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## Competing Claims: The Developing Role of International Law and Unilateral Challenges to Maritime Claims in the South China Sea

Kevin Leddy

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# Competing Claims: The Developing Role of International Law and Unilateral Challenges to Maritime Claims in the South China Sea

## ABSTRACT

*Chinese military and economic expansion have led to a commensurate decrease in the ability of neighboring countries to object to excessive maritime claims in the South China Sea. The existing framework of international law under the United Nations Convention on the Law of the Sea provides an anchoring point for coastal states' legal claims to the region, but it does not adequately address the complicated diplomacy challenges created by unilateral military action and unique geographical issues, such as artificial islands. Gradual acquiescence to maritime claims that do not comply with international law results from these conditions. Once these boundaries are lost, they cannot easily be regained. This Note analyzes coastal states' legal arguments in the South China Sea dispute and concludes that international law in its current form cannot effectively regulate excessive maritime claims. It argues that unilateral objection to excessive maritime claims in the form of freedom of navigation operations can maintain the status quo and provide a temporary solution until the dispute resolution process under international law is improved. Finally, this Note offers predictions as to how permanent solutions to the problem of international law's failure may look in the region.*

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## I. INTRODUCTION

In August 2019, former White House National Security Adviser John Bolton admonished China's use of coercion and "bullying tactics" to intimidate neighboring countries out of resource development rights in the South China Sea on Twitter.<sup>1</sup> The White House's criticism of efforts by the People's Republic of China (China) to forcibly increase its maritime presence in the region represents yet another flashpoint in the escalating conflict over strategic waterways and landmasses in the 3.5 million square kilometer area of ocean that spans from the Gulf of Tonkin in the Northwest to the coastal borders of Malaysia and Brunei

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1. John Bolton (@AmbJohnBolton), TWITTER (Aug. 20, 2019, 7:41 AM), <https://twitter.com/AmbJohnBolton/status/1163793051128672256> [<https://perma.cc/Y59R-AJX9>] (archived March 13, 2021).

in the East.<sup>2</sup> China's assertion of its right to disputed waters and landmasses, combined with the competing assertions of regional claimants and Western powers with security interests in the area, has escalated the South China Sea into a region of major strategic importance.<sup>3</sup>

The South China Sea carries one third of global maritime traffic and an estimated \$5 trillion in international trade annually.<sup>4</sup> Lucrative fisheries and oil supply routes carry nearly 80 percent of China's crude oil imports through disputed waters in the area.<sup>5</sup> Additionally, several estimates predict that bedrock in the South China Sea contains oil and natural gas reserves roughly equal to those of Mexico, making it one of the most important waterways of the twenty-first century.<sup>6</sup>

For centuries, these waters have been vital to the economic survival of neighboring Vietnam, Brunei, Malaysia, and the Philippines, each of which made political declarations of ownership in various pieces of the region to support domestic fishing operations, oil extraction, and territorial interests.<sup>7</sup> China, however, asserts territorial claims in the region based on historically ambiguous documents that it claims prove an original territorial interest in the region as far south as the Paracel and Spratly Islands near the Philippines.<sup>8</sup> In the past half-century, China's growth as an economic and military power on the global stage coincided with land-grabbing and island-building campaigns to assert territorial control of the region, often resulting in conflicts with claimant countries and non-claimants who hold security interests in the area.<sup>9</sup> Indeed, just months into former President George W. Bush's first term, a Chinese fighter jet collided with an American spy plane, and during former President Obama's presidency the USNS *Impeccable*, an American surveillance

2. See Jing Huang & Sharinee Jagtiani, *Introduction: Unknotting Tangled Lines in the South China Sea Dispute*, in TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: NAVIGATING ROUGH WATERS 1, 1 (Jing Huang & Andrew Billo eds., 2015).

3. See Christopher Joyner, *The Spratly Islands Dispute in the South China Sea: Problems, Policies, and Prospects for Diplomatic Accommodation*, in INVESTIGATING CONFIDENCE BUILDING MEASURES IN THE ASIA-PACIFIC REGION 53, 53 (Rajeet K. Singh ed., 1999).

4. See *id.* at 55.

5. See Leszek Buszynski, *The Origins and Development of the South China Sea Maritime Dispute*, in THE SOUTH CHINA SEA MARITIME DISPUTE: POLITICAL, LEGAL AND REGIONAL PERSPECTIVES 1, 10, 11 (Leszek Buszynski & Christopher B. Roberts eds., 2015).

6. See Joyner, *supra* note 3, at 67–68.

7. See, e.g., Nguyen Thi Lan Anh, *Origins of the South China Sea Dispute*, in TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: NAVIGATING ROUGH WATERS, *supra* note 2, at 15, 17–18 (Jing Huang & Andrew Billo eds., 2015).

8. See Buszynski, *supra* note 5, at 7.

9. See Jonathan G. Odom, *A China in the Bull Shop? Comparing the Rhetoric of a Rising China with the Reality of the International Law of the Sea*, 17 OCEAN & COASTAL L. J. 201, 202 (2012).

ship, had to be escorted through the region by a guided-missile destroyer after being told to leave an area south of Hainan island in the Gulf of Tonkin.<sup>10</sup>

Claimant countries and interested non-claimants have largely resorted to international law to address Chinese aggression in the region.<sup>11</sup> Many countries have urged Beijing to abide by the United Nations Convention on the Law of the Sea (UNCLOS), which sets zones of control based on areas of coastline.<sup>12</sup> China, however, views UNCLOS as incompatible with its domestic laws and rights to its claims in the South China Sea that it has established throughout history.<sup>13</sup> Even after a five-judge panel in the Hague unanimously rejected the legal basis of China's maritime claims,<sup>14</sup> China's Supreme People's Court issued a regulation stating that China has a clear legal basis to safeguard maritime order in the disputed region.<sup>15</sup> Attempts to maintain the status quo through political concessions by the Association of Southeast Asian Nations (ASEAN) have only led to more aggressive land-grabbing and assertions of territory that effectively cannot be revoked.

This Note analyzes the approaches that neighboring ASEAN claimants, non-claimant states with security interests, and international organizations have adopted to address the unique challenges that Chinese territorial claims have created for international law in the South China Sea. It argues that unilateral challenges to excessive territorial claims around islands and other strategic formations in the regions are necessary to curtail Chinese aggression in the region where international law has been insufficient to solve these problems. Part II details the South China Sea conflict against the backdrop of UNCLOS and the unique challenges that the complicated geopolitical characteristics of the region create in its implementation. Part III analyzes the developing territorial assertions of China and neighboring ASEAN countries, such as Vietnam and the Philippines, concluding with an analysis of the Chinese government's dismissal of the *Philippines v. China* arbitral decision that existing dispute resolution systems under UNCLOS are presently inadequate

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10. See *id.* at 229–34.

11. See, e.g., Robert T. Kline, *The Pen and the Sword: The People's Republic of China's Effort to Redefine the Exclusive Economic Zone Through Maritime Lawfare and Military Enforcement*, 216 MIL. L. REV. 122, 144–45 (2013) (arguing that the Chinese government's historical claims are difficult to square with existing customary international law).

12. See, e.g., *id.* at 149.

13. See *id.* at 150 (“China seeks to create a self-enforced precedent under international law”).

14. See Joseph M. Isanga, *Philippines v. China Aftermath: Rule of Law and Legitimacy Under Assault*, 45 SYRACUSE J. INT'L L. & COM. 147, 150 (2018).

15. See James Griffiths, *South China Sea: Beijing vows to prosecute 'trespassers'*, CNN (Aug. 2, 2016, 2:05 PM), <https://www.cnn.com/2016/08/02/asia/south-china-sea-supreme-court/index.html> [<https://perma.cc/V762-RL8U>] (archived Feb. 21, 2021).

to stop territorial losses. Finally, Part IV argues that unilateral protest in the form of freedom of navigation operations by interested parties in the region is a viable temporary solution to the problems posed by the existing principles and dispute resolution mechanisms of international law and offers predictions and recommendations for permanent solutions in the region.

