea-fonop-wasnt-a-fonop

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Ronald Reagan, President of the United States of America 'Statement on United States Oceans Policy', *U.S. Navy Judge Advocate General's Corps*, (10 March 1983), available at <http://www.jag.navy.mil/organization/documents/Reagan%20Ocean%20Policy%20Statement.pdf>

perpendicular to its coastline when used as a base line.³⁶ This therefore is the purpose of the FONOP ‘sending the USS *Lassen* within 12 nm of the Chinese build-up on Subi Reef’ in order to seemingly challenge any claimed sovereignty.³⁷ On the other hand however, although freedom of navigation operations are not found within the text of UNCLOS Article 87 of UNCLOS provides for freedom of the high seas *including* freedom of navigation to all States.³⁸ Furthermore, under Article 17 UNCLOS provides for the right of innocent passage for all States through territorial sea.³⁹ This why the mere sailing of within 12 nautical miles of the maritime features is not of itself sufficient to demonstrate that the waters are indeed on the high seas.⁴⁰ Such sailing as has occurred could as a consequence be plausibly be read as innocent passage within territorial waters and therefore inadvertently bolster up China’s territorial claims.⁴¹ At a bare minimum the situation could be read as *either* innocent passage in territorial sea *or* freedom of navigation on the high seas.

Although China is a contracting party to UNCLOS because the US is not it is unclear the full extent to which UNCLOS either codifies or is reflective of customary international law to which the US will concur in each and every detail. According to the International Court of Justice (ICJ), for a rule to be established as customary, the corresponding practice need not be in absolutely rigorous conformity with the rule.⁴² However, the conduct of States should in general be consistent with such rules, and State conduct inconsistent with a given rule should be treated as a breach of that rule, not the existence of a new rule.⁴³ A rule should be widespread and systematic but not necessarily universal.⁴⁴ Furthermore the *Nicaragua (Merits)* case stated that customary rules in the nature of *jus cogens* could not be varied by treaty.⁴⁵ Even where principles of customary international law were codified into treaties, they continue to exist side by side. The

³⁶ UNCLOS Articles 2 and 3.

³⁷ Choi, *supra* note 31.

³⁸ UNCLOS article 87

³⁹ UNCLOS article 17

⁴⁰ Choi, *supra* note 31.

⁴¹ *Ibid.*, at para. 4-7.

⁴² *Military and Parliamentary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits) (1986) ICJ Rep 14 at 62.

⁴³ *Ibid.* (*Military and Parliamentary Activities in and Against Nicaragua*)

⁴⁴ *North Sea Continental Shelf Cases, (Germany v Denmark and the Netherlands)* Judgment (1969), ICJ Rep 1, at 42-47.

⁴⁵ *Nicaragua v. United States of America*, *supra* note 42.

Court relied on the *North Sea Continental Shelf* cases to support the assertion that principles of customary international law can exist side by side with identical treaty law provisions. There is consequently no lack of legal ambiguity surrounding the South China Sea.⁴⁶

This is probably why, on 30 January 2016, the US Navy conducted another FONOP in the South China Sea three months after the previous effort.⁴⁷ In it, American destroyer USS Curtis Wilbur sailed within 12 nautical miles of Triton Island in the Paracels. Unlike the USS Lassen case, which approached an artificial island, built atop a reef that consequently did not enjoy a 12 nautical mile territorial water zone, Triton island is an actual island, and therefore entitled to a 12 nautical mile territorial water zone.⁴⁸ Both instances of transit however, did not address the larger point of speculation that China seeks to establish new precedents, by building entire islands anew and then claiming territorial sea and exclusive economic zones around them.⁴⁹ The *Wilbur* and *Lassen* operations were similar with respect to legal assertion contrary to claims by multiple states.⁵⁰ Here, the Chinese response was broadly similar, Foreign Affairs spokeswoman Chunying Hua stated that, ‘the U.S. warship violated Chinese law and entered China’s territorial sea without authorization’.⁵¹ Despite that strongly worded diplomatic statement, the USS *William P. Lawrence*, a guided missile destroyer, conducted A third FONOP exercising the right of innocent passage on the 10th of May 2016 this time within 12 nautical miles of Fiery Cross Reef in the Spratly Islands.⁵² A fourth FONOP was conducted by the USS Decatur a guided missile destroyer near but not within the 12 nautical mile limit of the Paracel Islands.⁵³ The thing

⁴⁶ Panda, *supra* note 11, at para. 7.

⁴⁷ N. Bisley, ‘We should think carefully about an Australian FONOP in the South China Sea’, *The Lowy Interpreter* (04 February 2016), para 1, available at www.lowyinstitute.org/the-interpreter/we-should-think-carefully-about-australian-fonop-south-china-sea

⁴⁸ D. Cheng, ‘US Conducts Freedom of Navigation Operation in South China Sea’, *The Daily Signal* (03 February 2016), para 2, available at <http://dailysignal.com/2016/02/03/us-conducts-freedom-of-navigation-operation-in-south-china-sea>

⁴⁹ *Ibid*, para 3.

⁵⁰ M. Rapp-Hooper, ‘Confronting China in the South China Sea’, *Foreign Affairs* (08 February 2016), at para 1, available at www.foreignaffairs.com/articles/china/2016-02-08/confronting-china-south-china-sea

⁵¹ S. LaGrone, ‘China Upset over “Unprofessional” US South China Sea Freedom of Navigation Operation’, *UNSI News* (31 January 2016), at para. 4, available at www.news.usni.org/2016/01/31/china-upset-over-unprofessional-u-s-south-china-sea-freedom-of-navigation-operation

⁵² E. Graham, ‘US Navy carries out third FONOP in South China Sea’, *The Interpreter* (10 May 2016), available at http://www.lowyinterpreter.org/post/2016/05/10/US-Navy-carries-out-third-FONOP-in-South-China-Sea.aspx?utm_source=Lowy+Interpreter&utm_campaign=da05f2f7bd-RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_eed7d14b56-da05f2f7bd-59370029

⁵³ ABC News ‘South China Sea: US warship challenges Beijing’s territorial claims with freedom of navigation exercise’ (22 Oct 2016) available at <http://www.abc.net.au/news/2016-10-22/us-warship-challenges-chinas->

to note though is that none of these examples shown cited a single incident of navigation being hampered in the South China Sea. Perhaps the underlying concern is to prevent potential disruptions of navigation.

