

CHINA AND DISCOURSE POWER IN INTERNATIONAL LAW: MODES OF ENGAGEMENT WITH THE INTERNATIONAL COURT OF JUSTICE

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ABSTRACT

This article examines China's engagement with the International Court of Justice as a manifestation of its pursuit of discourse power and influence in international legal affairs. It analyses the strategies and motivations behind its participation in a series of advisory proceedings and considers how China could build on this practice to experiment with bolder forms of intervention in the context of the Court's contentious jurisdiction. Situated in the broader context of China's evolving geopolitical aspirations, the discussions developed in this article shed light on China's role in shaping international legal discourse and, in turn, promoting its own interpretations and perceptions of international law.

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INTRODUCTION

Over the past few decades, China has accumulated a significant amount of hard power that has allowed it to take an increasingly assertive role in international affairs.¹ Hard power alone, however, cannot ensure a State's steady advancement on the global stage. Today, it is generally acknowledged that to maintain or enhance its standing in the world, a country "must find new, complementary ways of establishing and exerting power."² One such way is to deploy soft power as a tool of foreign policy. Contrary to hard power, which relies on tangible assets such as economic and military capabilities to effect change through coercion, soft power refers to a State's ability to influence others' behavior through attraction and persuasion.³ While it is not difficult to identify the resources, e.g., culture, values, and policies, on which soft power rests, its fluidity makes it particularly hard to measure and define.⁴ The important point to emphasize is that soft power is a supplement to, and not a substitute for, hard power. In other words, it is the combined effect of hard and soft power that can enhance a State's ability to achieve desired outcomes and, in turn, enable it to protect its interests more effectively.⁵

Cognizant of these benefits, China has been using a variety of methods to project its soft power globally. These include public diplomacy, the use of external communication, and the promotion of Chinese language and culture.⁶ Additionally, China has

1. See, e.g., European Parliament Recommendation of 13 December 2023 to the Council and the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy Concerning EU-China Relations (2023/2127 (INI)), at 4–5, P9_TA (2023) 0469 (Dec. 13, 2023) (discussing China's recent rise to power in the international community and methods to preserve the EU's presence in the global sphere).

2. See SELECT COMMITTEE ON SOFT POWER AND THE UK'S INFLUENCE, PERSUASION AND POWER IN THE MODERN WORLD, 2013-14, HL 150, at 8 (UK) (arguing that countries should continually develop methods of exerting power which complement the demands of the era in which they exist).

3. Joseph S. Nye, *Soft Power*, FOREIGN POL'Y 80, Fall 1990, at 153.

4. Joseph S. Nye, *Public Diplomacy and Soft Power*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 94, 94, 97 (2008).

5. Joseph S. Nye, *Get Smart: Combining Hard and Soft Power*, 88 FOREIGN AFFS. 160, 160–63 (2009).

6. MARIA REPNIKOVA, CHINESE SOFT POWER (2022).

recently begun investing in a particular variant of soft power, namely, discourse power in international law.⁷ This can be broadly described as the ability of a State to influence legal narratives at the global level. The significance of this form of power should not be underestimated. It can, in fact, be instrumental in the pursuit of key foreign policy objectives, such as overcoming external legal challenges and legitimizing State conduct.⁸

While States can use several methods to exercise discourse power in international law, two intertwined contemporary trends make international adjudication a particularly interesting avenue to examine from a Chinese perspective. The first trend is the process of judicialization of international relations, which has led to the creation of a “plethora” of international and regional adjudicative bodies.⁹ This, in turn, has facilitated the rise of strategic litigation as a State tactic to advance political goals.¹⁰ The second trend is China’s gradual abandonment of its traditional policy of rejecting international adjudication in favor of a more flexible cost-analysis approach that is slowly pushing the boundaries of its comfort zone in this critical area of international relations.¹¹

Among other things, these two parallel developments have influenced the way in which China relates to the International Court of Justice (ICJ), the most important judicial body operating at the global level. States tend to keep a safe distance from the ICJ because, by virtue of a potentially unlimited jurisdiction, the latter has the capacity to adjudicate sensitive matters involving

7. For a broader discussion of China’s quest for discourse power in international law, see generally Wim Muller, *The Power of Discourse: Doctrinal Implications of China’s Normative Aspirations*, 31 HAGUE Y.B. INT’L L 43 (2021).

8. *Id.* at 45.

9. Cesare P. R. Romano, *Litigating International Law Disputes: Where To?*, in LITIGATING INTERNATIONAL LAW DISPUTES: WEIGHING THE OPTIONS 20, 20 (Natalie Klein ed., 2014).

10. Michael Ramsden, *Strategic Litigation Before the International Court of Justice: Evaluating Impact in the Campaign for Rohingya Rights*, 33 EUR. J. INT’L L. 441, 441 (2022).

11. HARRIET MOYNIHAN, CHATHAM HOUSE, CHINA’S EVOLVING APPROACH TO INTERNATIONAL DISPUTE SETTLEMENT 8–9 (2007); Yayezi Hao & Ignacio de la Rasilla, *China and International Adjudication—Picking Up Steam?*, 12 J. INT’L DISP. SETTLEMENT 637, 637, 639 (2021).

very high stakes. At the same time, the pronouncements of such an authoritative body can have important “downstream effects” that extend beyond the limited context of a specific dispute.¹² In this sense, the ICJ represents a platform where States not only directly defend their national interests through the medium of international law, but also seek to influence the meaning and interpretation of international rules in accordance with their own preferences and priorities.¹³

Against this background, this article will examine China’s modes of engagement with the ICJ in the context of Beijing’s ambition to contribute more prominently to international legal discourse. Section 2 will briefly contextualize China’s quest for discourse power in international legal affairs. Subsequently, Section 3 will introduce international adjudication as an avenue to exercise discourse power in international law. Section 4 will then highlight China’s attitudes towards the ICJ as the main judicial body operating at the international level, and Section 5 will analyze the motivations and key aspects of China’s intervention in three recent advisory opinions of the ICJ. Finally, Section 6 will discuss China’s potential future strategies of engagement with the Court.

II. CHINA, DISCOURSE POWER, AND INTERNATIONAL LAW

Since powerful States usually have the resources and ambition to exercise discourse power, it is not surprising that China has shown a growing interest in strategically engaging with international law. While Beijing began to consider the concept of soft power almost two decades ago,¹⁴ the objective of “strengthening international discourse power” was formally proclaimed at the 2011 sixth plenum of the 17th Central

12. Tom Ginsburg, *International Judicial Law-Making* 7 (Ill. L. & Econ. Working Paper Series, Paper No. LE05-006, 2005).

13. *Id.* at 3–4.

14. See Paul SN Lee, *The Rise of China and its Contest for Discursive Power*, 1 GLOB. MEDIA & CHINA 102, 104 (2016) (discussing China’s need to effectively utilize soft power methods to maintain cordial relations with Western nations worried about their sudden influx of power).

Committee of the Chinese Communist Party (CCP).¹⁵ Under the presidency of Xi Jinping, calls for enhancing discourse power not only intensified but also acquired a normative dimension.¹⁶ For example, at the fourth plenum of the 18th Central Committee of the CCP, held in 2014, China pledged to “vigorously participate in the formulation of international norms[,]” “strengthen [its] discourse power and influence in international legal affairs[,]” and “use legal methods to safeguard [its] sovereignty, security and development interests.”¹⁷ At the basis of this new trajectory lies the realization that engaging more actively with the processes of interpretation, application and creation of international law not only allows a country to better defend itself from external challenges but also enables it to impact both the present and future of the international legal system. Thus, China has begun to build its own narratives of international law, using the latter

15. Rogier Creemers, *Central Committee of the Chinese Communist Party Decision Concerning Deepening Cultural Structural Reform*, DIGICHINA (Oct. 18, 2021), <https://digichina.stanford.edu/work/central-committee-of-the-chinese-communist-party-decision-concerning-deepening-cultural-structural-reform/>.

16. See Camilla T.N. Sørensen, *Constraints on the Soft Power Efforts of Authoritarian States: The Case of the 2015 Military Parade in Beijing*, 46 J. CURRENT CHINESE AFFS. 111, 115–16 (2017) (discussing Xi Jinping’s focus on sculpting a powerful, yet peaceful, reputation for China); Selina Ho, *Infrastructure and Chinese Power*, 96 INT’L AFFS. 1461, 1461–62 (2020) (noting China’s use of discursive power to cultivate a well-rounded presence in the international community); Wu Xinbo, *China in Search of a Liberal Partnership International Order*, 94 INT’L AFFS. 995, 1003–04 (2018) (remarking on China’s continued use of external resources to find best practices for gaining respect from other nations).

17. Timothy Heath, *Fourth Plenum: Implications for China’s Approach to International Law and Politics*, CHINA BRIEF, Nov. 20, 2014, at 10, 15; see also Andrew Jacobs & Chris Buckley, *China Moves to Reinforce Rule of Law, With Caveats*, N.Y. TIMES (Oct. 3, 2014), <https://www.nytimes.com/2014/10/24/world/asia/china-moves-to-enact-rule-of-law-with-caveats.html> (observing Chinese Communist Party leaders implementation of legal doctrines which seek to configure a more predictable legal system and combat corruption); Carl Minzner, *After the Fourth Plenum: What Direction for Law in China?*, CHINA BRIEF, Nov. 20, 2014, at 7, 9 (emphasizing China’s disposal of communist policies which are considered to be “dangerous”); Jacques deLisle, *The Rule of Law with Xi-Era Characteristics: Law for Economic Reform, Anti-Corruption, and Illiberal Politics*, 20 ASIA POL’Y 23, 23–25 (2015) (declaring the rule of law as a tactic for furthering the Communist agenda while simultaneously gathering public trust and respect).

as an instrument to enhance its relevance and influence as a global actor.¹⁸

Signs of this new ambition have been noticeable across a range of areas. For example, in 2015, the International Law Advisory Committee of the Ministry of Foreign Affairs was established with the task of assisting the foreign minister with legal opinions, reports, and policy recommendations on major diplomatic issues.¹⁹ Two years later, the Martial Law Institute was established to provide legal support for China's military operations.²⁰ In 2023, China upgraded the status of international law studies in the national education system. This had important implications both in terms of funding and prestige. The declared objective of the measure was to produce, by 2035, "a contingent of prominent home-grown international law scholars" who "[will] fill [. . .] the critical shortage of experts in this field."²¹

These types of initiatives contribute to the enhancement of China's legal diplomacy and potential to generate influential international legal scholarship, leading to a more sophisticated engagement with international law. Yet they are not in and of themselves constitutive of discourse power; rather, they are propaedeutic to it. There are, instead, more direct ways in which China could effectively use discourse power in international law, including, crucially, in the domain of international adjudication. This will be the focus of the next section.