## II. THE SOUTH CHINA SEA DISPUTE AGAINST THE BACKDROP OF INTERNATIONAL LAW

The South China Sea dispute has escalated considerably over the past five decades.<sup>16</sup> Although Beijing's assertions of Chinese claims in the region have been remarkably consistent over time, neighboring ASEAN states, interested non-claimants, and international organizations with security and trade interests in the region have varied their responses to these claims.<sup>17</sup> The conflict can thus be framed by surveying competing maritime boundary claims in the region and differentiating between the legal and political responses that interested actors have employed in response to excessive Chinese maritime claims.<sup>18</sup>

### A. A Snapshot of the Dispute

The South China Sea is one of the most consequential geopolitical regions in the world today.<sup>19</sup> It is more than eight hundred thousand square miles in area, teems with natural resources, and is one of the most consequential maritime commerce regions in the world.<sup>20</sup> The region contains important sea communication lines and is the site of one of the most important strategic geographic chokeholds, the Strait of Malacca, a frequent forum for standoffs between the naval forces of the United States and China.<sup>21</sup> Former Secretary of State Hillary Clinton once summarized the strategic importance of the region and the dangers of increased Chinese assertiveness during her remarks at an ASEAN regional forum in Hanoi: "The United States has a national interest in freedom of navigation, open access to Asia's maritime commons and respect for international law in the South China Sea."<sup>22</sup>

16. See Joyner, *supra* note 3, at 55.

17. See Buszynski, *supra* note 5, at 7–8.

18. See *id.* at 5.

19. See, e.g., Huang & Jagtiani, *supra* note 2.

20. See Joyner, *supra* note 3, at 55.

21. See *id.*

22. Mark Landler, *Offering to Aid Talks, U.S. Challenges China on Disputed Islands*, N.Y. TIMES (July 23, 2010), [https://www.nytimes.com/2010/07/24/world/asia/24diplo.html?\\_r=0](https://www.nytimes.com/2010/07/24/world/asia/24diplo.html?_r=0) [https://perma.cc/3JAP-QD8J] (archived Feb. 21, 2021).

Experts disagree over the historical catalyst for the Chinese government's aggressive assertion of maritime claims over nearly the entire region.<sup>23</sup> This Note will not attempt to go into great detail about the historical origins of China's assertion of maritime boundaries encompassing many of the islands, reefs, and shoals in the region, as numerous scholars have already created an excellent body of work that details the history of the South China Sea.<sup>24</sup> A general overview of China's historical claims, however, is useful to put an analysis of such arguments in context. In 1947, the government of China, led by Nationalist leader Chang Kai-Shek, published a map of the South China Sea.<sup>25</sup> This map included a U-shaped line of eleven dashes and encompassed nearly all of the South China Sea, including the Pratas Islands, the Macclesfield Bank, and the Spratly Islands, with the southern-most tip of the line touching James Shoal, which is as far south as 4 degrees north latitude.<sup>26</sup> The map gave Chinese names to 132 islands, reefs, and other features in the area.<sup>27</sup> Historical evidence demonstrates that the U-shaped line was intended to be the median line between China and the other coastal states in the region, but the Chinese government did not specify the intended baselines for this delineation.<sup>28</sup> The eleven-dash-line was inherited by the communist government of China and is the basis of the Chinese government's claims in the region today,<sup>29</sup> although two dashes were removed in the Gulf of Tokin in 1953 by order of Zhou Enlai as a concession to the communist government in North Vietnam.<sup>30</sup> Appendix 1 shows China's current U-shaped claim delineation, which is commonly referred to as the "U-Shaped Line" or the "nine-dash-line."<sup>31</sup>

It is commonly accepted that the nine-dash-line represents the Chinese government's claim for islands and surrounding waters within the line, but Beijing has been unclear about the claim's dimensions, which islands and reefs are included, and how far each island's coastal rights extend.<sup>32</sup> China used the nine-dash-line in an official communication for the first time in May 2009 when it attached a map of the region to its diplomatic note to the UN Commission on the Limits of the Continental Shelf in protest against Vietnamese and Philippine

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23. See Joyner, *supra* note 3, at 59.

24. See, e.g., TERRITORIAL DISPUTES, *supra* note 7, at 59–64.

25. See Peter Dutton & John Garofano, *China Undermines Maritime Laws*, 172 FAR EASTERN. ECON. REV. 44, no. 3, 2009, at 45; Li Jinming & Li Dexia, *The Dotted Line on the Chinese Map of the South China Sea: A Note*, 34 OCEAN DEV. & INT'L L. 287, 287, 291 (2003).

26. See Buszynski, *supra* note 5, at 6.

27. See *id.*

28. See *id.*

29. Dutton & Garofano, *supra* note 25.

30. See Buszynski, *supra* note 5, at 6.

31. See *id.* at 6–7.

32. See *id.* at 7; Jinming & Dexia, *supra* note 25, at 291.



claims to their outer continental shelves.<sup>33</sup> China's infrequent use of the nine-dash-line in its official capacity has led to numerous disputes over the boundary of its claims, as maps must be incorporated into a treaty and conform to boundary definitional requirements to have legal validity.<sup>34</sup> The Chinese have since convened teams of experts from Taiwan and the mainland to strengthen the country's claims in the region and give the international community a legal explanation of the nine-dash-line.<sup>35</sup> Although its legal basis has been contested multiple times for the reasons mentioned above, according to the Chinese government, the nine-dash-line is merely representative of a historical sense of entitlement, which gives China uncontroverted sovereignty over the region.<sup>36</sup>

Because the nine-dash-line is only representative of a historical sense of entitlement to the area, the Chinese government in recent years has attempted to bolster the legitimacy of its claims through its own interpretation of international law<sup>37</sup> and unilateral action in the region to ensure Chinese presence in disputed areas.<sup>38</sup> For example, Chinese scholars declared shipping and resource exploitation boundaries around islands and other formations in the Paracel Islands area, a right that is normally reserved for archipelagic states, which China is not.<sup>39</sup> Additionally, Chinese legal scholars asserted that even if the nine-dash-line is inaccurate, legal claims to the area are valid through the principles of recognition, estoppel, and title by treaty.<sup>40</sup> Although commentators agree that China may have legitimate claims in parts of the South China Sea, particularly in the Paracel Islands, Beijing's overinclusive response to the international community's assertion that some of China's claims should be curtailed is probably an effort to fit its maritime boundary assertions into its own interpretation of the existing international legal framework.<sup>41</sup>

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33. See Zou Keyuan, *China's U-Shaped Line in the South China Sea Revisited*, 43 OCEAN DEV. & INT'L L., no. 1, 2012, at 18.

34. See Masahiro Miyoshi, *China's "U-Shaped Line" Claim in the South China Sea: Any Validity Under International Law?*, OCEAN DEV. & INT'L L., no.1, 2012, at 3, 4.

35. See Buszynski, *supra* note 5, at 7.

36. See *id.*

37. See *id.* ("[the Chinese government] has attempted to apply its own interpretation of UNCLOS in support").

38. See Sean P. Belding, Comment, *China's Island Building in the South China Sea: Collateral Effect on the UNCLOS and Potential Solutions*, 40 HOUS. J. INT'L L. 1003, 1012 (2018) (describing some of the tensions that China's island-building and military campaigns have created in the region).

39. See Hungdah Chui, *South China Sea Islands: Implications for Delimiting the Seabed and Future Shipping Routes*, 72 CHINA Q. 743, 748 (1977).