The resort to using naval destroyers by parties to the dispute in order to assert rival legal claims has a basis that goes at least as far back as Hugo Grotius writing about the requirement of having effective control to adjoining waters by coastal states in order to be able to found territorial claims. This is especially as read with Cornelius van Bynkershoek's requirement that this legal control be restricted to the range of coastal weapons, which as at that time he was writing was three nautical miles.⁵⁴ There is a view though that the origin of this three mile limit could be based upon either the range of coastal cannon or following long-standing Danish/Swedish practice, or perhaps both of them separately.⁵⁵ In any event, with inter-continental ballistic missile technology this rule of thumb is no longer a viable statement of the applicable law but it does begin to explain why military assets would be utilized in this manner as a sort of rough and ready but nevertheless highly visible legal instrument.

At present this construction of new islands in the disputed South China Sea by the Chinese state has been compared to the 1823, US President James Monroe's 'Monroe Doctrine'.⁵⁶ The doctrine identified the Western hemisphere as America's backyard, and old European colonial powers were told to keep out.⁵⁷ Shirley V. Scott surveys the vast literature on the Monroe Doctrine and finds that in relation to the South China Sea, China may very well seek to superimpose a novel legal regime in the region that subsumes the current one without necessarily replacing it.⁵⁸ In other words there is more than just a legal dispute here but rather rival conceptions of the legal order regionally at the very least but with global ramifications. This is clearly *not* only about the content, effect and application of legal rules.

[claims-in-south-china-sea/7956826](#)

⁵⁴ L. Oppenheim, *International Law: A Treatise*, vol 1 (Clark, 2005), at 335.

⁵⁵ H. Kent, 'The Historical Origins of the Three Mile Limit' (1954) 48 *American Journal of International Law*, 537-555, at 537.

⁵⁶ R. Wingfield-Hayes, 'China's Island Factory', *BBC News* (09 September 2014), at para 55, available at www.bbc.co.uk/news/resources/idt-1446c419-fc55-4a07-9527-a6199f5dc0e2

⁵⁷ *Ibid.*, para. 56. (Wingfield-Hayes, 'China's Island Factory',)

⁵⁸ S.V. Scott, 'China's Nine-dash line, international law, and the Monroe Doctrine analogy' (2016) *China Information* at 1-16, at 10-11.

China could well start with the point that there is no absolute freedom in today's oceans.⁵⁹ China could, as a consequence quite argue that its claim to the South China Sea Islands and the adjacent waters are supported both by historical facts as well as the rules of international law pertaining to the acquisition of territorial sovereignty: specifically discovery and naming.⁶⁰

Furthermore, from the Chinese perspective, bitter memories of colonialism and national humiliation are never far from the surface:

Basically speaking, China enjoyed peaceful and uninterrupted control over the South China Sea Islands and the surrounding waters until the 1930's when France seized the opportunity to occupy and "annex" several islands in the South China Sea. This took place at a time when the Chinese government was preoccupied with internal conflicts and threatened by the full-scale Japanese aggression, and was therefore unable to effectively defend herself except for lodging the strongest possible protests to the French government time and again.⁶¹

There is more to it though than simply righting the wrongs of the past. It could be that this assertion of claims by China goes beyond its immediate territory to the region at large.

In the past, Xi Jinping, the General Secretary of the Communist Party of China, has suggested that he is more committed to a long-term maritime strategy than his predecessors. According to Sukjoon Yoon, he is basically attempting 'to restore the Middle-Kingdom regional order through four thrusts':

1. establishing new high-profile organizations dealing with maritime policy and strategy;
2. upgrading naval capabilities to counter the US pivot to Asia;
3. reframing the issues away from prevailing international law and toward China's rights as derived from historical precedence; and
4. demonstrating China's ostensible goodwill through participation in international forums and multilateral exercises in the region.⁶²

⁵⁹ H. Zhang, 'Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States?—Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ' (2010) 9 *Chinese Journal of International Law* 31.

⁶⁰ J. Shen, 'China's Sovereignty over the South China Sea Islands: A Historical Perspective', (2002) 1 *Chinese Journal of International Law* 94, at 101.

⁶¹ Ibid, at 99.

⁶² S. Yoon, 'Xi Jinping's "True Maritime Power" and ESCS Issues' (2014) 13 *Chinese Journal of International Law* 887.

According to an observer the real purpose underlying Xi Jinping's maritime power policy is the restoration of China's traditional maritime order as a true maritime power.⁶³ This is being pursued through an incremental strategy modelled upon 'the historical advances of Western colonial powers'.⁶⁴ While avoiding any serious reaction until the Chinese position is beyond challenge.⁶⁵ Furthermore any nation that should attempt to obstruct Xi's salami-slicing tactics will quickly feel the consequences of China's displeasure.⁶⁶

The legal use of military assets then by both sides to the dispute does seem then to broadly conform to the dichotomy Walter Benjamin identified as between law creating and law destroying violence.⁶⁷ Francis Fukuyama places all this in a geopolitically even broader context than China's immediate backyard:

In 2013, President Jinping Xi announced a massive initiative called "One Belt, One Road," which would transform the economic core of Eurasia. The One Belt component consists of rail links from western China through Central Asia and thence to Europe, the Middle East, and South Asia. The strangely named One Road component consists of ports and facilities to increase seaborne traffic from East Asia and connect these countries to the One Belt, giving them a way to move their goods overland, rather than across two oceans, as they currently do.⁶⁸

Fukuyama neglects to mention that Africa and Latin America too are part of the One Belt, One Road (OBOR) initiative's vision.⁶⁹ Carl Schmitt predated Fukuyama's observation above of a 'strangely named One Road' when he observed that: 'We speak, in relation to the sea, of sea lanes, although there are only traffic lines and no lanes as there are on land'.⁷⁰ What is more,

⁶³ S. Yoon, 'Xi Jinping's "True Maritime Power" and ESCS Issues' (2014) 13 *Chinese Journal of International Law* 887.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ W. Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writings* (Harcourt Brace Javanovich, 1978), at 281.