III. CHINA AND INTERNATIONAL ADJUDICATION

As an economic giant with global political stature, China has no shortage of opportunities to use discourse power on the

18. See ZHIPENG HE & LU SUN, *A CHINESE THEORY OF INTERNATIONAL LAW* 23 (Sun Lu trans., 2020) (emphasizing China's need for participation in the international realm).

19. *Advisory Committee on International Law of Foreign Ministry Convenes Third Plenary Session*, MINISTRY FOREIGN AFFS. CHINA (Jan. 6, 2016), https://www.fmprc.gov.cn/eng/xw/wjbxw/202405/t20240530_11337798.html.

20. CONGYAN CAI, *THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY* 293 (2019).

21. Sylvie Zhuang, *China Raises Status of International Law Studies in Push for Home-grown Global Expertise*, S. CHINA MORNING POST (Feb. 28, 2023), <https://www.scmp.com/news/china/politics/article/3211736/china-raises-status-International-law-studies-push-home-grown-global-expertise> (internal quotations omitted).

international stage. For example, its permanent seat at the United Nations (UN) Security Council allows it to regularly engage in defining, debating, interpreting, and re-interpreting fundamental rules and principles of international law.²² To fully appreciate the importance of these activities, one must first acknowledge that international law does more than regulate relations between States. As the indispensable language of foreign policy and international affairs,²³ it also performs a parallel function of legitimizing, or de-legitimizing, behavior.²⁴ This is because the *perceived* legality of a particular action confers on it a high degree of legitimacy. For this reason, States routinely justify their actions by reference to international law, including when doing so requires appealing to implausible legal exceptions or advancing unconvincing legal interpretations.²⁵

China also has the capacity to influence both the design and objectives of international governance structures. For example, it is not a coincidence that Beijing's "bureaucratic footprint" within U.N. agencies has recently become both wider and deeper.²⁶ Similarly, China has been pivotal to the establishment of international institutions, such as the Asian Infrastructure Investment Bank and the Shanghai Cooperation Organization, which reflects its ambition to lead in the spheres of international finance and security.²⁷ Operating under the principle that "international rules should reflect the concerns of all countries in

22. Ian Johnstone, *Discursive Power in the UN Security Council*, 2 J. INT'L L. & INT'L RELS. 73, 89 (2005).

23. Ian Hurd, *The Empire of International Legalism*, 32 ETHICS & INT'L AFFS. 265, 269 (2018).

24. Kyle Rapp, *Justifying Force: International Law, Foreign Policy Decision-making, and the Use of Force*, 28 EUR. J. INT'L RELS. 337, 338 (2022).

25. *Id.* at 338–39.

26. Courtney J. Fung & Shing-hon Lam, *Why the Increase in Chinese Staff at the United Nations Matters*, MEDIUM: INT'L AFFS. BLOG (Aug. 2, 2021), <https://medium.com/international-affairs-blog/why-the-increase-in-chinese-staff-at-the-united-nations-matters-e0c30fdfcc46>.

27. Zhongzhou Peng & Sow K. Tok, *The AIIB and China's Normative Power in International Financial Governance Structure*, 1 CHINESE POL. SCI. REV. 736, 742–43 (2016); Rashid Alimov, *The Role of the Shanghai Cooperation Organization in Counteracting Threats to Peace and Security*, UN CHRON. (Oct. 11, 2017), <https://www.un.org/en/chronicle/article/role-shanghai-cooperation-organization-counteracting-threats-peace-and-security>.

a balanced manner,”²⁸ China has also adopted a more entrepreneurial stance in international law-making. Its efforts to shape the normative discourse on the Responsibility to Protect²⁹ and promote the concept of cyber-sovereignty as an alternative to the Western model of cyber regulation³⁰ are two pertinent examples of its ambition to act as both a norm shaper and norm maker with regard to important global issues.³¹

Without any doubt, the examples discussed above represent more established methods of exercising discourse power in international law. Yet they do not exhaust the repertoire of actions that a State like China could take to advance its interests through international law. In particular, in light of the ongoing process of judicialization of international relations, participation in international adjudication today represents an important mechanism for strategic engagement with international law. This is especially true considering the potential “rule-creating functions of international judicial decisions.”³² Evidently, international courts are tasked with applying, rather than making, international law; yet the dividing lines between these two acts tend to blur when courts are confronted with the indeterminacy of the international legal system and the need to develop, adapt, or expand the meaning of the law.³³

The fact that international courts have the capacity to affect the way in which international law is interpreted and ultimately applied provides an incentive for powerful States to participate in what has been described as a “symbolic struggle” to assert control

28. Zhang Jun, Ambassador, China, Remarks at the U.N. Security Council Open Debate on the Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security (Jan. 12, 2023).

29. Mauro Barelli, *Preventing and Responding to Atrocity Crimes: China, Sovereignty and the Responsibility to Protect*, 23 J. CONFLICT & SEC. L. 173, 174–75 (2018).

30. Courtney J. Fung, *China’s Use of Rhetorical Adaptation in Development of a Global Cyber Order: A Case Study of the Norm of the Protection of the Public Core of the Internet*, 7 J. CYBER POL’Y 256, 257–58 (2022).

31. Sonya Sceats, *Guest Post: China As a Shaper of International Law?*, OPINIO JURIS (Mar. 17, 2015), <https://opiniojuris.org/2015/03/17/guest-post-china-as-a-shaper-of-international-law/>.

32. Ginsburg, *supra* note 12, at 6–7.

33. ROBERT JENNINGS, *Judicial Function and the Rule of Law in International Relations*, in COLLECTED WRITINGS OF SIR ROBERT JENNINGS 486 (1998) (discussing courts’ creative role in the development of the law).

over the meaning of international legal rules.³⁴ This participation offers two advantages. First, and most obviously, by bolstering or undermining the authority of specific interpretations of international law, a State appearing before a tribunal will be able to defend its legal position and, consequently, its national interests.³⁵ Second, looking beyond the specific outcome of a case and taking into account the law-making function of judicial decisions, a State will also have a chance to control the potential effects of a ruling on the future of international law.³⁶ In this respect, it is worth noting that high-ranking Chinese officials have themselves acknowledged the strategic importance of the ICJ's pronouncements in shaping "the long-term development of international law."³⁷

For these reasons, authors like Eder have called on China to "engage more" with international adjudication as part of a larger plan to "make full use" of international law in protecting both its short and long-term interests.³⁸ Crucially, similar calls have also come from within Chinese legal academic circles. For example, Song Jie has pointed to the need for China to increase both the extent and quality of its participation in international adjudication to better align with and take advantage of the recent trend towards the legalization of international dispute settlement.³⁹ On his part, Yi Xianhe has argued that, to safeguard its economic and political achievements, China must become a

34. Tommaso Soave, *The Social Field of International Adjudication: Structures and Practices of a Conflictive Professional Universe*, 36 LEIDEN J. INT'L L. 565, 586 (2023).

35. *Id.* at 571–72.

36. Vaughan Lowe, *The Function of Litigation in International Society*, 61 INT'L & COMP. L.Q. 209, 212 (2012).

37. See *International Court of Justice Docket Reflects Legal Questions Concerning Humanity in Every Region*, UNITED NATIONS (October 26, 2023), <https://press.un.org/en/2023/ga12547.doc.htm> (stating that the ICJ plays an important role in protecting national security, settling disputes, and promoting friendly relations).

38. THOMAS S. EDER, CHINA AND INTERNATIONAL ADJUDICATION: CAUTION, IDENTITY SHIFTS, AND THE AMBITION TO LEAD 520–21 (2021).

39. Song Jie, *Evaluating the Effectiveness of China's Participation in International Legal Matters: Lessons from China's Practice in the International Law Commission and the International Court of Justice*, 15 CHINA: INT'L J. 144, 146 (2017).

“leading” country in international law increasingly capable of and confident in appearing before international tribunals.⁴⁰

The art of legal persuasion that is needed to successfully engage with international tribunals, however, is not something that can be improvised; instead, it requires sophisticated understanding of the relevant law, on-the-ground experience, and familiarity with the relevant institutional setting. In this sense, the initiatives mentioned in the previous section aimed at promoting the study of international law and its integration into foreign policy decision-making are important first steps on which to build further. Nonetheless, as its experience with the World Trade Organization (WTO) has shown, the best investment that China could make going forward is in the process of direct learning.⁴¹ In fact, this investment has allowed China to transform, in a span of less than ten years, from being shy to being a confident participant capable of navigating and benefitting from the WTO dispute resolution system.⁴² China’s recent experience in the South China Sea arbitration, initiated by the Philippines in connection with the UN Convention on the Law of the Sea (UNCLOS),⁴³ further illuminates the importance of this point. China’s decision not to take part in the UNCLOS proceedings was primarily aimed at delegitimizing the arbitral tribunal, which, in its view, lacked the jurisdiction to deal with a disguised sovereignty dispute. Nonetheless, it is telling that China did not skip participation altogether.⁴⁴ Rather, it chose to

40. Qi Yuefeng, Zhōngguó yīng gèng jījí cānyù guójì fǎzhì jìnchéng [*China Should Be More Actively Involved in the International Rule of Law Process - Dialogue with Yi Xianhe*], ORIENTAL OUTLOOK WKLY. (Jan. 28, 2016), <https://www.aisixiang.com/data/111199.html>

41. See Yang Guohua, *China in the WTO Dispute Settlement: A Memoir*, 49 J. WORLD TRADE 1 (2015) (describing China’s increasing confidence in the WTO dispute settlement system over the time of its involvement).

42. *Id.*; see also Gregory Shaffer & Henry S. Gao, *How China Took on the United States and Europe at the WTO*, in EMERGING POWERS AND THE WORLD TRADING SYSTEM: THE PAST AND FUTURE OF INTERNATIONAL ECONOMIC LAW 174, 174 (2021) (discussing how China learned to defend its interests through the WTO rules).

43. Chinese Society of International Law, *The South China Sea Arbitration Awards: A Critical Study*, 17 Chinese J. Int’l L. 207 (2018) (presenting a Chinese perspective on the arbitration).