40. See Zhiguo Gao & Bing Bing Jia, *The Nine Dash Line in the South China Sea: History, Status, and Implications*, 107 AM. J. INT'L L. 98, 115–17 (2013) (detailing that Chinese officials have asserted the concept of title by treaty in reference to the 1887 Sino-French boundary treaty that "recognized China's sovereignty over the islands east of the demarcation line" and conferred a title by that recognition").

41. See Belding, *supra* note 38, at 1012–13.

In addition to its legal claims of varying degrees of legitimacy, the Chinese government has attempted both unilateral island-building and militarization to bolster its presence in the region.<sup>42</sup> In the Spratly Islands, for example, the Chinese military has begun reinforcing existing shoals and reef formations with platforms and helicopter landing pads to create small military outposts.<sup>43</sup> These man-made formations, unable to sustain life in their natural state, have gone from shallow, partially underwater features that were once part of larger islands, to possibly meeting the definition of a discrete island under UNCLOS, bolstering China's argument for the expansion of maritime boundaries around some of the most hotly contested areas of the South China Sea.<sup>44</sup> If Beijing is able to successfully argue that these man-made features—in some cases only able to sustain a few soldiers at a time through helicopter supply deliveries on a weekly basis<sup>45</sup>—are in fact discrete islands or other landforms under UNCLOS definitions, Chinese maritime claims may be rapidly expanded by anchoring territorial delineations around man-made formations to existing maritime boundaries.<sup>46</sup>

Additionally, Chinese military aggression in the region has increased in recent years. In 2012, Chinese ships cut a Vietnamese ship's survey cables in Vietnamese waters in an area between the south-central coast of Vietnam and China's Hainan Island, triggering an international incident.<sup>47</sup> This is one of the many examples of Chinese aggression in the region, which include standoffs between Chinese vessels and those of neighboring claimants and Western countries that undermine the freedom of navigation principles outlined in the international charter on the law of the sea.<sup>48</sup> The combination of Chinese aggression and China's challenges to existing international law in the region has created heightened security concerns within

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42. See Dr. Imogen Saunders, *Artificial Islands and Territory in International Law*, 52 VAND. J. TRANSNAT'L L. 643, 644 (2019) (surveying China's reclamation of 3,200 acres of land in the Spratly Islands archipelago to build artificial structures around existing maritime features).

43. See Marius Gjetnes, *The Spratlys: Are They Rocks or Islands?*, 32 OCEAN DEV. & INT'L L. 191, 200 (2001) (describing the presence of military establishments on small islands in the Spratly island chain).

44. See *id.* (conceding that the presence of a military establishment on a man-made formation could meet the definition of an island under UNCLOS, legitimizing claims to expand maritime boundaries past existing claims in the region).

45. See Manuel Mogato, *Exclusive: Philippines Reinforcing Rusting Ship on Spratly Reef Outpost*, REUTERS (July 13, 2015) <https://www.reuters.com/article/uk-southchinasea-philippines-shoal-exclu-idAFKCN0PN2IY20150713> [<https://perma.cc/Y6PL-CSWX>] (archived Feb. 21, 2021) (noting that most outposts in the region need to have supplies shipped to them to sustain human life).

46. See Saunders, *supra* note 42, at 644, 680.

47. See *Vietnam accuses China in seas dispute*, BBC (May 30, 2011), <https://www.bbc.com/news/world-asia-pacific-13592508> [<https://perma.cc/6Z3Q-92GZ>] (archived Feb. 21, 2021).

48. See Buszynski, *supra* note 5, at 5.

neighboring Asian countries and Western countries with security interests in the area.

### B. *The Dispute in the Context of International Law*

China has used other bases to defend its claims in the South China Sea to the international community.<sup>49</sup> For example, the U-shaped delineation line is based almost entirely on what Beijing characterizes as historical accession, a justification that has been traditionally characterized as a weak basis of asserting territorial claims under international law.<sup>50</sup> Thus, Chinese officials have sought to apply their own interpretation of UNCLOS to support the country's maritime claims to nearly the entire region.<sup>51</sup> The following subparts will outline the basic legal framework of China's massive claims under its own interpretation of UNCLOS and the validity of the claims under international law.

#### 1. Overview of UNCLOS

Signed and opened to ratification on December 10, 1982, UNCLOS is a multilateral international agreement that defines the rights and responsibilities of nations in the world's oceans and overlying airspace.<sup>52</sup> In an effort to codify what had been known as customary international law, UNCLOS combined traditional international law concepts with progressive new legal concepts such as Exclusive Economic Zones (EEZs) and methods for delineating a nation's continental shelf.<sup>53</sup> UNCLOS creates a set of rules for the establishment of territorial seas and other ocean boundaries by coastal nations, defines navigational freedoms within each nation's maritime domain, and establishes dispute resolution mechanisms to resolve competing claims and disagreements between countries with regard to their maritime claims.<sup>54</sup>

Guyana entered UNCLOS into force when it became the sixtieth nation to ratify it.<sup>55</sup> Currently, 168 nations are parties to UNCLOS,

49. *See id.* at 7.

50. *See id.* at 5 (pointing to cases adjudicated in international courts that have rejected an actor's claim to islands based on historical accession).

51. *See id.* at 7.

52. *See The United Nations Convention on the Law of the Sea (A historical perspective)*, UNITED NATIONS: DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, [https://www.un.org/Depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](https://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm) (last visited Oct. 10, 2019) [<https://perma.cc/D8AV-MQ3Q>] (archived Feb. 21, 2021) [hereinafter *UNCLOS Historical Perspective*].

53. Bernard H. Oxman, *Offshore features subject to claims of sovereignty*, in *THE SOUTH CHINA SEA DISPUTES AND LAW OF THE SEA* 8, 8–9 (S. Jayakumar, Tommy Koh & Robert Beckman eds., 2014).

54. *Id.*

55. *See UNCLOS Historical Perspective*, *supra* note 52.

including China, the United Kingdom, Japan, Australia, and Russia.<sup>56</sup> The few states not parties to UNCLOS generally respect its provisions as declaratory of the law of the sea today.<sup>57</sup> Although the United States has never been a party to UNCLOS, former President Ronald Reagan noted in 1983 that the United States views the navigation and overflight provisions of UNCLOS as declarations of international law, and that the United States intended to “exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner consistent with the balance of interests reflected in the convention.”<sup>58</sup>

## 2.Key Operating Provisions of UNCLOS

UNCLOS operates as a mechanism for resolving maritime boundary disputes. It defines the rights and responsibilities of claimant countries underneath, on the surface, and in the air above the world’s oceans.<sup>59</sup> The South China Sea’s geography, collection of state actors, political issues, and related legal arguments make the following issues within UNCLOS particularly relevant: (a) the concept of territorial seas; (b) Exclusive Economic Zones (EEZs); (c) rocks, islands, and reefs; (d) ownership and sovereignty over maritime claim areas; and (e) dispute resolution.

### a. Territorial Seas

The notion of territorial seas determines the boundary between a nation’s land and its territorial waters, which can have significant implications for a country’s specific maritime jurisdiction.<sup>60</sup> UNCLOS attempts to create a method for delineating a state’s territorial sea; Article 3 of the convention states: “[e]very State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines determined in accordance with this Convention.”<sup>61</sup> Under this provision, a coastal

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56. See UNITED NATIONS, CHRONOLOGICAL LISTS OF RATIFICATIONS OF, ACCESSIONS AND SUCCESSIONS TO THE CONVENTION AND THE RELATED AGREEMENTS (2019), [https://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](https://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm) [<https://perma.cc/GUF9-B7R8>] (archived Feb. 21, 2021).

57. Oxman, *supra* note 53, at 10.

58. Presidential Statement on United States Ocean Policy, 1983, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983).

59. See Oxman, *supra* note 53, at 10–11.

60. See Clive Schofield, *Defining the ‘boundary’ between land and sea: territorial sea baselines in the South China Sea*, in THE SOUTH CHINA SEA DISPUTES AND LAW OF THE SEA, *supra* note 53, at 21, 21.