⁶⁸ F. Fukuyama, 'One Belt, One Road: Exporting the Chinese Model to Eurasia, Project Syndicate', *Project Syndicate* (12 January 2016), available at www.project-syndicate.org/commentary/china-one-belt-one-road-strategy-by-francis-fukuyama-2016-01#s7bgUL8SCvH501Mf.99

⁶⁹ Liu Cigui Reflections on Maritime Partnership: Building the 21st Century Maritime Silk Road, China Institute of International Studies http://www.ciis.org.cn/english/2014-09/15/content_7231376.htm

⁷⁰ Carl Schmitt, *Land and Sea: A World-Historical Meditation* (Telos Press Publishing 2015) at 79.

these coordinates of a struggle between land and sea where law, economic prosperity and conceptions of legal order are at stake almost self-evidently invite analysis through Schmitt's *Land and Sea*.⁷¹ Through its lens we can see the US as a predominantly sea power vying with China, a predominantly land power, and recognize how this struggle both reflects and generates the underlying global legal order. Thus in that framing the US champions the artificial highways of sea-lanes for freedom of navigation while China builds up artificial islands in what was once sea to bolster up claims of territorial sovereignty. This struggle between land and sea which themselves under separate legal regimes is why the rules encompassed in the law of the sea can emphatically only be a part an important part but nonetheless only a part of the dispute.

How can this rivalry be resolved if at all? Would a Chinese triumph for instance usher in a renewed age of a land-based global order? Is therefore the current status quo of the free sea or *mare liberum* rivalled by a shift towards returning to a state of exerting territorial dominion over the high seas or *mare clausum*? Do we see a return to the 17th century debate between Hugo Grotius and John Selden only instead of The Netherlands and England we have the United States and China? Is China attempting to make the South China Sea into a *Mare Nostrum* as the Romans did of the Mediterranean Sea? Not quite. There are statements from semi-official sources that: 'China cares about freedom of navigation in the South China Sea more than any other country. Disputes should be resolved by exercising restraint, not by speculation'.⁷² Should this be taken at face value then at least one area of mutual concern regarding piracy off the Somali coast in East Africa would demonstrate that the costs of mutual antagonism are outweighed by the benefits of cooperation.⁷³ China as the 2nd largest global economy, has a significant stake in the current legal order and has a unique vantage point to independently evaluate the costs as well as the benefits to cleaving to and supporting the current legal order right from its backyard. As it happens too, piracy is another of Schmitt's concerns and ties in

⁷¹ Schmitt, *supra* note 70.

⁷² A. Jun, 'China's island construction facilities navigation freedom', *Global Times* (17 September 2015), para. 8, available at www.globaltimes.cn/content/942948.shtml

⁷³ 'China's anti-piracy role off Somali expands,' *BBC News* (29 January 2010), available at <http://news.bbc.co.uk/2/hi/asia-pacific/8486502.stm>; A. Erickson and J. Mikolay, 'Welcome China to the Fight against Pirates', (2009) 153 (3) *Proceedings Magazine*; Xinhua, 'China continues fighting Somali Piracy', *China Daily* (27 December 2013), available at www.chinadaily.com.cn/china/2013-12/27/content_17200695.htm

with his central idea of *Nomos* as expanded upon below.⁷⁴

III. Carl Schmitt's *Land and Sea: A World-Historical Meditation*

Written in the closing episodes of the Second World War, *Land and Sea* manages to be a critique - masquerading as a propagation - of National Socialist propaganda.⁷⁵ In the first instance, Schmitt marvels at the seemingly pedestrian fact that the human being is a land dweller, and as a consequence, 'humans call the planet we lives in "earth" although... it is known to be almost three quarters water and a quarter earth by surface and indeed the largest pieces of earth float like islands'.⁷⁶ Schmitt conceives of land and sea as 'elements' not 'as mere natural scientific quantities' but as being somehow open to human choice and empowerment.⁷⁷ The struggle is therefore not *because* of land and sea as such but what humans make of them in intra-human relationships.⁷⁸ It is here that Schmitt discloses his core thesis that 'World history is a history of land powers against sea powers'.⁷⁹ Schmitt credits Admiral Raoul Castex for the inspiration behind this statement.⁸⁰

Schmitt recasts the struggle between the land and the sea by transposing it to the land creature Behemoth, and the sea creature Leviathan, each drawn from the biblical Book of Job (a major plot device of Goethe's *Faust*). The biblical connection is further emphasised by Schmitt's view that from beginning to end the Bible is about a struggle between land and sea.⁸¹ Schmitt extends the metaphorical allusion to actual countries with Behemoth referencing Germany, Russia and Italy and Leviathan being shorthand for England and America. It has to be said though that in a related work *Dialogues on Power and Space* Schmitt explicitly includes China as among land powers.⁸² Michael Salter has discussed the significance of this to East Asia extensively.⁸³

⁷⁴ *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, (Telos Press Publishing, 2006)

⁷⁵ Schmitt, *supra* note 70, at lxix.

⁷⁶ *Ibid.*, at 6.

⁷⁷ *Ibid.*, at 10-11.

⁷⁸ *Ibid.*, at 132.

⁷⁹ *Ibid.*, at 11.

⁸⁰ *Ibid.*, at 11; at note 10 referencing a work published in 1935.