44. It was reported that The Politburo Standing Committee was split as to whether take part in the proceedings, with a 5-to-4 victory for non-participation.

engage with the judicial process laterally, releasing official statements and communications which the tribunal ultimately considered equivalent to preliminary objections.⁴⁵ In an important sense, this form of “non-participating participation”⁴⁶ can be seen as an attempt by China to gradually develop its understanding and familiarity with the UNCLOS dispute settlement mechanism ahead of an expected increase in its use.⁴⁷

If China’s encounter with the WTO and UNCLOS dispute resolution systems has demonstrated the importance of gaining discourse power in international litigation, the tribunals operating within these two specialized systems can only deal with a limited set of disputes, namely those related to international trade law and the law of the sea. There is only one international court States can turn to for virtually any dispute concerning international law: the ICJ. The prestige of this institution is reflected in the provisions of the U.N. Charter that describe it as the “principal judicial organ” of the U.N., and instruct States that international legal disputes should be, as a general rule, referred to it.⁴⁸ The ICJ’s potentially unlimited jurisdiction and unmatched judicial authority makes it an ideal platform for international discourse power.⁴⁹ Yet, precisely because of those qualities, the ICJ can also deal with disputes that involve very high stakes. This has profound consequences considering that, as Coleman put it, “the more vital the outcome of a dispute, the less prepared States are to devolve control of its resolution to an

See SUSAN L. SHIRK, *OVERREACH: HOW CHINA DERAILED ITS PEACEFUL RISE* 223, 224 (2022).

45. *Phil. v. China*, Case No. 2013-19, Procedural Order No. 4, at 5 (Perm. Ct. Arb. 2015), <https://www.pcacases.com/pcadocs/PH-CN - 20160712 - Award.pdf>.

46. See Wim Muller, *Law of the Sea*, 8 *ASIAN J. INT’L L.* 296, 298 (2018) (explaining that even though China did not participate in the proceedings, it made its views known through its Position Paper, which is an example of “non-participating participation”).

47. Anne Hsiu-An Hsiao, *China and the South China Sea Lawfare*, 52 *ISSUES & STUD.: SOC. SCI. Q. ON CHINA, TAIWAN, & EAST ASIAN AFFS.*, 1, 28 (2016); Ryan Martínez Mitchell, *China’s engagement with the ITLOS climate change advisory proceedings and its strategic formalism in international law*, CENTRE FOR INT’L L. NAT’L UNI. OF SINGAPORE (Feb. 6, 2024), <https://cil.nus.edu.sg/blogs/chinas-engagement-with-the-itlos-climate-change-advisory-proceedings-and-its-strategic-formalism-in-international-law>.

48. U.N. Charter art. 92; *id.* art. 36, ¶ 3.

49. Andrew Coleman, *The International Court of Justice and Highly Political Matters*, 14 *MELB. J. INT’L L.* 26, 31–33 (2003).

independent body.”⁵⁰ As a result, States are particularly wary of appearing before the Court as either claimants or respondents. That said, appearing before the ICJ as a party to a contentious case is not the only form of engagement with this body. In particular, the Statute of the ICJ allows States to intervene as non-parties in contentious proceedings as well as to submit written statements and make oral observations during advisory proceedings.⁵¹ As will be discussed in the next sections, the advantage of these indirect forms of participation is that they offer States a concrete opportunity to influence the relevant judicial processes without having to pay the potentially high costs of direct litigation.

IV. CHINA AND THE INTERNATIONAL COURT OF JUSTICE

As a newcomer to the international stage, the People's Republic of China was imbued with a broad sense of mistrust towards the international legal system. Later fueled by its prolonged exclusion from the United Nations, this mistrust originally derived from China's traumatic 19th-century encounter with foreign powers and international law that left the country in a semi-colonial status as a result of military aggressions and a series of unequal treaties.⁵² Skepticism towards international law and organizations also affected China's attitude towards international adjudication, which it did not regard as a reliable method for solving inter-State disputes.⁵³ While a clear preference for diplomatic methods continues to characterize the Chinese approach to dispute settlement,⁵⁴ recent studies have highlighted how China has gradually moved from “outright

50. *Id.* at 32.

51. Statute of the International Court of Justice art. 63, ¶ 2, Apr. 18, 1946, 33 U.N.T.S. 993 [hereinafter Statute Int'l Ct. Just.].

52. Jean d'Aspremont & Binxin Zhang, *China and International Law: Two Tales of an Encounter*, 34 LEIDEN J. INT'L L. 899, 906 (2021).

53. See Julian Ku, *China and the Future of International Adjudication*, 27 MD. J. INT'L L. 154, 155–56 (2012) (discussing China's gradual transition from a dismissive stance toward international courts and arbitration tribunals to a more engaged and constructive approach); see also *id.* at 158–60 (noting a series of inequitable treaties and historical events to which China was subjected).

54. Ma Xinmin, *China's Mechanism and Practice of Treaty Dispute Settlement*, 11 CHINESE J. INT'L L. 387, 388, 390, 392 (2012).

rejection” to “selective acceptance” of international adjudication mechanisms.⁵⁵ Accordingly, China’s current engagement with international adjudication can be described as “asymmetrical,” in the sense that Beijing has developed various approaches towards different adjudicative bodies on the basis of strategic and ideological rationales.⁵⁶

Despite this general progress, China’s traditional uneasiness about third-party adjudication has remained particularly acute with regard to the ICJ. This does not mean that China maintains a principled position against this institution. On the contrary, given its commitment to multilateralism and the importance of the ICJ for the maintenance of a truly international legal order, China regularly praises it for its contribution towards “upholding the purposes and principles of the U.N. Charter and the promotion of the international rule of law.”⁵⁷ However, this rhetorical support has not developed into substantive engagement.

Nonetheless, it is worth highlighting that there is nothing unique about China’s reluctance to engage with the ICJ. In accordance with a fundamental precept of international adjudication, the Court only has jurisdiction over a State with its consent and, as a matter of fact, the majority of States have either not given this consent in advance of a dispute, or have done so in a very limited way in order to safeguard their sovereignty and national interests.⁵⁸ Nowhere is this clearer than in respect of optional clause declarations. These are unilateral acts that, in accordance with the Statute of the ICJ, allow States to voluntarily

55. See generally, CHATHAM HOUSE, CHINA’S EVOLVING APPROACH TO INTERNATIONAL DISPUTE SETTLEMENT (2017); Hao & de la Rasilla, *supra* note 11, at 639.

56. Hao & de la Rasilla, *supra* note 11, at 637, 639.

57. Xu Hong, Chinese Del., Statement at the 73rd Session of the United Nations General Assembly on Agenda Item 76 Report of the International Court of Justice (Oct. 25, 2018); Liu Yang, Chinese Del., Statement at the 74th Session of the U.N. General Assembly on Agenda Item 83 and The Rule of Law at the National and International Levels 2–4 (Oct. 11, 2019).

58. See INT’L CT. JUST., HANDBOOK 9, 34, 41–42 (2019) (stating that the ICJ only has jurisdiction over states with their consent and making note of the several limitations that states have made with respect to the consent they have given).

accept as compulsory the jurisdiction of the Court.⁵⁹ At the time of this writing, only 74 States have deposited such declarations.⁶⁰ Crucially, most of these declarations are replete with far-reaching reservations that significantly limit the ability of the Court to carry out its judicial function with respect to the declarant State. The picture is even starker in relation to the great powers, which, by their very nature, have a predilection for diplomatic, as opposed to judicial, methods of solving inter-State disputes. Russia has never accepted the compulsory jurisdiction of the Court.⁶¹ France terminated its optional clause declaration in 1974, after the ICJ indicated provisional measures in a case concerning French nuclear tests conducted in the South Pacific.⁶² The United States made a U-turn in 1985 following the Court's finding that it had jurisdiction to entertain a case concerning the legality of American military activities in Nicaragua.⁶³ It follows that today the United Kingdom (U.K.) is the only permanent member of the Security Council to have accepted the obligatory jurisdiction of the Court.⁶⁴ Nonetheless, its optional clause declaration includes far-reaching conditions and limitations that effectively shield it from judicial scrutiny, signaling a *de-facto* exit from the system of compulsory jurisdiction of the Court.⁶⁵

In line with the pattern of behavior described above, China has taken several measures to limit its exposure to the ICJ. After being admitted to the UN, it promptly disowned the optional clause declaration that had been previously made in 1946 by the Republic of China, and has not contemplated the prospect of

59. *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. JUST., <https://www.icj-cij.org/declarations> (last visited Nov. 3, 2024).

60. *Id.*

61. *Id.* at 640, 640 n. 15.

62. Jean Charpentier, *Pratique Française Concernant le Droit International* [French Practice Concerning International Law], 20 ANNUAIRE FRANÇAISE DE DROIT INTERNATIONAL [FR. Y.B. INT'L L.] 1027, 1050, 1052–53.

63. United States: Department of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction, 86 DEP'T ST. BULL. 67 (Jan. 1986), reprinted in 24 I.L.M. 1742, 1742 (1985); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. Rep. 392, 442 (Nov. 26).

64. Mauro Barelli, *A Heartfelt Commitment to the International Rule of Law? The United Kingdom and the International Court of Justice*, 70 NETH. INT'L L. REV. 143, 147–48 (2023) [hereinafter *A Heartfelt Commitment to the International Rule of Law?*]

65. *Id.* at 152.

re-joining the optional clause system since that time.⁶⁶ China has also regularly opted out of compromissory clauses included in treaties to which it is a party.⁶⁷ These are clauses that grant the ICJ jurisdiction with regard to disputes concerning the interpretation and application of the treaties in question. For example, China made a reservation to Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination, which establishes that any dispute between two States Parties with respect to the interpretation or application of that convention shall be referred to the ICJ.⁶⁸ It similarly opted out of Article IX of the Genocide Convention, whereby disputes between the contracting parties relating to the interpretation, application, or fulfilment of that convention shall be submitted to the ICJ.⁶⁹

As a natural consequence of this reluctant posture, China has never initiated a contentious case before the ICJ, while, in 2014, the Marshall Islands became the first, and so far, only State that sought, unsuccessfully, to bring a claim against China.⁷⁰ Similarly, China has never intervened as a non-party in bilateral disputes before the Court.⁷¹ While these records signal a high level of disengagement with the contentious jurisdiction of the ICJ, they overlook an important element, namely, that China's attitudes towards the advisory function of the Court have followed a different trajectory. As will be further discussed below, this is significant for three main reasons. First, reflecting its ambition to contribute to international legal discourse, China has

66. Report of the I.C.J., U.N. GAOR. 28th Sess., ¶ 10, U.N. Doc. A/9005 (August 1972–July 1973).

67. Xinmin, *supra* note 54, at 389–91.

68. Int'l Convention on the Elimination of All Forms of Racial Discrimination, art. 22, Mar. 12, 1969, 660 U.N.T.S. 195; Int'l Convention on the Elimination of All Forms of Racial Discrimination, Declarations and Reservations, Mar. 12, 1969, 660 U.N.T.S. 195.