61. United Nations Convention on the Law of the Sea art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

state must establish a baseline to measure the starting point of its territorial sea from a coastal land feature.<sup>62</sup> The baseline is the anchor of any country's maritime claims because it provides a starting point for the measurements of the limits of all other maritime claims that a country may choose to make.<sup>63</sup> Article 5 of UNCLOS articulates the rule for drawing the most common, or "normal," baseline: "[e]xcept where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state."<sup>64</sup> Nearly every baseline will be measured by a country's definition of its low tide watermark and follow the curvature of its coast.<sup>65</sup> UNCLOS is virtually silent as to how a coastal state defines the low-water mark on its coasts, which can vary depending on the type of measurements that a state uses to measure the slope of its coastline, the depths of water on its coast, and the height of tide.<sup>66</sup> Thus, states have no clear standard for measuring their baselines, so each state must choose for itself.<sup>67</sup> In limited cases when states are unable to establish coastal baselines because of particularly complex geographical issues, UNCLOS provides that a state may draw "straight" baselines, rather than baselines delineated by the low tide mark.<sup>68</sup> UNCLOS further provides that straight baselines must be recorded in charts or maps and that the state shall give due publicity in the international community to such charts.<sup>69</sup>

Water inside of a country's baseline is legally equivalent to land for the purposes of a coastal state's complete authority as a sovereign, while water outside of the baseline up to a maximum of twelve nautical miles constitutes a state's territorial sea.<sup>70</sup> Coastal states, subject to some limitations, may exercise sovereign control of their territorial sea, such as the right of innocent passage and safe harbor of ships.<sup>71</sup> Although states have limited control of the area outside of their territorial sea, waters greater than twelve miles away from a coastal

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62. See Schofield, *supra* note 60.

63. See *id.* at 21–22.

64. UNCLOS, *supra* note 61, art. 5 (adopting a near verbatim repetition of Article 3 of the 1958 Convention on the Territorial Sea and Contiguous Zone).

65. See *id.*

66. See Schofield, *supra* note 60, at 23–26 (providing an excellent description of the ways that a coastal state could extend its coastline significantly depending on the use of various measurements).

67. See CHRIS CARLETON & CLIVE SCHOFIELD, INT'L BOUNDARIES RESEARCH UNIT, 3 DEVELOPMENTS IN THE TECHNICAL DETERMINATION OF MARITIME SPACE: DELIMITATION, DISPUTE RESOLUTION, GEOGRAPHICAL INFORMATION SYSTEMS AND THE ROLE OF THE TECHNICAL EXPERT 21–26 (Shelagh Furness ed.) (2002).

68. UNCLOS, *supra* note 61, arts. 6–17; see also Schofield, *supra* note 60 (applying the straight baseline concept to a crescent-shaped atoll that makes delineating the coastal baseline challenging).

69. UNCLOS, *supra* note 61, art. 16.

70. See Schofield, *supra* note 60, at 28–34.

71. UNCLOS, *supra* note 61, arts. 17–26, 41.

state's baseline are subject to considerably less control than the territorial sea, and UNCLOS guarantees freedom of navigation and flight path rights to nations in the water beyond a country's territorial sea.<sup>72</sup> Appendix 2 depicts the concepts of baselines and the zones of maritime jurisdiction under UNCLOS, including a coastal state's territorial sea and Exclusive Economic Zone, discussed below.

#### b. Exclusive Economic Zones (EEZs)

Part V of UNCLOS created the concept of the EEZ, which extends a maximum of two hundred nautical miles from the baseline, over which a coastal state may exercise "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil."<sup>73</sup> In essence, an EEZ represents a resource-related maritime boundary that was designed to protect coastal countries' economic interests over the natural resources contained within it, with the convention focusing on the protection of countries' interests in fishing rights off of their coastal waters.<sup>74</sup> EEZs also notably confer jurisdiction over man-made installations and structures, marine research, and protection of the marine environment to coastal states, subject to UNCLOS terms.<sup>75</sup> In order to further protect the coastal states' economic interests in EEZs, Article 73 allows coastal states to take action, including judicial proceedings, to enforce their claims in an EEZ.<sup>76</sup> In a similar fashion to Article 16's requirement to delineate straight baselines through international publication, Article 75 of UNCLOS requires states to establish the outer limits of their EEZs with charts or lists of geographic points on a map to the international community.<sup>77</sup>

EEZs under UNCLOS provide the opportunity for "rational, well-managed exploitation under an assured authority" of oil, gas, and other economic resources.<sup>78</sup> UNCLOS also provides for enforcement methods within a coastal nation's EEZ, allowing "boarding, inspection, arrest and judicial proceedings," to enforce the economic and resource related rights.<sup>79</sup> EEZs have proven to be a source of contention in the region because nearly every contested landmass, reef, and strategic waterway

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72. *Id.* arts. 58, 87.

73. *Id.* art. 56.

74. Buszynski, *supra* note 5, at 10–16.

75. UNCLOS, *supra* note 61, art. 56.

76. *Id.* art. 73.

77. *Id.* art. 75.

78. See *UNCLOS Historical Perspective*, *supra* note 52.

79. UNCLOS, *supra* note 61, art. 73 (adding that warships are exempted from a coastal state's enforcement actions).

in the South China Sea dispute falls inside of the EEZ of one or more coastal states in the region.<sup>80</sup>

c. Rocks, Islands, and Reefs

Rocks, islands, and reefs, as defined in UNCLOS's provisions, have generated the most vigorous legal debate because each of these features are isolated landmasses that could provide an anchor for a country's legal claim to strategic waters.<sup>81</sup> UNCLOS contains separate legal definitions for "[i]slands" and "rocks," providing that islands can be a method of delineating a coastal state's territorial sea, contiguous zone, EEZ, and continental shelf in accordance with provisions of the convention that apply to coastal land.<sup>82</sup> In other words, islands are just as valuable as coastal land in establishing a country's territorial claims to the most restrictive type of maritime boundary, the EEZ.<sup>83</sup> Although an island is "a naturally formed area of land, surrounded by water, which is above water at high tide,"<sup>84</sup> rocks under UNCLOS are "[unable to] sustain human habitation or economic life of their own."<sup>85</sup> Rocks, by contrast, can delineate the boundaries of a territorial sea, but cannot be used as the justification for the boundary of an EEZ or continental shelf.<sup>86</sup>

As to reefs, Article 6 of UNCLOS creates a clear requirement that in the case of islands with "fringing reefs," the baseline for delineating the territorial sea is the seaward side of the low-water line of the reef.<sup>87</sup> Although this definition is clear, Article 6 places no restriction on the distance that may exist between an island and the seaward low-water line used to delineate its territorial waters.<sup>88</sup> Many of the barrier reefs that claimants in the South China Sea could use to demarcate maritime boundaries of island formations, and consequently their EEZs, are a significant distance from their connecting islands, and could conceivably be used to expand territorial claims.<sup>89</sup>

These definitional discrepancies in the unique environment of the South China Sea have led to the reality that there is no simple formula for defining landmasses in the region, and unresolved legal questions

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80. See Commander Dustin E. Wallace, *An Analysis of Chinese Maritime Claims in the South China Sea*, 63 NAVAL L. REV. 128, 140 (2014).

81. See *id.* at 141.

82. See UNCLOS, *supra* note 61, art. 121.

83. See Wallace, *supra* note 80, at 141.

84. See UNCLOS, *supra* note 61, art. 121.

85. *Id.*

86. *Id.* ("rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.").