⁸¹ *Ibid.*, at 54.

⁸² Schmitt, *supra* note 70, at 54

⁸³ Michael Salter, 'Law, Power and International Politics with Special Reference to East Asia: Carl Schmitt's

Schmitt added a layer of complexity when he opposed a maritime West to a terrestrial East. For Schmitt the East encompassing the land powers of Russia and China stood for barbarism while the Western sea powers stood for civilization.⁸⁴ This symbolism is present even in current discussions of the South China Sea.⁸⁵

Schmitt moves on to plot an arc from the coast onward to the ocean in the context of a historical progression from river culture to inland seas and on to oceanic culture.⁸⁶ He writes that: ‘Mere navigation of the sea and a culture erected upon an advantageous coastal position is indeed something other than resituating a complete historical existence from the land to the sea as into another element’.⁸⁷ Schmitt then eulogises the whale and its hunters as providing a new spatial sensibility based on the sea through the ship-building that accompanied whale hunting.⁸⁸ For Schmitt, the technological achievement of moving from oars to sails makes possible the actual turning point in the history of the relation between land and sea’.⁸⁹

Because Schmitt both cites and alludes to Goethe’s *Faust* right from the start of his meditation on land and sea, its spectre hovers over the work. Indeed *Dialogues on power and space* even ends with a quote from the beginning of *Faust* Part II: ‘You, Earth, stood firm this night’.⁹⁰ But, does Goethe’s *Faust* help us begin to appreciate, understand and explain the South China Sea dispute? From the evidence above, in vying for supremacy, both sides of the dispute evince some Faustian aspects. This should be no surprise given that as Jane K Brown writes: ‘Faust has been seen as the paradigmatic text of modernity almost since its conception’.⁹¹ Joan Hoff, appositely observed that:

The comparison to Faust is especially apt in terms of US foreign policy after the end of the Cold war. Faust, at the zenith of his happiness and potency, broke his pact with the

Grossraum Analysis' (2012) 11 (3) *Chinese Journal of International Law*, at 393.

⁸⁴ Schmitt, *supra* note 70, at 61-2.

⁸⁵ See for instance: ‘the Chinese are creatures of the land, not the water’. ‘Full steam: If long-standing tensions ease in the South China Sea, China will ensure they rise elsewhere’ *The Economist* (Aug 20th 2016) <http://www.economist.com/news/asia/21705373-if-long-standing-tensions-ease-south-china-sea-china-will-ensure-they-rise-elsewhere-full>

⁸⁶ Schmitt, *supra* note 70, at 20-1.

⁸⁷ *Ibid.*, at 21-2.

⁸⁸ *Ibid.*, at 25.

⁸⁹ *Ibid.*, at 31.

⁹⁰ Carl Schmitt, *Dialogues on Power and Space* (Polity, 2015), at 82.

⁹¹ J. Brown, *The Cambridge Companion to Goethe*, (Cambridge University Press, 2002), at 84.

devil by wishing that things would never change. Carrying the metaphor forward, it could be argued that the United States, at the height of its power upon winning the Cold War, made a similar mistake by trying to stop time and impose its hegemony indefinitely on the rest of the world. Philosophically, one could retreat to Oswald Spengler's much maligned theory about the decline of the West and see the United States as the ultimate example of his "Faustian civilization" where the populace constantly strives for the unattainable and goes into protracted, inevitable, and tragic decline, knowing that its goals cannot be achieved but refusing to settle for less. In either metaphor, Faust's relationship to Mephistopheles is emblematic of the ways the United States has conducted its foreign policy from 1920 through 2007.⁹²

But let us not forget that 'boundless ambition' is not a purely American monopoly. It is at the very least a striking coincidence that Faust's dying wish/final ambition is to turn water into land by means of draining a swamp. This is of course not all that different to turning water into land by building artificial islands. Both sides to the dispute therefore fit with a Faustian paradigm.

Pirates are yet another area of discussion and analysis of Schmitt's, he uses them as a tool to demonstrate how a pirate developed from a means to conduct 'war at sea' to be transformed and recast so as to 'become a sad criminal'.⁹³ Pirates, at least to Schmitt's own satisfaction, are an integral part of installing Elizabethan England as heir to European maritime legacy.⁹⁴ Schmitt provides a colourful potted history of the infamous Pettigrews a 16th century prominent pirate clan as if by their example to explain an entire epoch.⁹⁵

A feature story in the *Guardian* newspaper on a prominent Somali pirate leader noted that neither Boyah, the individual in question nor his companions referred to themselves as 'pirates' in the Somali language.⁹⁶ Instead and this matters for present purposes, they referred to

⁹² J. Hoff, *A Faustian Foreign Policy from Woodrow Wilson to George W. Bush: Dreams of Perfectibility* (Cambridge University Press, 2007), at 308.

⁹³ *Ibid.*, at 36-7.

⁹⁴ *Ibid.*, at 39.

⁹⁵ *Ibid.*, at 41-4. to be sure, Schmitt did discuss piracy elsewhere including Schmitt, *supra* note 74, in Carl Schmitt, 'The Concept of Piracy' (2011) 2 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* at 29; and in Carl Schmitt, *Writings on War*, (Polity, 2011).