69. Convention on the Prevention and Punishment of the Crime of Genocide, art. 9, Dec. 9, 1948, 78 U.N.T.S. 277; Int'l Convention on the Prevention and Punishment of the Crime of Genocide, Declarations and Reservations, Dec. 9, 1948, 78 U.N.T.S. 277.

70. China was, however, the subject of an order indicating measures of interim protection issued by the Permanent Court of Justice as part of a case brought by Belgium in 1927 (but later discontinued). For the background, see Chi-Hua Tang, *China-Europe, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 701, 706–11 (Bardo Fassbender & Anne Peters eds., 2012).

71. MOYNIHAN, *supra* note 11.

begun to engage regularly with the most important judicial body operating at the international level. Second, China has chosen to do so via more indirect forms of participation that do not require it to act as a party to a case. Third, this limited practice may well evolve and harden into bolder forms of participation linked with the contentious jurisdiction of the Court.

V. CHINA'S INTERVENTION IN THE ADVISORY PROCEEDINGS OF THE ICJ

In addition to deciding legal disputes submitted to it by States, the ICJ is also entrusted to give opinions on legal questions at the request of duly authorized UN organs, such as the General Assembly.⁷² Although they cannot request them, States can use advisory opinions as a vehicle to wield discourse power in international law.⁷³ This is because the Statute of the ICJ allows States concerned by a question posed to the Court to present both written and oral statements before it.⁷⁴ In this way, States are provided with the opportunity to influence the Court's interpretation of the rules of international law that sit at the heart of an opinion.

Of course, one may say that advisory opinions are not legally binding, but that is not tantamount to saying that they do not carry legal weight. Aimed to "guide the United Nations in respect of its own action,"⁷⁵ advisory opinions are in fact a key instrument used by the ICJ to promote compliance with international law within the U.N. and among the members of the international community. In the words of former ICJ President Hisashi Owada, advisory opinions "serve as an authoritative declaration of the law in fields where the law has not been entirely free from

72. U.N. Charter, art. 96.

73. *Advisory Jurisdiction*, INT'L CT. JUST., <https://www.icj-cij.org/advisory-jurisdiction> (last visited Jan. 22, 2025).

74. Statute Int'l Ct. Just., *supra* note 51, art. 66.

75. Reservations to the Convention on Genocide, Advisory Opinion, 1951 I.C.J. 15, 19 (May 28); *see also* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 32 (June 21); Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶ 72 (Oct. 16).

ambiguity or has at least been subject to some controversy.”⁷⁶ Another former President of the Court, Abdulqawi Yusuf, similarly described them as “authoritative pronouncements” that “provide legal clarity [...] on specific principles and rules of international law.”⁷⁷ In other words, advisory opinions not only represent definitive statements of the law that concur to direct State behavior on the international stage, but also affect the evolving interpretation of contemporary international law. This provides an important incentive for States to integrate their concerns into the pronouncements of the Court, especially when the subject of an opinion is strategically important.

This indirect form of involvement in the activities of the ICJ has two additional advantages for a State like China. First, there is a correlation between a State’s participation in advisory proceedings and its perceived commitment to, and respect for, the judicial function of the ICJ.⁷⁸ This correlation acquires even more value when advisory opinions concern fundamental questions of international law that affect the international community as a whole. Under those circumstances, participating in the activities of the ICJ would contribute to reinforcing the image of China as a great power intent to engage responsibly with global issues and challenges.⁷⁹ Second, given that advisory opinions are not aimed at solving inter-State disputes, but rather at providing an authoritative answer to general questions of international law, interventions in advisory proceedings do not collide with China’s

76. Hisashi Owada, Honorable Judge, Int’l Ct. Just., Introductory Remarks at the Seminar on the Contribution of the International Court of Justice to International Law (Oct. 25, 2011).

77. Abdulqawi A. Yusuf, Honorable Judge, Int’l Ct. Just., Address at the Seventy-Fourth Session of the United Nations General Assembly (Oct. 30, 2019).

78. Michael Wood, *European Perspectives on Inter-State Litigation*, in LITIGATING INTERNATIONAL LAW DISPUTES: WEIGHING THE BALANCE 130, 145 (Natalie Klein ed., 2014).

79. See, e.g., *Foreign Ministry Spokesperson Lu Kang’s Regular Press Conference on 27 February 2019*, CHINA DAILY (Feb. 27, 2019), <https://govt.chinadaily.com.cn/s/201902/27/WS5cc7f203498e079e6801f647/foreign-ministry-spokesperson-lu-kangs-regular-press-conference-on-february-27-2019.html> (emphasizing that China took an active part in the Chagos proceedings and supported the decolonization process championed by the United Nations).

characteristic commitment to non-interference in the internal affairs of other States.⁸⁰

Against this background, in 2009, China participated for the very first time in the advisory proceedings of the ICJ concerning the legality of the declaration of independence of Kosovo.⁸¹ About a decade later, and despite the more challenging nature of these endeavors, China intervened in two advisory proceedings concerning, respectively, the legal consequences of the separation of the Chagos Islands from Mauritius and the legality of Israel's occupation of Palestinian territory.⁸² The next two sections will analyze China's involvement in these advisory opinions, highlight its motivations to intervene, and assess its impact on the respective outcomes.

A. *The Background of the Three Opinions*

In 2010, the ICJ rendered an opinion on the legality of the declaration of independence from Serbia issued by the Assembly of Kosovo in 2008.⁸³ The core question prompting this opinion—and that the Court chose not to address directly—was whether the right to self-determination confers on certain peoples a legal entitlement to independence via unilateral secession. Kosovo's attempt to break from Serbia divided the international community.⁸⁴ By the time the opinion was issued, almost seventy

80. *Advisory Jurisdiction*, *supra* note 73.

81. The Republic of China submitted written statements to the ICJ in its first two advisory proceedings. *See generally* Condition of Admission of a State to Membership in the United Nations, Advisory Opinion, art. 4, 1948 I.C.J. 57, 59 (May 28); Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 176 (Apr. 11).

82. China is also currently participating in the ICJ's advisory opinion on "the obligations of States in respect of climate change". At the time of this writing, these advisory proceedings are still ongoing. Press Release, Int'l Ct. Just., Obligation of States in Respect of Climate Change, I.C.J. Press Release No. 2024/31 (Apr. 21, 2024).

83. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 84 (July 22) [hereinafter *Accordance with International Law*].

84. THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION 9 (Marko Milanovic & Michael Wood eds., 2015).

States had recognized Kosovo as an independent State.⁸⁵ Yet many others, including China, Russia, India, and some European Union countries like Greece and Spain, had not.⁸⁶ State participation in this opinion was remarkable. Thirty-six States filed written statements, while twenty-eight participated in the oral phase of the proceedings.⁸⁷ Given the highly politicized moment and the existence of secessionist movements within its own borders, China broke with its past behavior by intervening, for the very first time, in the Court's judicial activities. Presenting both written and oral statements, China participated in the proceedings with the objectives of demarcating the legal boundaries of the right to self-determination and accentuating the supremacy of the principles of sovereignty and territorial integrity in the international legal order.⁸⁸

In 2018, China continued on the path of engagement with the ICJ taking part in the advisory opinion proceedings concerning the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965.⁸⁹ Located in the Indian Ocean, the Chagos Islands form part of British overseas territory.⁹⁰ Between 1814 and 1965, the islands were administered by the U.K. as a dependency of the colony of Mauritius. Before granting independence to Mauritius, the UK separated the archipelago from the territory of the colony in order to retain its possession and lease its major atoll, Diego Garcia, to

85. *Countries That Have Recognized Kosovo as an Independent State*, BE IN KOSOVO (Feb. 17, 2018), <https://www.beinkosovo.com/countries-that-have-recognized-kosovo-as-an-independent-state/>.

86. *Id.*

87. Accordance with International Law, *supra* note 83, ¶¶ 6–14.

88. *See generally* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of China, (Apr. 16, 2009), <https://www.icj-cij.org/files/case-related/141/15611.pdf> [hereinafter "Accordance with International Law Written Statement"].

89. *See generally* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Written Statement of China, (Mar. 1, 2018), <https://www.icj-cij.org/files/case-related/169/169-20180301-WRI-03-00-EN.pdf> [hereinafter "Legal Consequences Written Statement (China)"].

90. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 26 (Feb. 25) [hereinafter "Legal Consequences"].

the US for military purposes.⁹¹ Considering the British conduct to be in violation of the laws regulating the process of decolonization, Mauritius sought in various ways to regain control of what it considered unjustly lost territory.⁹² Among other things, Mauritius explored the possibility of referring the dispute to the ICJ, but, as explained in Section 4, the latter can only entertain a dispute with the consent of both parties.⁹³ As the UK did not consent to such adjudication, the ICJ was prevented from resolving this dispute through its contentious jurisdiction.⁹⁴ This opinion, like the Kosovo opinion, sparked significant interest in the international community: thirty-one States submitted a written statement and twenty-two States subsequently participated in the oral proceedings.⁹⁵ On this occasion, China opted only to submit a written statement without later appearing before the Court.⁹⁶ Remarkably, the length of its statement paralleled that of countries with a more established international law tradition such as Russia and France.⁹⁷ China intervened in this opinion to both champion the cause of decolonization and caution against the possible erosion of the principle of consent in international adjudication, two objectives that, as we shall see, were not easily reconcilable in the context of the opinion.⁹⁸

The third advisory proceedings in which China has intervened concerned the legal consequences of Israel's occupation of the Palestinian territory and were triggered by a request advanced by the General Assembly on December 30th, 2022.⁹⁹ A

91. Legal Consequences, *supra* note 90, at 98.

92. *A Heartfelt Commitment to the International Rule of Law?*, *supra* note 64, at 155.

93. *Id.* at 156.