87. See *id.* art. 6.

88. See Schofield, *supra* note 60, at 27–33.

89. See *id.*

remain.<sup>90</sup> For instance, should a continuously occupied military garrison on an artificially made platform that UNCLOS would normally define as a rock actually be considered an island?<sup>91</sup> China and other claimants in the region have gradually created military establishments on small islands, and even, in extreme cases, dilapidated ships that would normally be neither unable to sustain life nor are above water at high tide.<sup>92</sup> Although it is generally accepted that military garrisons or outposts are irrelevant to the calculus of whether a landmass can be considered an island, questions about China's creation of tourism sites on the sparsely populated Spratly and Paracel Islands, control of major fishery locations, and artificial island building have left legal arguments untested.<sup>93</sup> Nonmilitary establishments in contested waters could potentially be used as a legal justification for a landmass to be classified as an island although such arguments previously fell well outside of UNCLOS's traditional definitions.

#### d. Ownership and Sovereignty Claims

UNCLOS does not formally create a framework of how sovereignty or ownership of landmasses within disputed maritime boundaries are established.<sup>94</sup> While there are no formal principles for establishing control over maritime boundaries, Commander Dustin Wallace's article notes that general principles of ownership and sovereign control over maritime boundaries can be inferred from the text.<sup>95</sup> Notably, maritime claims must be (1) linked to land features or their equivalent and (2) must be transparent and publicly announced to the international community.<sup>96</sup> Commander Wallace points out that UNCLOS consistently uses the term "coastal State" when referencing maritime claimants and conversely uses the word "State" when discussing non-claimant countries.<sup>97</sup> As noted above, a country's baseline delineates its claims to a certain portion of its maritime boundaries and requires coastal land or equivalent islands as a

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90. See Jian Zhang, *China's South China Sea Policy*, in *THE SOUTH CHINA SEA MARITIME DISPUTE: POLITICAL, LEGAL AND REGIONAL PERSPECTIVES*, *supra* note 5, at 60, 70–74.

91. See Wallace, *supra* note 80, at 141.

92. See, e.g., Gjetnes, *supra* note 43 (describing the presence of military establishments on small islands in the Spratly island chain); see also Mogato, *supra* note 45 (describing a military outpost on a dilapidated ship in contested waters in the Spratly chain maintained by the Philippines).

93. See Wallace, *supra* note 80, at 141 (military garrisons have generally been considered irrelevant in arguments about the definition of islands).

94. See *id.* at 142.

95. See *id.*

96. See *id.*

97. See *id.*



starting reference point.<sup>98</sup> Additionally, as noted above, Articles 16 and 75 require claimants to publish charts or lists of coordinates delineating baselines or outer limits of their territorial waters.<sup>99</sup>

#### e. Dispute Resolution

Conflicting maritime claims under UNCLOS's dispute resolution procedures must be resolved through "equitable solution" or in accordance with the general dispute resolution provisions in UNCLOS part XV.<sup>100</sup> Although Article 74 only applies to EEZ disputes, maritime legal scholars generally agree that its language is applicable to all maritime boundary disputes under UNCLOS.<sup>101</sup> Under Article 2 of the United Nations Charter, all parties must resolve their disputes by peaceful means, and states should not take actions that may "jeopardize or hamper" a final agreement.<sup>102</sup> If a state is unable to resolve a conflict by its own remedial action, a party is allowed to refer the matter to the International Tribunal for the Law of the Sea, the International Court of Justice, or an international arbitration award.<sup>103</sup> No parties in the South China Sea dispute have referred the matter to any international body under part XV of UNCLOS at the time of this writing.<sup>104</sup>

### III. CONFLICTING APPROACHES OF LEGAL CLAIMS IN THE REGION

Each of the claimants in the South China Sea have at one time or another presented vastly different territorial claims in the region under divergent theories of international law and historical entitlement. Although there is certainly some consensus about entitlement to parts of the region, there are far more cases of uncertainty, and consensus is unlikely.<sup>105</sup> None of the claimants in the South China Sea have clarified which features they consider to be islands, rocks, or reefs for example, much less what territorial baselines or maritime territorial zones should apply to each feature in contention.<sup>106</sup> Furthermore, as noted previously, claimant countries have begun establishing military outposts and installments on man-made features such as shipwrecks, or on artificially reinforced reefs

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98. See Schofield, *supra* note 60, at 21.

99. UNCLOS, *supra* note 61, arts. 16, 75.

100. *Id.* art. 74.

101. See, e.g., Wallace, *supra* note 80, at 143 (applying Article 2 of the United Nations Charter to UNCLOS).

102. UNCLOS, *supra* note 61, art. 74.

103. *Id.* pt. XV.

104. See Wallace, *supra* note 80, at 143.

105. See Robert Beckman, *Agora: The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea*, 107 AM. J INT'L L. 142, 151 (contending that consensus is unlikely for many of the features in the region).

106. See *id.*

that are partially underwater in their natural state.<sup>107</sup> Some of these new installations are within two hundred nautical miles of another country's claims, and could theoretically be part of another nation's Exclusive Economic Zone.<sup>108</sup> The resulting lack of consensus in the region has led to numerous theories of entitlement by each country<sup>109</sup> as well as attempts by the international community to resolve the conflict through international law and unilateral military action.<sup>110</sup> This Part will analyze and assess some of the conflicting claims of ASEAN countries in the region, as well as the international response to territorial disagreements through international tribunals, other dispute resolution mechanisms, and military action.

Although other claimants in the South China Sea, including Malaysia, the Philippines, and Vietnam, have made efforts to bring their claims in the region into conformity with UNCLOS, China sought to prove that its claims are valid under multiple legal theories.<sup>111</sup> In some cases, the Chinese government has sought to validate territorial claims under UNCLOS, while in others Beijing asserted that UNCLOS does not apply to particular claims, or that UNCLOS is preempted by the Chinese government's historical claims based on maritime records that are sometimes thousands of years old.<sup>112</sup> By employing what commentators dub "strategic ambiguity" about the breadth and rationale for claims in the region, the Chinese government created several episodes of confusion and conflict that are not easily resolved.<sup>113</sup> This Part will analyze the territorial claims of (1) China, (2) Vietnam, and (3) the Philippines.

### A. China

As noted above, China seems to be taking a two-pronged approach to legitimizing its territorial claims in the South China Sea in the international community, asserting not only that its claims fit the

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107. See, e.g., Gjetnes, *supra* note 43 (noting the presence of military establishments on small islands in the Spratly island chain). See also Mogato, *supra* note 45 (the Philippines has maintained a military outpost on a dilapidated ship in contested waters in the Spratly chain).

108. See Beckman, *supra* note 105.

109. See Buszynski, *supra* note 5, at 7–8.

110. See, e.g., Joshua L. Root, *The Freedom of Navigation Program: Assessing 35 Years of Effort*, 43 SYRACUSE J. INT'L L. & COM. 321, 321 (2016) (assessing the American Freedom of Navigation Program).

111. See Beckman, *supra* note 105, at 152 (explaining that whereas Malaysia, the Philippines, and Vietnam seem to be taking steps to bring their claims into conformity with UNCLOS, China seems to be moving to assert maritime claims on the basis of history as well).

112. See *id.* at 153.

113. See Zhang, *supra* note 90, at 67–70.

proscribed definitions of UNCLOS but also that it has a historical entitlement to its claimed territorial boundaries.<sup>114</sup>

### 1. Historic Entitlement Arguments

China has asserted historic claims of sovereignty over five of the major archipelagic areas in the South China Sea—the Spratly Islands, the Paracel Islands, the Prata Islands, Macclesfield Bank, and Scarborough Reef.<sup>115</sup> As noted above, articles and maps published by the Chinese government depict these features in the region with Chinese names, written in Chinese characters, as far back as points in ancient Chinese history.<sup>116</sup> The main issue raised by such historical claims, however, is that the maps and documents published by the Chinese government that claim to legitimize the country's claims over contested archipelagos, such as the Spratly island chain near the Philippines, are ambiguous as to which features are being claimed and what boundaries are being asserted around them.<sup>117</sup> Some statements suggested that China's historic sovereignty claim extends to all islands, rocks, reefs, and shoals in the five main archipelagos.<sup>118</sup> The map that the Republic of China published in 1947 depicting the original eleven-dash-line, titled "Map on Location of Islands in the South China Sea," suggests that China intended to include each of these islands in its claims to the region.<sup>119</sup> The Chinese government has been ambiguous about the specificity of its historical claims to the region, attaching an amended version of the 1947 map, this time with nine dashes instead of eleven to its *note verbale* response to the joint submission of Malaysia and Vietnam on the two countries' territorial claims in the region,<sup>120</sup> suggesting that it could be asserting claims over the entire area within the nine-dash-line.<sup>121</sup>

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114. See Beckman, *supra* note 105, at 155–56.