⁹⁶ J. Bahadur, 'Somali Pirates: "We're not murders...We just attack Ships"', *The Guardian* (25 May 2011), available at www.theguardian.com/world/2011/may/24/a-pioneer-of-somali-piracy

themselves as ‘saviors of the sea’ which was often translated to ‘coastguard’ in English:

Boyah joked that he was the “chief of the coastguard”, a title he invoked with pride. To him, his actions had been in protection of his sea, the native waters he had known his whole life; his hijackings, a legitimate form of taxation levied in absentia on behalf of a defunct government that he represented in spirit, if not in law.⁹⁷

Boyah’s tale was not just a personal story but emblematic of Somalia as a whole since the collapse of its central government:

His story was typical of many coastal dwellers who had turned to piracy since the onset of the civil war almost 20 years ago. In 1994, he still worked as an artisanal lobster diver in Eyl – “one of the best”, he said. Since then, the lobster population off the coast of Eyl has been devastated by foreign fishing fleets – mostly Chinese, Taiwanese and Korean ships, Boyah said.⁹⁸

They initially begun with fishing vessels and then moved on:

From 1995 to 1997, Boyah and others captured three foreign fishing vessels, keeping the catch and ransoming the crew. By 1997, the foreign fishing fleets had become more challenging prey, entering into protection contracts with local warlords that made armed guards and anti-aircraft guns regular fixtures on the decks of their ships. So, like all successful hunters, Boyah and his men adapted to their changing environment, and began going after commercial shipping vessels.⁹⁹

Interestingly enough they even self-consciously cleave to the distinction between land and sea:

Boyah's moral compass seemed to be divided between sea and shore; he warned me, half-jokingly, not to run into him in a boat, but, despite my earlier misgivings, assured me that he was quite harmless on land.¹⁰⁰

Furthermore, given his expressed approval of the view that piracy was a ‘pre-scientific stage of conducting war at sea’.¹⁰¹ Schmitt would probably have had an element of sympathy for Somali pirates. Goethe too put in the mouth of Mephistopheles the lines:

War, trade, and piracy, allow
As three in one, no separation

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, at para. 14.

¹⁰¹ Schmitt, *supra* note 70, at 36-37.

Indeed at least some of the Somali pirates see themselves as ‘coast guards’ of a failed state.¹⁰² The legal history of piracy illuminates how free trade and liberal values based upon sea power universalized issues of law and right at the expense of the land power based *jus publicum Europeum* that had had Germany at its geopolitical centre.¹⁰³ It would not be lost on the Somali pirate that the key legal reference points for the so-called scramble for Africa were precisely freedom of trade, freedom of navigation and the rules for the occupation of the African coast.¹⁰⁴ None of these would be lost on Schmitt either of course who rightly emphasizes their significant influence upon the subsequent development of international law.¹⁰⁵

For Schmitt, piracy was politicized by sea powers as an interim concept between war and peace at the expense of ‘continental international law’.¹⁰⁶ The international community thus needed pirates as agents and objects of imperial ambition.¹⁰⁷ According to Schmitt it is at precisely this point that ‘the specifically European order dissolved into a spaceless universalism, and no new order took its place.’¹⁰⁸ In this regard Schmitt said that ‘a global universalism lacking any spatial sense’ prevailed.¹⁰⁹ For Schmitt as for Mephistopheles, the globalization of trade is inseparable from piracy.¹¹⁰

Doctrinally speaking, piracy belongs simultaneously to the law of the sea and international criminal law. Piracy is located where the protection of international trade bisects the suppression of criminality on the a-territorial space of the high seas. It also by necessary implication invokes the protection by states of their monopoly on the legitimate use of force. Huang Yao justifies

¹⁰² David Axe, ‘10 Things You Didn’t know about Somali Pirates’, *The Wall Street Journal* (27 April 2009), at para. 2, available at www.wsj.com/articles/SB124060718735454125.

¹⁰³ Schmitt, *supra* note 70, at 127.

¹⁰⁴ See ‘General Act of the Conference of Berlin Concerning the Congo’ (1909) 3(1) *The American Journal of International Law*, 7-25; Matthew Craven, ‘Between law and history: The Berlin Conference of 1884-1885 and the logic of free trade’ (2015) 3 (1) *London Review of International Law* 31.

¹⁰⁵ Schmitt, *supra* note 74, at 216

¹⁰⁶ Carl Schmitt, ‘The Concept of Piracy’, (2011) 2 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* at 29.

¹⁰⁷ Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Polity, 2007), at 177.

¹⁰⁸ Schmitt, *supra* note 74, at 192.

¹⁰⁹ *Ibid.*, at 235.

¹¹⁰ Thomas O Beebee, ‘Carl Schmitt’s Myth of Benito Cereno’ (2006) 42 *Seminar: A Journal of Germanic Studies*, at 122.

universal jurisdiction over piracy by making three points.¹¹¹ First, it fills the jurisdictional gap on the high seas where the jurisdiction of any state is easily evaded. international law as a consequence extends an invitation to all States to exercise jurisdiction and in that way prevent the impunity of pirates. Second, universal jurisdiction over piracy is desirable because freedom and safety of navigation upon the high seas is an interest held in common by all States. Third, universal jurisdiction over piracy allows the States with appropriate naval and other capabilities to act in the place of those that lack the same capabilities.

The US, China, the European Union (EU) and Australia as leading members of the international community all have common interest in Somali piracy some of them indeed too would seem to bear some small proportion of responsibility for the conditions that led to piracy in Somalia as well as its instability. This should demonstrate overall, that keeping to the law bears less costs for the key protagonists than not keeping to it or even trying to fundamentally overturn the legal order. To put it another way the basis for the rules applicable is not under challenge

Schmitt proceeds to expand on what a spatial revolution is as to be when ‘even the structure of the concept of space itself is altered’.¹¹² In what can only be described as a critical section Schmitt next describes what was for him the initial planetary spatial evolution.¹¹³ He says: ‘[n]ow a new world emerges, in the bravest sense of the term, and the collective consciousness, first of the western and central European peoples, and then, finally, the whole of human collective consciousness is transformed from the ground up. This is the first authentic spatial revolution in the full, earth- and world- encompassing sense of the term’¹¹⁴ It is now clear that ‘[f]or the first time in its history, the human held the whole terrestrial orb like a ball in its hand’.¹¹⁵

Schmitt here shows his indebtedness to Oswald Spengler’s notion of Faustian Civilization¹¹⁶ if the following passage is relevant:

That which is called the rational superiority of the European, that which has been termed

¹¹¹ Y. Huang, 'Universal Jurisdiction over Piracy and East Asian Practice' (2012) 11 *Chinese Journal of International Law*, at 625-626.