94. *Id.*

95. Legal Consequences, *supra* note 90, ¶¶ 9–23.

96. Legal Consequences Written Statement (China), *supra* note 89, ¶ 3.

97. See generally Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Written Statement of Russia, (Feb. 27, 2018), <https://www.icj-cij.org/files/case-related/169/169-20180227-WRI-05-00-EN.pdf>; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Written Statement of France, (Feb. 28, 2018), <https://www.icj-cij.org/files/case-related/169/169-20180227-WRI-03-00-EN.pdf>.

98. Legal Consequences Written Statement (China), *supra* note 89, ¶¶ 15–19.

99. G.A. Res. 77/24730, ¶ 18 (Dec. 30, 2022). Eighty-seven States voted in favor of the resolution, including China. Twenty-six States voted against, including the United States, United Kingdom, Germany, Australia, and Canada. There were fifty-three

considerable number of States took part in the proceedings: fifty-three States filed a written statement and fifty States subsequently participated in the oral proceedings.¹⁰⁰ The aim of China's intervention was two-fold: first, to support the Palestinian people's struggle for self-determination and, second, to clarify why the ICJ was entitled to render this opinion in the absence of Israel's consent.¹⁰¹ It is noteworthy that, in 2004, the ICJ issued a similar opinion on the legal consequences arising from Israel's construction of a wall in the occupied Palestinian territory.¹⁰² At that time, however, alone among the permanent members of the Security Council, China did not take part in the proceedings.¹⁰³ While facilitated by Beijing's growing diplomatic involvement in the region,¹⁰⁴ this later change in approach is revealing of an important shift towards a more determined and systematic participation in the judicial functions of the Court.

abstentions, and twenty-seven States chose not to cast a vote. *See Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem: Resolution / Adopted by the General Assembly*, U.N. DIGIT. LIBR., <https://digitallibrary.un.org/record/3999158?ln=en> (last visited Nov. 24, 2024).

100. *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, 2024 I.C.J. 186, ¶¶ 7–21 (July 19) [hereinafter *Legal Consequences II*].

101. *See generally* *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Written Statement of China, (July 25, 2023), <https://www.icj-cij.org/sites/default/files/case-related/186/186-20230725-wri-21-00-en.pdf> [hereinafter *Legal Consequences II Written Statement (China)*].

102. *See generally* *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter *Legal Consequences III*].

103. *Id.* at 143.

104. *See, e.g., Position Paper of the People's Republic of China on Resolving the Palestinian-Israeli Conflict*, MINISTRY FOREIGN AFFS. CHINA (Nov. 30, 2023), https://www.fmprc.gov.cn/eng/zy/gb/202405/t20240531_11367506.html; Xi Jinping, President, China, Carrying Forward the Spirit of China-Arab Friendship and Jointly Building a China-Arab Community with a Shared Future in the New Era, Keynote Address at the First China-Arab States Summit (Dec. 9, 2022).

B. China's Interventions and Discourse Power: Strategies and Motivations

China's position on each of the three advisory opinions in question was diametrically opposed to that of the U.S. and other powerful Western countries. In the Kosovo opinion, where the U.S., the U.K., and France acted as Kosovo's main allies, China supported Serbia's counter-secession strategies.¹⁰⁵ In the Chagos opinion, China endorsed Mauritius's demands for decolonization against the vested interests of the UK and the US.¹⁰⁶ In the Occupation opinion, Beijing's strong accusations of Israel did not find an echo in Western capitals.¹⁰⁷ Strategically, China's interventions in these opinions were aimed at protecting two core national interests: first, the inviolability of the principle of territorial integrity; and, second, a State's prerogative to determine its preferred method of dispute resolution as a manifestation of its sovereignty.

1. Self-determination and Territorial Integrity

The right to self-determination featured prominently in each of the three advisory proceedings discussed in this article. The Kosovo opinion concerned the applicability of the right to self-determination to peoples aspiring to secede from an existing State;¹⁰⁸ the Chagos opinion focused on the content and scope of the right to self-determination applicable to the process of decolonization;¹⁰⁹ and finally, in the Occupation opinion, the Court considered the legal consequences arising from the violation of the right to self-determination of a people under occupation.¹¹⁰

The significance of the right to self-determination derives from the fact that this right poses a potential challenge to one of

105. For a discussion, see James Ker-Lindsay, *Explaining Serbia's Decision to Go to the ICJ*, in *THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION* (Marko Milanovic & Michael Wood eds., 2015).

106. Legal Consequences Written Statement (China), *supra* note 89, ¶¶ 15–19.

107. Legal Consequences II Written Statement (China), *supra* note 101, ¶¶ 47–50.

108. Accordance with International Law, *supra* note 83.

109. Legal Consequences, *supra* note 90.

110. Legal Consequences III, *supra* note 102.

the constitutive elements of State sovereignty, namely, territorial integrity.¹¹¹ More specifically, the external dimension of self-determination relates to the right of peoples to determine their own political status, including—under certain circumstances—through the creation of a new State.¹¹² Not surprisingly, all States are, to various degrees, preoccupied by the potential implications of the right to self-determination. It is, however, those States that are directly confronted with internal threats to their territorial integrity that are particularly wary of the risks associated with expansive interpretations of this right.¹¹³

As one of those States, China participated in the advisory proceedings concerning Kosovo's attempt to secede from Serbia with a clear strategy and purpose. In its pleadings, China highlighted that "respect for [the] territorial integrity of a sovereign State is one of the fundamental principles of contemporary international law."¹¹⁴ Noting that this paramount principle is reflected in key international law documents, such as the UN Charter and the 1970 UN Declaration on Friendly Relations,¹¹⁵ China argued that the right of peoples to self-determination cannot be construed as authorizing, in any manner, the disintegration of existing States and that,

111. Press Release, General Assembly / Third Committee, Viewed Narrowly as Right to Secede, Self-Determination Could Threaten Territorial Integrity of States, Third Committee Told, U.N. Press Release GA/SHC/3708 (Oct. 29, 2002).

112. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995); *see also* JAMES SUMMERS, PEOPLES AND INTERNATIONAL LAW: HOW THE RIGHT OF SELF-DETERMINATION AND NATIONALISM SHAPE A CONTEMPORARY LAW OF NATIONS (2007).

113. *See* CASSESE, *supra* note 112; *see also* SUMMERS, *supra* note 112.

114. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Verbatim Record, ¶ 15 (Dec. 7, 2009), <https://www.icj-cij.org/sites/default/files/case-related/141/141-20091207-ORA-01-00-BI.pdf> [hereinafter Accordance with International Law Verbatim Record]; Accordance with International Law Written Statement, *supra* note 88, at 2–3.

115. G.A. Res. A/2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, at 124 (Oct. 24, 1970) [hereinafter Declaration on Principles of International Law].

accordingly, its application under international law is confined solely to situations of colonial rule and foreign occupation.¹¹⁶

The fact that these are precisely the two scenarios at play in the Chagos and Occupation opinions explains why China felt sufficiently comfortable to intervene in those proceedings in support of the self-determination claims of Mauritius and Palestine. In the Chagos opinion, after referring to its own experience of “aggression and oppression under imperialism and colonialism,”¹¹⁷ China affirmed that peoples under colonial domination are legally entitled to independence as part of their right to self-determination.¹¹⁸ To justify its position, China referenced key instruments of international law such as the 1960 UN Declaration on the Granting of Independence to Colonial Countries and Peoples, which strongly condemns colonialism and emphasizes that all peoples have the right to self-determination,¹¹⁹ and the already mentioned 1970 UN Declaration on Friendly Relations, which affirms that every State has the duty to promote the realization of the right to self-determination of peoples in order “to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned.”¹²⁰ Likewise, in the Occupation opinion, China stated that, as a people under foreign occupation, the Palestinian people are legally entitled to self-determination,¹²¹ a conclusion that it emphasized has also been reached by authoritative bodies like the UN General Assembly and the International Court of Justice.¹²² In particular, China submitted that Israel’s prolonged

116. Accordance with International Law Written Statement, *supra* note 88, at 3; Accordance with International Law Verbatim Record, *supra* note 114, ¶ 21.

117. Furthermore, the Constitution of the People’s Republic of China affirms that “China consistently opposes imperialism, hegemonism and colonialism, works to strengthen unity with the people of other countries, supports the oppressed nations and the developing countries in their just struggle to win and preserve national independence and develop their national economies, and strives to safeguard world peace and promote the cause of human progress.” Legal Consequences Written Statement (China), *supra* note 89, ¶ 12.

118. *Id.*

119. G.A. Res. A/1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

120. Declaration on Principles of International Law, *supra* note 115, at 123–24.

121. Legal Consequences II Written Statement (China), *supra* note 101, ¶ 37.

122. *Id.* ¶ 43.

occupation has prevented the Palestinian people from fully exercising their right to self-determination, including their right to establish an independent State.¹²³

The Kosovo opinion presented a different set of challenges. As Kosovo is neither colonized nor occupied, the conventional notion of self-determination discussed above would not entitle its people to break away from Serbia and form a new State. As the ICJ noted, the international law of self-determination has developed “in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.”¹²⁴ Yet a number of States that intervened in the proceedings referred to a variant of the right to self-determination that may exceptionally legitimize unilateral secession when this is the only available remedy to the systematic oppression of a distinct group within a State.¹²⁵ These views find some support in the pronouncements of judicial and quasi-judicial bodies both at the national and international level that have referred, if implicitly, to the existence of a right to remedial secession. For example, the Supreme Court of Canada famously held that the right to self-determination can generate a right to unilateral secession in situations where a people is oppressed or denied meaningful political representation.¹²⁶ The fact that this right has some traction in the international legal community is also confirmed by the fact that a number of judges of the Court referred to it in their individual opinions.¹²⁷

Unqualified support for a right to remedial secession, however, is lacking among great powers.¹²⁸ This is due not only to fears of potential internal repercussions but also to concerns about the political complexity of having to deal with secessionist

123. *Id.* ¶ 45.

124. Accordance with International Law, *supra* note 83, ¶ 79.

125. *Id.* ¶ 82.

126. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 222 (Can.).

127. Accordance with International Law, *supra* note 83, at 622, ¶ 11 (Yusuf, J., separate opinion); *id.* at 594–95, ¶¶ 178–81 (Cançado Trindade, J., separate opinion).