115. See Jiangming Shen, *International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands*, 21 HASTINGS INT'L & COMP. L. REV. 1, 3–5 (1997) (Shen uses traditional Chinese names to refer to these locations—their Western names are included in parentheses within the piece and refer to four major archipelagic areas and one isolated island).

116. See Buszynski, *supra* note 5, at 6–7.

117. See Beckman, *supra* note 105, at 155–56.

118. See *id.* at 153.

119. See *id.* at 154 (China likely intended to include each of the islands on the map in its claims).

120. A *note verbale* is a type of diplomatic communication written by an actor in the third person. Unlike other diplomatic messages, a *note verbale* is not signed, but rather includes the initials of a duly authorized signing officer in the lower right-hand corner of the last page of the document. Although it carries the same weight as a signed note, a *note verbale* is traditionally considered to be less formal than an official diplomatic note and is thus the preferred method of communication in diplomatic relations. See YE. V. BORISOVA, DIPLOMATIC CORRESPONDENCE 4 (2013).

121. See Beckman, *supra* note 105, at 155 (describing China's assertion to landforms and "relevant waters" within the nine-dash-line).

## 2. Evolving UNCLOS Arguments

The historical ambiguity of China's claims in the region provides only one piece of the puzzle in assessing the territorial boundaries the Chinese government considers part of its territorial sovereignty. By attaching the map of the nine-dash-line to an official communication circulated to members of the United Nations in adjudication of a claims dispute in the South China Sea, experts reason that China's claims to the region at most include the entirety of the area within the nine-dash-line, and are at the very least tied in some way to the map of historical claims included in the statement.<sup>122</sup> In China's 2009 *note verbale* response to the Philippines and Vietnamese governments' claims, its claims to islands, "adjacent waters," and the "sovereign rights and jurisdiction" of these features suggests that the Chinese government hopes to claim jurisdiction over all maritime space within the nine-dash-line's boundaries.<sup>123</sup> Ultimately, if the Chinese government claims it is entitled to the area within the entire nine-dash-line using historical or contemporaneous legal arguments, it is also possible that it can use features within such boundaries as a justification to expand the boundaries included in the map under the principles of UNCLOS.<sup>124</sup>

The *note verbale* of 2009 garnered critical response from neighboring ASEAN claimants to the region, namely the Philippines government, which responded in a subsequent *note verbale* that UNCLOS does not support a legal basis for any claim to waters within the ambiguously delineated nine-dash-line,<sup>125</sup> other than claims to waters adjacent to islands, which are appropriate under UNCLOS Article 121.<sup>126</sup> This reaction caused the Chinese government to respond with relatively heightened clarity, asserting that the concepts of Exclusive Economic Zones and the continental shelf under UNCLOS support China's claims to the Spratly island chain and "its components," without reference to the nine-dash-line map submitted

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122. See, e.g., *id* (discussions of China's claims to the South China Sea in the aggregate frequently reason that even if the Chinese government does not overtly discuss such arguments in official correspondence, historical reasoning forms the basis of China's proposed boundary lines).

123. Note Verbale CML/17/2009 from the permanent mission of the People's Republic of China to the UN Secretary-General (May 7, 2009).

124. See Buszynski, *supra* note 5, at 17 (positing that Chinese legal claims could appropriate large portions of other ASEAN claimants' territorial claims).

125. See Note Verbale No. 000228 from the Permanent Mission of the Republic of the Philippines to the UN Secretary-General (Apr. 5, 2011), at [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/phl\\_re\\_chn\\_2011.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/phl_re_chn_2011.pdf) [<https://perma.cc/T2E4-4XRS>] (archived Feb. 21, 2021) (objecting to the statements made in China's Notes Verbales CML/17/2009 & CML/18/2009).

126. See Donald R. Rothwell, 1982 *UN Convention on the Law of the Sea and its relevance to maritime disputes in the South China Sea*, in THE SOUTH CHINA SEA MARITIME DISPUTE: POLITICAL, LEGAL AND REGIONAL PERSPECTIVES, *supra* note 5, at 46, 55.

in 2009.<sup>127</sup> All told, the official statements made by the Chinese government about the totality of its claims in the region have been unclear, making it difficult for the international community to assess what the Chinese government considers to be the full extent of its territory in the region.<sup>128</sup> Beijing's attempts to use ambiguity as a tactic in relating its claims to the international community have frustrated the international community's efforts at assessing competing claims in the region, but the official communications can be pieced together to form some evidence as to China's claims. The official 2009 *note verbale* communication that included the attached nine-dash-line and China's ambiguous historical claims to the region suggests that its claims generally follow the path of the nine-dash-line and originated before UNCLOS was enacted.<sup>129</sup> Additionally, the subsequent *note verbale* that Chinese officials released in response to Philippine protest in 2011 asserts, albeit ambiguously, that China should enjoy territorial boundaries that encompass the two-hundred-nautical-mile circle of Exclusive Economic Zone around the entirety of the Spratly Islands.<sup>130</sup> This information at the very least creates a starting point for an analysis of Chinese claims, and should be used as evidence of the Chinese government's intentions in any future dispute resolution forums.

### 3. Chinese Domestic Policy

Chinese domestic policy regarding the South China Sea has also given the international community yet another ambiguous lens into Beijing's claimed territory in the region.<sup>131</sup> Despite claims of "indisputable sovereignty" over the area encompassed by the nine-dash-line, since the signing of UNCLOS in 1982, Beijing has made increasing efforts to bring its body of domestic law into compliance with the new maritime domain.<sup>132</sup> For example, following its ratification of UNCLOS in 1996, the Chinese military engaged in several clashes with Vietnamese and the Philippine navies over Johnson Reef in the Spratly Islands and Mischief Reef in the Paracel Islands.<sup>133</sup> In an aggressive campaign to curtail ASEAN claimants in the region, Beijing promulgated several laws that appear to place Chinese claims within the newly ratified UNCLOS, including the 1992 "Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone" and the 1996 "Law of the People's Republic of China on the Exclusive

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127. See Beckman, *supra* note 105, at 155.

128. See *id.*

129. See Zhang, *supra* note 90, at 72.

130. See Beckman, *supra* note 105, at 156.

131. See Zhang, *supra* note 90, at 62–67.

132. See *id.* at 62.

133. Ian Storey, *Creeping Assertiveness: China, the Philippines and the South China Sea Dispute*, 21 CONTEMP. SE. ASIA 95, 96 (1999).