¹¹² *Ibid.*, at 49.

¹¹³ *Ibid.*, at 55.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ This debt is rendered explicit in Schmitt, *supra* note 90, at 44.

the European spirit and “Occidental rationalism” now advances irresistibly. It develops in the western and central European peoples. Destroys the medieval forms of human community, builds new states, fleets, and armies, invents new machines, subjugates the non-European peoples, and places them before the dilemma of either adopting European civilization or of descending to the status of a mere colonial people’.¹¹⁷

He goes on to provide three examples from world history – Alexander the Great, the Roman Empire in the 1st century and the crusades to make his point that spatial transformation is at the same time a cultural transformation.¹¹⁸

Schmitt expands on to the momentous occasion of the European land-appropriation of the new world.¹¹⁹ This provides the opportunity to make a statement that later informed the entirety of his *Nomos of the Earth* that: ‘Every fundamental order is spatial order. One speaks of the constitution of a country or piece of earth as of its fundamental order, its *Nomos*’.¹²⁰ It is no coincidence of course that the US pivot to Asia referenced above echoes Halford John Mackinder’s ‘Geographical Pivot of History’.¹²¹ Indeed Schmitt acknowledges his debt to Mackinder in *Nomos of the Earth*.¹²² Clearly *Nomos of the Earth* belongs side by side with *Land and Sea*. Schmitt relates how ‘the battle for the land appropriation of the new earth became a battle between the Reformation and the Counter-Reformation, between the World Catholicism of the Spanish and the World Protestantism of the Huguenots, the Dutch and the English’.¹²³ This battling between land appropriators continued in the context of the war of religion.¹²⁴ However, ‘[t]he religious fronts and the theological battle parlance of this period also carry in their core the opposition between elementary forces that effected a re-positioning of world-historical existence from solid land to the sea’.¹²⁵

British or English sea appropriation and the separation of land and sea is a definitively world

¹¹⁷ Schmitt, *supra* note 90, at 44.

¹¹⁸ *Ibid.*, at 49-54.

¹¹⁹ Schmitt, *supra* note 70, at 59.

¹²⁰ *Ibid.*

¹²¹ H. J. Mackinder ‘The Geographical Pivot of History’ (1904) 23 (4), *The Geographical Journal*, 421-437

¹²² Schmitt, *supra* note 74, at 37.

¹²³ Schmitt, *supra* note 70, at 66.

¹²⁴ *Ibid.*, Schmitt does not mention it but the myth of Faust is itself traceable to this specific struggle; See e.g., D. Hawkes, *The Faust Myth: Religion and the Rise of Representation* (Palgrave Macmillan, 2007), at 31.

¹²⁵ Schmitt, *supra* note 70, at 72.

historical moment for Schmitt.¹²⁶ ‘The firm land belongs to a dozen sovereign states, the sea belongs to no one or to all or finally only to one: England’.¹²⁷ Apparently, ‘[h]ere you can see that the great Leviathan has power even over the spirits and minds of humans. This is what is most astounding about its dominion’.¹²⁸ England was as a result at the centre of the transformation of the essence of the island.¹²⁹

Schmitt argues that: ‘We name the image that we make of our planet simply our image of the earth, and we forget that there can also be a sea-image of it’. We speak in relation to the sea, of sea lanes although there are only traffic lines and no lanes as there are on land ... Conversely, for a perspective oriented only by the sea, the fixed land is a mere coast, a beach with a “hinterland”’.¹³⁰ England became like a ship or better fish: ‘[t]he ship could lift anchor and lay anchor in another part of the earth. The great fish, the Leviathan, could set itself in motion and seek out other oceans.’¹³¹ ‘Then presently the Leviathan transformed itself from a great fish into a machine’.¹³² ‘Then, whether fish or machine, the Leviathan in any case, became ever stronger and more powerful and its empire appeared to have no end’.¹³³

Those ideas are built upon the dichotomy of Land and Sea; the battle between Leviathan and Behemoth. However, Schmitt draws upon the possibility of a third element – air – and the effect that this has upon the international dynamics. The invention of airplanes and discovery of radio waves added a new element, air.¹³⁴ ‘To both the mythic beasts, Leviathan and Behemoth, a third would be added, a great bird or perhaps it would be fire ‘that is the additional, genuinely new element of human activity’.¹³⁵ Schmitt moves on to the influential American Admiral Alfred Thayer Mahan’s notion of the greater island.¹³⁶ ‘For him what is decisive is that the Anglo-Saxon dominion over the seas of the world must be upheld, and that can only happen on an

¹²⁶ Schmitt, *supra* note 70, at 72.

¹²⁷ *Ibid.*; See also M. Salter, *Carl Schmitt: Law as Politics, Ideology and Strategic Myth* (Routledge-Cavendish, 2012).

¹²⁸ *Ibid.*, at 76.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*, at 79.

¹³¹ *Ibid.*, at 83.

¹³² *Ibid.*, at 85.

¹³³ *Ibid.*, at 86.

¹³⁴ Schmitt, *supra* note 70, at 90-1.

¹³⁵ *Ibid.*, at 91.

¹³⁶ Schmitt, *supra* note 70, at 86.

“insular” basis through a union of both Anglo-American powers’.¹³⁷ This heralds ‘[a] new stage of planetary spatial evolution brought on by new technology’.¹³⁸

This consideration of Air would go some way to explaining why nuclear tipped inter-continental ballistic technology combining both air and fire elements could then supersede both land and sea in terms of founding a genuinely new *Nomos* for the earth let alone space based satellites. In his analysis though, Schmitt reaches two conclusions at the end. First is the rather Heideggerian observation that: ‘The world is not in space, rather space is in the world’.¹³⁹ Second is that ‘[t]he sea is no longer an element as it was in the time of the whale hunters and corsairs’.¹⁴⁰ He rather tellingly ends with lines from German poet Friedrich Hölderlin:

Here, too, there are Gods and Gods hold sway,
Great is their mass.