128. See generally Marko Milanovic, *Arguing the Kosovo Case*, in THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION 21, 32 (Mark Milanovic & Michael Woods eds., 2015) (providing an overview of the pro-Kosovo camp's arguments about self-determination and territorial integrity).

movements in geopolitically inconvenient scenarios.¹²⁹ For these reasons, countries such as the US, the UK, and France refrained from endorsing a right to secession for the Kosovar people, instead presenting Kosovo as a *sui generis* case in an attempt to simultaneously support its factual independence and discourage others from pursuing a similar course of action.¹³⁰ China had different priorities. Its main concern was to prevent any explicit or implicit validation of secessionist claims through self-determination rhetoric. Accordingly, China employed strong and unequivocal language to discredit the existence of a right to remedial secession in international law.¹³¹ It is also telling that the same strong language against remedial secession was used in the Occupation opinion, even though the circumstances of the latter did not require China to take a position on that specific question.¹³²

China's argument against a right to remedial secession is not without merit, given that the normative foundations of this right—typically associated with the “safeguard” clause inserted in the UN Declaration on Friendly Relations—are not well defined. Read *a contrario*, this clause seems to suggest that a government that systematically oppresses a group within its territory is not entitled to invoke the principle of territorial integrity.¹³³ As a consequence, the group in question could, if it wished, claim a right to secede from that State. However, doubts exist as to the correctness of this interpretation. For example, some authors have highlighted that the drafting history of this provision does not suggest that States intended to confer a right to remedial secession on distinct groups living within their

129. *Id.*

130. *Id.*

131. Accordance with International Law Verbatim Record, *supra* note 114, ¶ 23.

132. Legal Consequences II Written Statement (China), *supra* note 101, ¶ 38.

133. “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.” See Declaration on Principles of International Law, *supra* note 115, at 124.

territories.¹³⁴ Equally, State practice does not provide sufficient evidence of support for such a progressive interpretation of that clause.¹³⁵ In fact, not only do States hold different views on the legal foundations of this right, but they also tend to succumb to *realpolitik* when dealing, inconsistently, with remedial secession claims.¹³⁶

The fact that China articulated its position on the question of remedial secession in the Kosovo opinion was not inconsequential. One of the reasons why the ICJ expediently declined to comment on the actual scope of the right to self-determination, including whether it includes a right to secession, is that “radically different views” on this question were expressed by States during the proceedings.¹³⁷ In this sense, China’s legal arguments contributed to the formulation of the advisory opinion in a manner that broadly aligned with its own interests. On the other hand, China’s argument against the legality of declarations of independence was less persuasive. China opined that, since they infringe on the principles of State sovereignty and territorial integrity, attempted acts of unilateral secession cannot be deemed to be in accordance with international law because the latter recognizes and protects those very principles as central pillars of the international legal system.¹³⁸ Yet, upholding the *Lotus* principle, according to which anything not expressly prohibited by international law is permitted,¹³⁹ the Court took a different view and found that the declaration of independence of Kosovo was not illegal.¹⁴⁰

134. Tamara Jaber, *A Case for Kosovo? Self-Determination and Secession in the 21st Century*, 15 INT’L J. HUM. RTS. 935, 936–37 (2011); James Summers, *The Right of Self-Determination and Nationalism in International Law*, 12 INT’L J. ON MINORITY & GRP. RTS. 325, 335–36 (2005).

135.

136. See, e.g., Christopher Borgen, *The Language and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHI. J. INT’L L. 1, 1–2, 4, 6, 8, 11–16 (2009); Richard Falk, *The Kosovo Advisory Opinion: Conflict Resolution and Precedent*, 105 AM. J. INT’L L. 50, 55–56 (2011).

137. Accordance with International Law, *supra* note 83, ¶ 82.

138. Accordance with International Law Verbatim Record, *supra* note 114, ¶ 17.

139. The Case of the S.S. “*Lotus*” (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 22–23 (Sept. 7).

140. Accordance with International Law, *supra* note 83, ¶¶ 79–84.

2. The Centrality of the Principle of Consent in International Adjudication

The only obligation that the UN Charter imposes upon States involved in a dispute is that they resolve it peacefully.¹⁴¹ It follows that no State is “obliged to allow its disputes to be submitted to judicial settlement without its consent.”¹⁴² The centrality of this tenet in international adjudication is a natural consequence of the principle of State sovereignty and can have potential ramifications for the advisory function of the ICJ.¹⁴³ In particular, a problem may arise when a request for an advisory opinion overlaps with a dispute between two States and at least one of them does not consent to the involvement of the Court.¹⁴⁴

This issue did not arise in the Kosovo opinion because Serbia itself, as the only State directly affected by the dispute, campaigned for the intervention of the ICJ in hopes that doing so would delegitimize the Kosovar declaration of independence.¹⁴⁵ In contrast, this was not the case in the Chagos and Occupation opinions. According to Israel, the General Assembly’s request for an advisory opinion “perversely [sought] to circumvent” the lack of Israel’s consent to the Court’s involvement, making “a dead letter” of the most fundamental principle of international adjudication.¹⁴⁶ Similarly, the UK argued that the question of the Chagos archipelago should have remained a bilateral matter between the UK and Mauritius, and it added that the request for

141. U.N. Charter, art. 33.

142. Western Sahara, *supra* note 75, ¶¶ 32–33 (Oct. 16); Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. 65, 71 (Mar. 30).

143. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, *supra* note 142, at 71.

144. Status of Eastern Carelia (Fin. v. U.S.S.R.), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 24 (July 23).

145. Press Release, General Assembly, Backing Request by Serbia, General Assembly Decides to Seek International Court of Justice Ruling on Legality of Kosovo’s Independence, U.N. Press Release GA/10764 (Oct. 8, 2008).

146. Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Written Statement of the State of Israel, ¶ 7 (July 24, 2023), <https://www.icj-cij.org/files/case-related/186/186-20230724-wri-08-00-en.pdf> [hereinafter Legal Consequences II Written Statement (Isr.)].

an advisory opinion was nothing but an attempt by Mauritius to bypass the absence of British consent to judicial settlement.¹⁴⁷

The British and Israeli objections put China in a difficult position. As discussed above, for political and strategic reasons, China wanted to offer its support to the causes of Palestine and Mauritius. At the same time, Beijing had good reasons to sympathize with the concerns voiced by the UK and Israel. Only a few years before, in fact, the Philippines had invoked the compulsory dispute settlement of UNCLOS to drag China before an arbitral tribunal in relation to a territorial dispute in the South China Sea.¹⁴⁸ China responded to what it described as a “wanton abuse” of the UNCLOS procedures by first questioning the jurisdiction of the tribunal to entertain the case and subsequently refusing to comply with the unfavorable verdict.¹⁴⁹ There is no doubt that this experience strengthened China’s condemnation of strategies aimed at bypassing the lack of a State’s consent to judicial settlement. Under the circumstances, it was the ICJ’s own jurisprudence that offered China a way out of this difficult situation.

Recognizing the importance of safeguarding the principle of consent in international adjudication, the ICJ has affirmed that “the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character.”¹⁵⁰ However, the ICJ has also clarified that this would not prevent it from giving an opinion on a question related to an inter-States dispute as long as the latter also has a multilateral dimension which falls within the sphere of competence of the

147. Meetings Coverage, General Assembly, General Assembly Adopts Resolution Seeking International Court’s Advisory Opinion on Pre-independence Separation of Chagos Archipelago from Mauritius; Minister Cites Need to Complete Decolonization Process as United Kingdom Says It Will Cede Territory When No Longer Needed for Defence, U.N. Meetings Coverage GA/11924 (June 22, 2017).

148. DOLVEN ET AL., CONG. RESEARCH SERV., R44555, ARBITRATION CASE BETWEEN THE PHILIPPINES AND CHINA UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS) 11–12 (2016).

149. “The South China Sea arbitration violated the principle of state consent, and the arbitral tribunal exercised its jurisdiction *ultra vires* and rendered an award in disregard of law.” See *Foreign Ministry Spokesperson Zhao Lijian’s Regular Press Conference on July 12, 2021*, CHINA EMBASSY (July 12, 2021), http://gr.china-embassy.gov.cn/eng/fyrth/202107/t20210712_8974967.htm.

150. Western Sahara, *supra* note 75, ¶ 33.

requesting organ.¹⁵¹ In fact, the 2004 opinion on the legal consequences arising from Israel's construction of a wall in the occupied Palestinian territory is one of the pronouncements that contributed to developing this logic.¹⁵² In this instance, the ICJ rendered an opinion in the absence of Israeli consent for two main reasons: first, because the opinion was requested "on a question which [was] of particularly acute concern to the United Nations[;]" and, second, because it was "located in a much broader frame of reference than a bilateral dispute."¹⁵³ This reasoning allowed China to confidently engage with the ICJ in the Occupation opinion without running the risk of undermining the principle of consent. As China put it:

The question of Palestine has always been an important part of the work of the UN since its founding. For more than 70 years, the UN has approached the question of Palestine as a matter of international peace and security ... Moreover, ... UN General Assembly resolutions have reaffirmed the permanent responsibility of the United Nations with regard to the question of Palestine until the question is resolved in all its aspects in accordance with international law and relevant resolutions.¹⁵⁴

In other words, by emphasizing the special responsibility of the U.N. to address the question of Palestine, China portrayed the latter as a unique case that can hardly set a precedent or be emulated by others.

The circumstances of the Chagos opinion, however, were significantly less straightforward. The first indication of China's more hesitant approach here came from its voting behavior at the General Assembly. While China voted in favor of the resolution seeking a judicial pronouncement on the question of Israel's occupation, it abstained on the resolution requesting an advisory

151. *Id.* ¶¶ 38–39.

152. Legal Consequences III, *supra* note 102, ¶ 17.

153. *Id.* ¶ 50.

154. Legal Consequences II Written Statement (China), *supra* note 101, ¶ 13.

opinion on the Chagos archipelago.¹⁵⁵ In explanation of its vote, China expressed its “firm support for the decolonization process and its understanding of the position of Mauritius[;]” yet, it also called upon the two countries “to continue to carry out bilateral negotiations and consultations” in order to find a political solution to their disagreement.¹⁵⁶ During the advisory proceedings, China continued to display some degree of ambivalence, inviting the States concerned “to act in good faith, and seek appropriate solution to [the] relevant issues through negotiation or any other peaceful means agreed to by both parties.”¹⁵⁷

China had good reasons to be cautious. The subject-matter of the opinion was an ongoing bilateral dispute between two member States of the UN and one of them, the UK, had not consented to submitting it for judicial settlement.¹⁵⁸ In fact, the UK had gone to great lengths to prevent Mauritius from bringing the dispute before the ICJ, unscrupulously amending a clause of its declaration of acceptance of the jurisdiction of the Court which would have otherwise allowed Mauritius to initiate proceedings against it.¹⁵⁹ The challenge to the principle of consent in international adjudication was, therefore, significantly more acute here than it was in the Occupation opinion, and consequently called for a more nuanced approach.