Economic Zone and Continental Shelf," which attempted to apply UNCLOS principles to areas previously justified by historical entitlement within the nine-dash-line.<sup>134</sup>

The effort by Beijing to bring Chinese domestic policies within the application of UNCLOS represents an attempt to find more moderate solutions to the problem of multiple ASEAN claimants with competing legal claims and a growing realization by Chinese legal experts that strategic ambiguity will not work forever.<sup>135</sup> A number of Chinese legal experts have realized that international law currently prioritizes continuous occupation and effective administration of legal claims over a sense of historical entitlement.<sup>136</sup> Some commentators have in fact argued that islands within the nine-dash-line that have not been continuously occupied by the Chinese government for at least fifty years will lose their historical claims altogether.<sup>137</sup> By this metric, some islands and formations in the Spratly archipelago that China had previously asserted claims to in the 2011 *note verbale* would be lost by the year 2020 since Vietnam and the Philippines occupied several islands in the archipelago for brief periods in the 1970s.<sup>138</sup>

#### 4. Unilateral Action

The realization that historical arguments for control over large, ambiguous areas of ocean in the South China Sea will be unlikely to hold water under any future dispute resolution system led to the emergence of a much more assertive and deliberate approach by Beijing beginning in the late 2000s to assert systematic control over areas of strategic interest to China's claims.<sup>139</sup> In 2008, the Chinese state government began naval operations under a program that it has dubbed China Marine Surveillance (CMS) under the State Oceanic Administration.<sup>140</sup> Under this program, Chinese vessels have actively patrolled the entirety of the Spratly island chain, reaching as far south as James Shoal (fifty miles from the Malaysian coast), placed sovereignty markers on formations of interest, and undertaken oil and gas exploration that frequently drifts into Vietnamese and Malaysian waters.<sup>141</sup> The Chinese government quickly realized that these exploration operations could also be used to police and patrol waters

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134. Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 25, 1992), 1992 P.R.C. LAWS 55 (China); Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf (promulgated by the Standing Comm. Nat'l People's Cong., June 26, 1998), 1992 P.R.C. LAWS 6 (China).

135. See Zhang, *supra* note 90, at 64.

136. See *id.*

137. See *id.*

138. See *id.*

139. See *id.* at 65.

140. See *id.*

141. See *id.*

that it sees as important to support claims of continuing sovereignty and control over islands in the Spratlys, and CMS operations have quickly taken the form of patrolling and policing against what the Chinese government considers illegal encroachment into Chinese territorial claims.<sup>142</sup> Beginning in 2011, CMS undertook a series of “special rights protection operations” mostly in the Spratly island chain, targeting what it characterized as illegal activities of foreign countries undertaking natural resource exploration, as well as maritime navigation operations.<sup>143</sup>

The clash between Chinese and Vietnamese survey vessels in 2011, described above, has not been an isolated incident;<sup>144</sup> Chinese naval vessels frequently harass Malaysian and Vietnamese vessels<sup>145</sup> and provoke contact with American planes and ships conducting navigation operations in the region from small military outposts on reefs and shoals.<sup>146</sup> These activities are likely viewed by the Chinese government as methods to legitimize Chinese claims to contested parts of the Spratly island chain as well as other locations of interest in the South China Sea.<sup>147</sup> If the Chinese military can claim a presence and continuous monitoring on these remote islands and shoals while other countries are unable to prove continuous control, the Chinese case for sovereignty may be strengthened should territorial claims need to be justified in front of a dispute resolution body in the future.<sup>148</sup>

China’s evolved strategy in the South China Sea can be condensed into two main prongs. In addition to vehemently insisting on its historical entitlement to the region, Chinese legal experts have realized that something more is needed to legitimize the Chinese presence in a region that is of increasing interest to ASEAN countries because of its vast resources.<sup>149</sup> Dubbed “UNCLOS-plus” by some

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142. See Beckman, *supra* note 105, at 156 (Chinese vessels have interfered in other countries’ seismic and navigation activities).

143. See Zhang, *supra* note 90, at 65.

144. See Beckman, *supra* note 105, at 156.

145. See Greg Tarode, *Chinese Coast Guard Involved in Most South China Sea Clashes: Research*, REUTERS (Sept. 6, 2016), <https://www.reuters.com/article/us-southchinesea-china-coastguard/chinese-coast-guard-involved-in-most-south-china-sea-clashes-research-idUSKCN11C2LA> [<https://perma.cc/BM8X-PA8L>] (archived Feb. 20, 2021).

146. See Amanda Macias, *China Has Been Quietly Perfecting a Key Military Outpost in the Disputed Waters of the South China Sea*, CNBC (Mar. 30, 2018), <https://www.cnbc.com/2018/03/29/how-china-perfected-military-outpost-in-south-china-sea.html> [<https://perma.cc/H5BU-77WD>] (archived Feb. 20, 2021).

147. See Zhang, *supra* note 90, at 71–72.

148. But see Belding, *supra* note 38, at 1020 (comparing Chinese unilateral action in the South China Sea to Russia’s descent to the bottom of the Arctic Circle and unilateral placement of a sovereignty marker). Unilateral placement of a sovereignty marker is not an accepted practice under UNCLOS and likely would not persuade an adjudicator, but there is no tried-and-true way of resolving this issue under international law. See *id.*

149. See Beckman, *supra* note 105, at 157 (noting justifications other than historical entitlement).

commentators, Beijing has combined its historical assertions in the region with attempts to bring its domestic and international policies in line with UNCLOS principles.<sup>150</sup> These objectives have led to an aggressive strategy of continued ambiguity with neighboring ASEAN claimants about the regions that China truly believes to be a part of its sovereign waters, as well as an aggressive exploration campaign to patrol and police perceived illegal activity within the nine-dash-line, notably in the Spratly Islands.<sup>151</sup> If the Chinese government continues this strategy without participation in any forms of adjudication or arbitration, the tense military clashes that have been an unfortunate biproduct of these efforts will inevitably continue to escalate with no solution in sight.

### B. Vietnam

Vietnam is one of the main claimants to the southern half of the South China Sea, along with China, Malaysia, and the Philippines.<sup>152</sup> Since the unification of the country in April 1975, Vietnamese territorial assertions in the South China Sea have overlapped in large part with Chinese claims of significant strategic importance in the region.<sup>153</sup> Particularly in the Paracel and Spratly island chains, competing claims between Vietnam and China have led to intense disputes over maritime boundaries and resource extraction rights, including fishing grounds and oil extraction.<sup>154</sup> As Vietnam, China, and other claimants in the region develop rapidly as world powers, these disputes have tested Vietnamese legal, historical, and extralegal dispute resolution methods.<sup>155</sup> Although Vietnam has made one of the region's most concerted efforts to bring its claims within international maritime law under UNCLOS, clashes between China and Vietnam over strategic parts of the region have led to unilateral Vietnamese pushback against Chinese action in the region and revealed some limitations of the dispute resolution mechanisms in UNCLOS.<sup>156</sup> This subpart will analyze Vietnam's response to the conflict in the South

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150. See Zhang, *supra* note 90, at 72.

151. See *id.* at 74.

152. See Do Thanh Hai, *Vietnam's Evolving Claims, in THE SOUTH CHINA SEA MARITIME DISPUTE: POLITICAL, LEGAL, AND REGIONAL PERSPECTIVES*, *supra* note 5, at 83, 83.

153. See Beckman, *supra* note 105, at 152.

154. See *id.* at 160.

155. See Hai, *supra* note 152.

156. See Beckman, *supra* note 105, at 152, 158, 160 (characterizing Vietnamese legal claims and unilateral action during some of the modern period of the South China Sea dispute as Hanoi's own way of questioning international law).



China Sea through its legal claims in the region, its responses to major incidents at sea at several key points of the dispute, and its domestic policy decisions in response to Chinese aggression in the region.