By this Schmitt clearly expresses the idea of installing a human in the place of God – the apotheosis of the human – that is at the heart of the myth of Faust. Playing god becomes the relentless pursuit of ultimately unattainable goals whose saving grace is supposed to be the consequent enlargement of human achievement. Elsewhere and subsequent to this Schmitt seemed to indicate the explicitly non-Faustian view that human morality itself placed limitations on human endeavour.¹⁴¹ This acceptance of morality as a limit on human endeavour would at the very least by this point rule Schmitt out as either a Faustian or Mephistophelean character.

IV. Competing Visions of the World? A Global Rules Based Order

Now that the paper has placed the South China Sea disputes in a geopolitical context by using Schmitt’s poetic vision of the struggle between land and sea we can now turn to his deployment of *Nomos* to answer whether China as a land power is challenging the contemporary sea based rules-based-order or *Nomos*. Schmitt highlights the development of his take on *Nomos*; the ordering of territory, law, regulation or norms and the concrete form in which a political, economic and social order becomes apparent.¹⁴² Having read Schmitt above we can now identify

¹³⁷ *Ibid.*, at 87.

¹³⁸ *Ibid.*, at 89.

¹³⁹ *Ibid.*, at 92.

¹⁴⁰ *Ibid.*, at 93.

¹⁴¹ *Ibid.*, at 64.

¹⁴² Schmitt, *supra* note 74, at 70-8.

the current global legal order as being a sea based *Nomos*. And it is by looking at the *Nomos* surrounding the South China Sea that we will be able to observe the abundant evidence that the *order* within which the legal rules exist is also demonstrably not under threat as such from China, except in so far as it is being identified as the wager at stake by the US and its allies as set out below.

The overall idea of an international rule of law/international rules based order/ rules based global order/liberal international order' however it is expressed cannot be founded merely on the basis of UNCLOS. It could only be a customary international law rule or, perhaps better, a principle that frames the production and reception of legal rules as well as their enforcement and authority. In a word, a *Nomos*. The Deputy Chair of the Australian Joint Parliamentary Committee on Treaties (JSCOT) recently spoke of his committee's support for what he referred to as the 'international rule of law'.¹⁴³ Americans tend to more transparently call it the 'liberal international order'.¹⁴⁴ These turns of phrase repeats with a different emphasis the so-called 'rules based international order'. In the Foreign Minister's agreed 'on the importance of a rules-based international order'.¹⁴⁵ The Shadow Defence Minister on his part found occasion to express his belief 'that Australia and other like-minded countries should act to support the international rules-based order in the South China Sea'.¹⁴⁶ Chatham House sees this as: '[t]he international order established by the victorious allies after the Second World War' basically a 'framework of liberal political and economic rules, embodied in a network of international organizations and regulations, and shaped and enforced by the most powerful nations',.¹⁴⁷

¹⁴³ Kelvin Thompson, 'In our best interest: Treaty Scrutiny in a connected world: Session 1', in *Proceedings of the Joint Standing Committee on Treaties: 20th Anniversary seminar*, (18 March 2016), available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/20th_Anniversary.

¹⁴⁴ Aaron L Connelly, 'The problem with American assumptions about Australia', *The Lowy Interpreter* (17 May 2016), available at http://www.lowyinterpreter.org/post/2016/05/17/The-problem-with-American-assumptions-about-Australia.aspx?utm_source=Lowy+Interpreter&utm_campaign=a23bcf2aaf-RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_eed7d14b56-a23bcf2aaf-59370029.

¹⁴⁵ Department of Defence, 'Australia –Indonesia 2+2', *Joint Press Conference by Australian Foreign Minister Bishop and Australian Minister for Defence Payne* (21 December 2015), available at <https://www.minister.defence.gov.au/minister/marise-payne/transcripts/minister-defence-transcript-joint-press-conference-australian-0>.

¹⁴⁶ Stephen Conroy, 'Turnbull Government adrift on ambiguous on South China Sea rhetoric', *The Interpreter* (2016), available at <https://www.lowyinstitute.org/the-interpreter/turnbull-government-adrift-ambiguous-south-china-sea-rhetoric>.

¹⁴⁷ See more at: 'Challenges to the Rule-Based International Order', Chatham House (2015), available at <https://www.chathamhouse.org/london-conference-2015/background-papers/challenges-to-rules-based-international-order#sthash.eAPdbsn2.dpuf>.

Interestingly, for Chatham House this framework provokes ‘violent and understandable resistance from those who see themselves as champions of their own established order, based on different rules’.¹⁴⁸ Australia’s answer to Chatham House, the Lowy institute noted that the over-arching principle that Australian leaders of all political stripes have used to describe Australia’s Asia-Pacific policy is maintaining a ‘rules-based order’ whose preservation is ‘a consistent and absolutely central objective’.¹⁴⁹

From Japan’s Prime Minister we get the view that: ‘Maintaining the seas of all humankind as a “global commons” accomplished through the rule of law is an interest shared in common by the entire international community.’¹⁵⁰ Even a recently published Australian Defence White Paper extensively spoke of what it preferred to phrase as ‘a rules based global order’ as including ‘a shared commitment by all countries to conduct their activities in accordance with agreed rules’.¹⁵¹ It noted however that there were implications for free trade where completion between States was carried out ‘outside of the established rules-based global order’ ... raising the risk of military confrontation.¹⁵² It agreed with Chatham House above that the rules-based global order was underpinned by an ‘architecture of international governance ... developed since the end of the Second World War. There was some slippage however between ‘rules and ‘rules based order’ when it cited examples of some countries seeking to challenge the rules that govern actions in the global commons of the high seas, etc, leading to uncertainty and tension.’¹⁵³

For some, the term ‘rules-based’ (occurring 56 times in the 2016 Defence White Paper) is short-form for ‘Australia prefers the status quo’, ‘is an expression of fear and uncertainty, given that the status quo is being challenged’, ‘and perpetual American primacy cannot be guaranteed’.¹⁵⁴

Because all the references above are to the South China Sea (and not for instance nuclear

¹⁴⁸ *Ibid.*

¹⁴⁹ Malcolm Jorgensen, ‘East Timor: Concession is the price for a rules based order’ *The Interpreter* (15 February 2016), available at <https://www.lowyinstitute.org/the-interpreter/east-timor-concession-price-rules-based-order>.