Despite its concerns with the strategies employed by Mauritius, China did not argue, like other States did, that there were compelling reasons for the ICJ to decline to give the opinion. Instead, recognizing that the views of those States were not without merit, China encouraged the ICJ to approach the question of consent in a cautious manner.¹⁶⁰ In particular, China affirmed that if the ICJ were to provide an opinion—something which China did not expressly encourage it to do—it should clearly articulate a set of reasons that, under the specific circumstances,

155. The resolution was passed with 94 votes in favor, 15 votes against, and 65 abstentions. See U.N. GAOR, 71st Sess., 88th plen. mtg. at 18, U.N. Doc. A/71/PV.88 (June 22, 2017).

156. *Id.* at 18–19.

157. Legal Consequences Written Statement (China), *supra* note 90, ¶ 19.

158. Legal Consequences, *supra* note 90, ¶ 83.

159. *A Heartfelt Commitment to the International Rule of Law?*, *supra* note 64, at 160.

160. Legal Consequences Written Statement (China), *supra* note 90, ¶ 14.

would allow it to make a pronouncement in the absence of British consent.¹⁶¹ In this regard, the Chinese written statement referred to a number of General Assembly resolutions which dealt with the question of Mauritius and the status of the Chagos archipelago, as well as to a 2010 resolution that reminded that “it is incumbent on the United Nations to continue to play an active role in the process of decolonization.”¹⁶² In other words, China seized on the historic and ongoing decolonization efforts of the UN to highlight that an important dimension of the bilateral dispute between the UK and Mauritius fell within the scope of activity of the organization.

Through this strategy, China achieved two goals. First, by not urging the Court to decline to give the opinion, it avoided openly assisting the UK’s attempt to evade judicial scrutiny to the detriment of a fellow member of the Global South; second, by asking the Court to tread carefully with regards to the overlap between the legal question before it and the territorial dispute between Mauritius and the UK, it defended the continued relevance of the principle of consent in international adjudication and tried to mitigate the risk of setting a dangerous precedent in the use of advisory opinions.

The way in which the Court ultimately approached the question of consent was largely aligned with the Chinese position.¹⁶³ In keeping with its jurisprudence, the ICJ carefully explained why, on this occasion, the rendering of its opinion would not amount to a circumvention of the principle of consent.¹⁶⁴ In particular, the Court did not deny the existence of a dispute between the UK and Mauritius, but attached greater significance to two facts: first, the fact that its opinion was sought on a matter, i.e. decolonization, which was of particular concern to the U.N.; second, the fact that the purpose of its advice was not to resolve a territorial dispute between two States but, rather, to

161. *Id.* ¶ 18.

162. Legal Consequences Written Statement (China), *supra* note 90, ¶ 1; *see generally* G.A. Res. 2066 (XX) (Dec. 16, 1965); G.A. Res. 2232 (XXI) (Dec. 20, 1966); G.A. Res. 2357 (XXII) (Dec. 16, 1967). *See also* G.A. Res. 65/118, ¶ 9 (Dec. 10, 2010).

163. *See* Legal Consequences, *supra* note 90, ¶¶ 87–91 (establishing the U.N.’s longstanding role in decolonization, thus allowing for an advisory opinion despite British objections).

164. *Id.* ¶ 90.

guide the General Assembly “in the discharge of its functions relating to the decolonization of Mauritius.”¹⁶⁵

In dealing with the actual merits of the opinion, however, the Court did not show the degree of restraint that China had wished for. In an attempt to demarcate the boundary between giving the opinion and resolving the bilateral dispute related to it, China had invited the Court to limit itself to “providing legal guidance to assist the General Assembly in fulfilling” its functions.¹⁶⁶ One way of achieving this delicate balance could have been to determine the applicable law without setting out in detail how that law would apply to the specific circumstances of the case.¹⁶⁷ In a similar way, Germany had asked the Court to limit its opinion “to those aspects of the request that are of relevance for the General Assembly in order for it to exercise its competences on issues of decolonization,” refraining, in particular, from elaborating on the legal consequences and remedies deriving from its findings.¹⁶⁸ Instead, the ICJ did more than simply clarify the relevant legal framework. After establishing that the process of decolonization of Mauritius was not lawfully completed at the time of independence, it deliberated that, first, the UK administration of the archipelago was unlawful and, second, that the islands should be returned to Mauritius.¹⁶⁹

It would be wrong to describe China’s approach to this opinion as that of a fence-sitter. China could have simply abstained from participating in these proceedings given the difficult position in which it found itself. The fact that it chose to intervene despite having to reconcile two conflicting objectives as part of its legal strategy is indicative of a growing commitment to both developing a sphere of political and economic influence in the developing world and playing a more active role in international legal

165. *Id.* ¶ 86.

166. Legal Consequences Written Statement, *supra* note 90, ¶ 13.

167. Sienho Yee, *Notes on the International Court of Justice (Part 7) - The Upcoming Separation of the Chagos Archipelago Advisory Opinion: Between the Court’s Participation in the UN’s Work on Decolonization and the Consent Principle in International Dispute Settlement*, 16 *CHINESE J. INT’L L.* 635, 639 (2017).

168. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Written Statement of Germany, ¶¶ 146–47, 155 (Jan. 15, 2018), <https://www.icj-cij.org/files/case-related/169/169-20180115-WRI-01-00-EN.pdf>.

169. Yee, *supra* note 167, ¶ 130.

discourse. It is also worth noting that China eventually made its position on this matter more explicit. In May 2019, the General Assembly adopted a resolution which welcomed the Court's opinion and demanded that the UK withdraw its colonial administration from the Chagos archipelago within a six-month deadline.¹⁷⁰ By voting in favor of that resolution, China endorsed the legitimacy of the Court's decision to issue the opinion, and called on the UK to fully comply with it.¹⁷¹

VI. INTERVENTION IN CONTENTIOUS CASES: A POSSIBLE WAY FORWARD?

Having discussed China's engagement with the advisory activities of the ICJ, the final section of the article will consider whether conditions could be ripe for China to experiment with intervention in the context of the Court's contentious jurisdiction. Historically, there have only been a few attempts to intervene in contentious proceedings, with most of them being rejected by the ICJ.¹⁷² Nevertheless, recent developments have ignited a new interest in this form of incidental participation, making this discussion particularly timely.

At the outset, it should be noted that a State willing to intervene as a non-party in a contentious case can do so via either Article 62 or Article 63 of the Court's Statute.¹⁷³ Setting a higher

170. G.A. Res. 73/295, ¶ 2(d) (May 24, 2019).

171. Meetings Coverage, General Assembly, General Assembly Welcomes International Court of Justice Opinion on Chagos Archipelago, Adopts Text Calling for Mauritius' Complete Decolonization, U.N. Meetings Coverage GA/12146 (May 22, 2019) <https://press.un.org/en/2019/ga12146.doc.htm>. See, also, a 2021 statement of the Foreign Ministry Spokesperson calling on the UK "to implement the 2019 International Court of Justice advisory opinion on the Chagos Archipelago as soon as possible and return Chagos to Mauritius at an early date to complete the decolonization of Mauritius." *Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on December 15, 2021*, S. CHINA SEA ISS. (Dec. 15, 2021) https://www.fmprc.gov.cn/nanhai/eng/fyrbt_1/202112/t20211215_10470159.htm.

172. Beatrice Bonafe, *The Collective Dimension of Bilateral Litigation: The Ukraine v Russia Case Before the ICJ*, 26 QUESTIONS INT'L L. 27, 27–28 (Nov. 30, 2022).

173. See generally George Barrie, *Third-Party State Intervention in Disputes before the International Court of Justice: A Reassessment of Articles 62 and 63 of the ICJ Statute*, 53 COMPAR. & INT'L L. J. S. AFR. 1 (2020); Terry Gill, *Third Party Intervention in Contentious Proceedings at the International Court within the Context of Litigation*

threshold for participation, Article 62 permits a State to intervene if “it has an interest of a legal nature which may be affected by the decision.”¹⁷⁴ As explained by the ICJ, this requires more than a mere interest “*in the general legal rules and principles likely to be applied by the decision.*”¹⁷⁵ The interest invoked by the intervening State must in fact be the “*object of a real and concrete claim of that State, based on law, as opposed to a claim of a purely political, economic or strategic nature.*”¹⁷⁶ In a less stringent manner, Article 63 provides that a State that is a party to a convention, the construction of which is at the center of a dispute, has a right to intervene in the relevant proceedings.¹⁷⁷ In other words, a State intervening under Article 63 does not have to claim a specific legal interest in the case at hand, since the purpose of the intervention would be to present to the Court its observations on the construction of the convention in question.¹⁷⁸

China has never sought to intervene under either Article 62 or Article 63 of the Statute.¹⁷⁹ By virtue of their less-confrontational nature, however, interventions under Article 63 could represent a natural progression of its earlier participation in the Court’s advisory opinions. This is especially so given the recent surge in Article 63 interventions. In the past few years, a considerable number of States have intervened in a series of cases concerning the Genocide Convention brought by

Strategy, 85 AM. SOC’Y INT’L L. 17, 42 (1991); SERENA FORLATI, THE INTERNATIONAL COURT OF JUSTICE: AN ARBITRAL TRIBUNAL OR A JUDICIAL BODY? 183, 185, 192 (2014).

174. Barrie, *supra* note 173, at 2.

175. Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Application by Nicaragua for Permission to Intervene, Judgment, 1990 I.C.J. 92, ¶ 76 (Sept. 13).

176. Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Honduras for Permission to Intervene, Judgment, 2011 I.C.J. 420, ¶ 37 (May 4).

177. Barrie, *supra* note 173, at 3.

178. Whaling in the Antarctic (Austl. v. Japan), Declaration of Intervention of New Zealand, Order, 2013 I.C.J. 3, ¶ 7 (Feb. 6).

179. Matina Papadaki, *Intervention: International Court of Justice (ICJ)*, MAX PLANCK ENCYC. OF INT’L L. (May 2018), <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3025.013.3025/law-mpeipro-e3025?rkey=yLz5Ta&result=1&prd=MPIL>; see also Juliette McIntyre, *The New Wave of Article 63 Interventions At The International Court Of Justice*, EUR. J. INT’L L.: TALK!, (Aug. 16, 2022), <https://www.ejiltalk.org/the-new-wave-of-article-63-interventions-at-the-international-court-of-justice>.