¹⁵⁰ S. Abe, ‘Message from Prime Minister Shinzo Abe on the occasion of “Marine May”’, *Prime Minister of Japan* (18 July 2014), available at http://japan.kantei.go.jp/96_abe/statement/201407/20140718uminohi.html.

¹⁵¹ ‘2016 Defence White Paper’, *Department of Defence* (2016), at 15, available at <http://www.defence.gov.au/whitepaper/Docs/2016-Defence-White-Paper.pdf>.

¹⁵² *Ibid.*, at 32.

¹⁵³ *Ibid.*, at 45-6.

¹⁵⁴ C. Rovere, ‘Defence White Paper 2016: Eight strategic observations’, *The Interpreter* (29 February 2016), available at http://www.lowyinterpreter.org/post/2016/02/29/Defence-White-Paper-2016-Eight-strategic-observations.aspx?utm_source=Lowy+Interpreter&utm_campaign=69e96e8a4f-RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_eed7d14b56-69e96e8a4f-59370029.

disarmament or the law on the use of force, etc.), this American primacy is what the FONOPs and the accompanying political policy seek to protect. Only the US and its allies invoke it at every turn as what *they* have staked in the dispute. Consequently, in that light Schmitt's work in part can be seen as a more or less accurate prognostication of the subject of the political speeches as well as the content of the Defence White Paper. What the US is protective of is the hierarchy implicit in the global legal order which leaves room for only one right at the very top.

V. Conclusion

The land and sea binary is illuminating but real life is not at all black and white right the way through. Lara Benton has noted the limitations on Carl Schmitt's approach to global law as a bracketing of violence in the Eurocentric sphere at the expense of the colonies and other areas external to the European empires.¹⁵⁵ For her, despite its temptations Schmitt's theory is at variance with the historical account and tends to oversimplify imperial sovereignty.¹⁵⁶ The American Monroe Doctrine for instance was based on land while the New Silk Route of course has a crucial maritime component. We cannot therefore give fixed and definite meaning to all the implications of contemporary applications of *Land and Sea*. Schmitt himself is far too enigmatic to be pigeonholed once and for all time. On a somewhat autobiographical note, in naming his residential cottage San Casciano Schmitt compared his exile to that earlier endured by Machiavelli. Each of them in different ways after initial resistance hastily pledged allegiance to a regime that was subsequently overthrown. This comparison could not be more apt as Isaiah Berlin could probably testify.¹⁵⁷ Among Berlin's interesting observations are that 'There is something surprising about the sheer number of interpretations of Machiavelli's political opinions'.¹⁵⁸ The same could easily be said of Schmitt and his 3-year membership of the Nazi Party.

Also Berlin adds that, 'But the commonest view of him [Machiavelli], at least as a political

¹⁵⁵ Lara Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400--1900* (Cambridge University Press, 2010), at 281.

¹⁵⁶ *Ibid.*, at 282-284.

¹⁵⁷ Isaiah Berlin, 'The originality of Machiavelli', in H. Hardy (ed), *Against the current: Essays in the History of Ideas* (New York: Viking Press, 1980), at liii, 394, 25.

¹⁵⁸ *Ibid.*

thinker, is still that of ... a man inspired by the Devil to lead good men to their doom'.¹⁵⁹ Indeed, "His name adds a new ingredient to the more ancient figure of Old Nick. For the Jesuits he is 'the devil's partner in crime'".¹⁶⁰ Schmitt himself was described as 'a strong spirit of a satanic kind'.¹⁶¹ More crucially for present purposes, he has also been described as 'an author of Faustian temperament'.¹⁶² The enduring irony was that they were both indisputably highly talented men who had to live the rest of their lives in disgrace because of their association with failed regimes, which they had supported albeit briefly and with some reluctance. This is the lens through which their work is refracted to us making it well-nigh impossible to finally definitively assign a fixed meaning of their work that will stand the test of time.

This form of analysis is consequently useful but only up to a point. The danger of applying the land sea binary too strictly and in a fashion divorced from the reality is especially to be avoided. Both after all are grounded upon the earth as Schmitt noted. The work consequently needs to be updated and supplemented by contemporary developments. Its underlying principles however remain as relevant as they ever were. What are the lessons to be drawn though from looking at the dispute through a Schmittian lens for a Somali pirate figure like Boyah above? At the very least Boyah could reflect on the protagonists as being 'a little more than kin', and yet 'less than kind' which is to say that although they are distant and different, they are also occurrences of the identical phenomenon. That phenomenon is ambitious grasping for power seeking to justify itself by the fruits of that grasping. To return to the opening research questions, is China challenging the rules? Not really no. Is It challenging the basis of the rules? Not even that nor the order within which those rules exist. How about the hierarchical order? Perhaps. From the analysis above that cannot be excluded. However protecting a specific hierarchical order by definition cannot be the basis of a universal legal order. To conclude it is not that China is challenging the rules based order as such but that the rules based order is what is at stake in challenging China.

¹⁵⁹ *Ibid.*

¹⁶⁰ Berlin *supra* note 157.

¹⁶¹ Reinhard Mehring, *Carl Schmitt: A Biography* (Polity, 2014), at 445.

¹⁶² Giovanni Sartori, 'The Essence of the Political in Carl Schmitt' (1989) 1 *Journal of Theoretical Politics* 63, at 64.