The Gambia, Ukraine, and South Africa.¹⁸⁰ The participation of third-party States has been particularly striking in *Ukraine v. Russia*, where a total of thirty-three States filed a declaration of intervention.¹⁸¹ Given States' traditional reluctance to intervene in contentious proceedings, and considering the unique features of the three cases mentioned above, it is difficult to say whether, and, if so, to what extent, a new trend towards a regular use of Article 63 will effectively emerge.

It is also worth noting that the Court has recently shown some signs of unease with the strategy and effects of "mass intervention."¹⁸² In March 2024, the ICJ amended the rules governing its practices and procedures with a view to alleviating the burden of interventions on its resources.¹⁸³ First, it introduced a tighter timeline for the submission of such requests. Then, to prevent large numbers of States from presenting the same legal arguments in the course of the same proceedings, it granted itself the power to decide whether an intervening State will be allowed to make an oral submission.¹⁸⁴

It remains to be seen whether these limitations will have a chilling effect on States' willingness to participate. That said, should the practice of intervening—at least via written submissions—continue to consolidate, China would be in a good position to begin experimenting with it. This, of course, does not

180. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gam. v. Myan.*), Application Instituting Proceedings and Request for Provisional Measures, 2019 I.C.J. 2, ¶ 120 (Nov. 11); Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukr. v. Russ.*), Application Instituting Proceedings, 2022 I.C.J. 2, ¶¶ 4, 6 (Feb. 26); Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*S. Afr. v. Isr.*), Application Instituting Proceedings and Request for the Indication of Provisional Measures, 2023 I.C.J. 1, ¶¶ 8–10 (Dec. 29).

181. I.C.J. Press Release No. 2023/27, *supra* note 180.

182. Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukr. v. Russ.*), Written Observation (*Russ.*), 2023 I.C.J. 1, ¶¶ 8, 10, 21 (Jan. 30).

183. Amendments to Articles 81, 82, and 86 of the Rules of Court, Press Release, 2024 I.C.J. 18 (Feb. 28); Juliette McIntyre, *The ICJ Changes the Rules for Intervention*, EUR. J. INT'L L.: TALK! (Mar. 11, 2024), <https://www.ejiltalk.org/the-icj-changes-the-rules-for-intervention/>.

184. McIntyre, *supra* note 183.

mean that China, a “litigation-averse”¹⁸⁵ country committed to non-interference in other States’ internal affairs, would enthusiastically embroil itself in other countries’ disputes. This is even more so considering the political sensitivity of many of the cases that land on the docket of the ICJ.¹⁸⁶ In this sense, any State contemplating intervention needs to navigate complex legal, political, and diplomatic issues. Yet, under certain circumstances, it would not be unconceivable for China to intervene as a non-party in contentious proceedings in order to cultivate discourse power, advance its interests, and familiarize itself further with the ICJ.¹⁸⁷

In bringing third-party intervention at the ICJ to the forefront, the recent cases mentioned above have also highlighted a number of factors that may contribute to determining a case’s suitability for Chinese intervention, including the number of States involved and the positions they take, the political repercussions of standing shoulder-to-shoulder with a particular State, and the potential effects of participation on the proceedings in question. First, a large number of interventions are more likely to prompt action through emulation. In particular, the participation of other permanent members of the Security Council could be a strong motivating factor for China. On the other hand, the level of political exposure associated with being the only major power to advance a certain legal argument could weigh against intervention. Second, an intervening State is not only addressing complex legal nuances before the Court, but is also taking sides in a dispute.¹⁸⁸ In this sense, “who supports whom” carries considerable political significance. For example, supporting a State whose conduct has provoked a chorus of international condemnation could lead to reputational damage and diplomatic isolation. In such situations, intervening based on political ties or shared views on certain issues of international law would not

185. CAI, *supra* note 20, at 267.

186. See generally Ambassador Juan Manuel Gomez-Robledo Verduzco, *The International Court of Justice: A Bright Light in Dark Times*, JUST SEC. (Oct. 24, 2022), <https://www.justsecurity.org/83723/the-international-court-of-justice-a-bright-light-in-dark-times/>.

187. C.M. Chinkin, *Third-Party Intervention Before the International Court of Justice*, 80 AM. J. INT’L L. 514–16 (1986).

188. *Id.*

necessarily align with the national interest. Third, the nature of the proceedings in which intervention is sought must also be considered. China has no desire to expand the scope of the Court's judicial activity, especially by encouraging progressive forms of litigation that risk unsettling the ICJ's traditional model of dispute settlement.¹⁸⁹ For example, applications that creatively seek to bypass the lack of consent of the respondent State to the jurisdiction of the Court¹⁹⁰ as well as lawsuits that aim to vindicate "public interests" as opposed to the interests of a directly injured State are not seen favorably by China.¹⁹¹ This can have important implications on its intervention strategies since the perceived illegitimacy of a proceeding tends to discourage participation for the risk of legitimizing the process and validating the tactics that lay behind it.

A final point worth noting relates to China's experience with the WTO. In 2001, in order to further integrate into, and benefit from, the world economy, China joined the WTO and accepted, among other things, its compulsory and binding dispute settlement system.¹⁹² Over time, China acquired greater confidence in operating within that system and increased both the quantity and quality of its engagement.¹⁹³ As a result, China has, as of October 2024, participated in 274 WTO disputes: as a complainant in 27 cases, and as a respondent in 50 cases.¹⁹⁴ Remarkably, China has intervened as a third party in as many as 197 cases.¹⁹⁵ This striking record has been driven by two main

189. Zhang Hua, *Zhōngguó Dāngdài Guójì Zhìxù Guān de Fǎlǐ Jīchǔ* [*The Juridical Basis for China's Contemporary Conception of the International Legal Order*], 40 *STUD. L. & BUS.* 45, 58 (2023).

190. Mark Milanovic, *ICJ Delivers Preliminary Objections Judgment in the Ukraine v. Russia Genocide Case, Ukraine Loses on the Most Important Aspects*, *EUR. J. INT'L L.: TALK!* (Feb. 2, 2024), <https://www.ejiltalk.org/icj-delivers-preliminary-objections-judgment-in-the-ukraine-v-russia-genocide-case-ukraine-loses-on-the-most-important-aspects/>.

191. Liao Xuexia, *Duì Guójì Shèhuì Zhèngtǐ de Yìwù" yǔ Guójì Fǎyuàn de Guǎnxiá* [*Obligations Erga Omnes and the Jurisdiction of the International Court of Justice*], 6 *INT'L L. RSCH.* (2020).

192. CAI, *supra* note 20, at 285, 289.

193. *Id.* at 289.

194. *Disputes by Member*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Oct. 17, 2024).

195. *Id.*

objectives. First, as a major trading partner, China has a systemic interest in the disputes arising within the organization and, for that reason, seeks to ensure that its voice is heard at the table to the greatest extent possible.¹⁹⁶ Second, intervening as a third party has provided China with an opportunity to learn from and become familiar with the WTO dispute settlement system, which paves the way for more direct forms of engagement with it. More generally, the experience with the WTO has been crucial for advancing China's capacity-building in dispute settlement and has already informed the country's practice in other areas such as that of investor-state arbitration.¹⁹⁷ Similarly, then, China could build on its WTO experience to develop a greater sense of confidence in its interaction with the ICJ's dispute resolution mechanism, ultimately strengthening its position as an "international law power" on the global stage.

VII. CONCLUSION

Sovereignty concerns and political sensitivities more often than not prevent States from utilizing the ICJ to settle their disputes. That said, a policy of complete disengagement with the Court can be detrimental for a major power which seeks to maintain or enhance its standing in the world. As the primary judicial body of the UN, the ICJ plays an important role in interpreting and developing international law, which, in turn, serves as a legitimizing framework for States' actions. In this sense, the ICJ provides great powers with an avenue to influence global perceptions and interpretations of international law in ways that better align with their interests and values.

Against this background, this article has analyzed how China, driven by the ambition to enhance its discourse power in international law, has begun to interact systematically with the judicial activities of the Court. Three key themes have emerged from this examination. Firstly, China has thus far favored engaging with the ICJ in its advisory capacity. This is not

196. CAI, *supra* note 20, at 290.

197. Ignacio de la Rasilla & Yayezi Hao, *China and International Dispute Settlement by Adjudicative and Other Means*, in THE CAMBRIDGE HANDBOOK OF CHINA AND INTERNATIONAL LAW 497, 508 (Ignacio de la Rasilla & Congyan Cai eds., 2024).

surprising given that advisory proceedings offer States a concrete opportunity to influence judicial pronouncements without having to pay the potentially high costs of direct litigation. Furthermore, participating in the advisory opinions of the ICJ is not only compatible with Beijing's characteristic commitment to non-interference in the internal affairs of other States but also enhances the image of China as a country that contributes responsibly to addressing global legal issues. Secondly, the way in which China positioned itself on the political and legal issues at the heart of the opinions examined in this article shows a growing confidence in challenging the views of States that have traditionally dominated international legal discourse. Politically, China saw the proceedings on Kosovo, the Chagos islands, and Israel's occupation of Palestinian territory as an opportunity to take a stance on important global issues while strengthening its influence in the respective regions. Legally, it intervened in those opinions to protect core national interests such as the inviolability of the principle of territorial integrity and the prerogative of a sovereign State to determine its preferred method of dispute resolution. Thirdly, while thus far confined to the advisory jurisdiction of the ICJ, China's practice may well evolve and harden into bolder forms of participation connected with the contentious jurisdiction of the Court. In particular, by allowing a State to partake in the process of legal interpretation of a convention at the center of a contentious case without having to become a party to it, interventions under Article 63 of the ICJ Statute represent an attractive method for shaping global interpretations of international law. In this sense, should a clear trend towards the use of third-party intervention emerge, China would be in a good position to experiment with it, building also on its previous experience with the WTO dispute settlement mechanism.

Inevitably, the nature and extent of China's participation in the judicial activities of the ICJ will be determined in each case by a combination of factors driven by national interests. This new trajectory is not without its pitfalls, especially for a country which strenuously defends the consent-based nature of international adjudication amidst concerns of judicial overreach. Nonetheless, active engagement with the ICJ represents a significant addition to China's repertoire of strategies to exert greater influence over

the formulation and development of international law. As such, the way in which China will approach the opportunities and challenges that come with an increased involvement with the Court warrants continued scholarly attention.