### 1. Historical Arguments

Perhaps unsurprisingly, Hanoi has also made historical claims to South China Sea features that date back several centuries.<sup>157</sup> After 1975, a unified Vietnam inherited a longstanding sovereignty claim to the entirety of the Paracel and Spratly Islands accompanied by underlying legal and historical claims to the region.<sup>158</sup> The Vietnamese government used these historical claims, based on longstanding fishing grounds and exploratory expeditions, to publish several papers throughout the 1970s and 1980s that laid the groundwork for legal claims in opposition to Chinese aggression in the region.<sup>159</sup> Like Chinese claims to the Spratly and Paracel Islands, the Vietnamese papers published to bolster Hanoi's competing claims against Chinese aggression in the 1980s present historical arguments that Vietnamese explorers and fishermen had peacefully occupied the Spratly and Paracel Islands since the seventeenth century when they were *terra nullius*.<sup>160</sup>

Vietnam also employed the "historic waters" doctrine to advocate for its control of the Gulf of Tonkin from August to November of 1974 during a negotiation between Hanoi and Beijing about its claims to the region.<sup>161</sup> Although an argument based on historical legal entitlement to the Gulf of Tonkin did lead to some concessions of territory by China to Vietnam in the 1970s, Chinese and Vietnamese legal claims in the South China Sea did not remain stable for long—several naval skirmishes occurred over more contested territories in the Spratly and

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157. See Hai, *supra* note 152 (citing Vietnamese Ministry of Foreign Affairs documents from 1979, after a unified Vietnam inherited South Vietnam's claims to features in the Spratly and Paracel archipelagos).

158. See *id.*

159. See *id.*

160. See *id.* at 84. The term *terra nullius* refers to a territory that was unoccupied and had not been acquired by another state, which another country could establish sovereignty over by simple occupation. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 173–74 (1979).

161. Much like Beijing's claims to control over the Paracel Islands, as well as most of the area within the nine-dash-line for that matter, the Vietnamese government argued by analogy that because the Gulf of Tonkin had been used as a strategic launching point for Hanoi's naval control of the region extending back to the French colonial era, Vietnam was entitled to ownership of the Gulf of Tonkin as internal waters. See Hai, *supra* note 152, at 84. This "historic waters" argument in part comes from ambiguity inherent in the provisions of UNCLOS, but in most cases serves as a stand-in argument when a country needs to supplement its claims to a region under international law. See *infra* Section III.B.2.

Paracel regions throughout the 1970s and 1980s.<sup>162</sup> These small, isolated fights culminated in a full-scale military clash in 1988 over the Sinh Ton Islands in the Spratly region, in which seventy armed Chinese military personnel landed on a strategic reef, removed the Vietnamese territorial flag, and began firing at and shelling unarmed Vietnamese troops and supply vessels anchored off the shoal.<sup>163</sup> The clash between the Chinese and Vietnamese in 1988, which occurred against the backdrop of the newly enacted UNCLOS, represented a failure of negotiations that each of the countries had previously only based on historical claims.<sup>164</sup> The use of military superiority against the Vietnamese in these clashes without effective negotiations solidified the resolve within the Vietnamese government to combine its unilateral territorial control over strategic waters with legal arguments that brought territorial claims in the region in line with UNCLOS and international law.<sup>165</sup>

## 2. Vietnam's Developing Legal Arguments

The clashes between Vietnamese and Chinese forces over strategically useful shoals and reefs in the South China Sea after Vietnam's unification presented the need for the Vietnamese government to legitimize its claims in the region under international law.<sup>166</sup> Like the Chinese arguments of historical entitlement to parts of the South China Sea, Vietnamese historical claims to the Spratly and Paracel Islands are nearly impossible to verify and would in any case be unlikely to hold any water under maritime law as established under UNCLOS, which does not recognize historical claims to strategic waters.<sup>167</sup> Although UNCLOS does not explicitly provide for claim justification on the basis of "historic waters," the Vietnamese government did in some ways use its longstanding historical arguments via analogical reasoning to justify its control over the Gulf of Tonkin.<sup>168</sup> Indeed, although UNCLOS does not provide for "historical waters," it does contain provisions about "historic bays,"<sup>169</sup> which Hanoi argued created a stronger anchor to its claims in the Gulf of Tonkin under the newly developing international legal system of UNCLOS during Vietnam's negotiations with China over the region in the 1970s and 1980s.<sup>170</sup>

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162. See generally, Pao-Min Chang, *A New Scramble for the South China Sea Islands*, 12 CONTEMP. SE. ASIA 20, 22-25 (1990).

163. See *id.* at 20, 26.

164. See *id.* at 20, 25.

165. See Hai, *supra* note 152, at 83-84.

166. See *id.* at 85.

167. See Buszynski, *supra* note 5, at 7.

168. See Hai, *supra* note 152, at 84.

169. UNCLOS, *supra* note 61, arts. 7-16.

170. See Hai, *supra* note 152, at 84.

In addition to asserting historical claims to disputed islands in the region, Hanoi initially favored a practice of unilaterally increasing its presence in strategic areas to protest Chinese aggression.<sup>171</sup> The willingness of the Chinese government to exercise military superiority over Vietnamese supply ships and unarmed naval vessels beginning in the 1970s created the preference for the Vietnamese government to defend important strategic interests in the region through military force if necessary, while participating in deliberations and presenting arguments within the new international legal regime under UNCLOS.<sup>172</sup> After several clashes in which Chinese naval forces removed Vietnamese ships from some strategic reefs in disputed waters in the Paracel region in 1974 and the Spratly Islands in 1988, the Vietnamese government took an increasingly steadfast approach of beefing up maritime defenses and construction of military installments in an effort to confront Chinese maritime aggression.<sup>173</sup> In the 1988 Spratly disputes, for example, the Vietnamese navy pressed for a particularly militaristic strategy of addressing Chinese aggression and naval skirmishes in the region by increasing the number of Vietnamese naval ships and airplanes to create numerical superiority over Chinese ships and planes patrolling the islands.<sup>174</sup> These clashes occurred during the United Nations' deliberation on the principles of UNCLOS,<sup>175</sup> and several legal experts have noted that Hanoi's willingness to confront Chinese military aggression with a commensurate show of force represented a willingness at the time to circumvent international law to enforce Vietnamese interests in the area.<sup>176</sup> Indeed, Vietnamese strategists, molded by the conflicts that led to the unification of the country, felt that UNCLOS and international law were tools to further national interests rather than an effective means of compromise between claimants in the South China Sea.<sup>177</sup>

The skirmishes in the 1970s and 1980s between the Vietnamese and Chinese navies were not isolated events—several more clashes erupted in the Spratly Islands in which the Chinese continued to force Vietnamese naval forces off of key shoals and reefs in the Spratly Islands.<sup>178</sup> Tensions over the region led the Vietnamese government to change strategy in favor of minimizing its losses in the region rather than offensive efforts to enforce its claims in contested parts of the

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171. See Chang, *supra* note 162, at 25.

172. See Hai, *supra* note 152, at 84.

173. See Chang, *supra* note 162, at 22, 26–27.

174. See *id.* at 26.

175. See Hai, *supra* note 152, at 84.

176. See *id.*

177. See *id.*

178. See, e.g., Hong Thao Nguyen, *Vietnam's Position on the Sovereignty over the Paracels and the Spratlys: Its Maritime Claims*, 5 J.E. ASIA & INT'L L. 165, 188 (2012); Chang, *supra* note 162, at 22–27.

South China Sea.<sup>179</sup> As the Chinese navy began to expand rapidly in years following the disputes outlined above, the newly created Vietnamese government decided to take the approach of prioritizing Vietnamese economic interests in the Gulf of Tonkin and parts of the southern half of the South China Sea over military aggression, which quickly lost utility in the face of expanding Chinese aggression and military strength.<sup>180</sup> Instead, Hanoi adopted a strategy of bringing its legal entitlement arguments into the framework of UNCLOS and allowing foreign military vessels to enter its territorial seas under innocent passage rules,<sup>181</sup> with the goal of maintaining the status quo of the country's delineated fishing grounds and oil resources in the region.<sup>182</sup> As Hanoi's military superiority began to wane in comparison to China, the Vietnamese government accepted the reality that it would have to recognize Chinese sovereignty over parts of the region, while also justifying its stronger claims to other ASEAN countries and the international community.<sup>183</sup>

The effort to maintain the status quo in areas of strategic importance to the Vietnamese government helped shed light on the limitations of international law under UNCLOS as a dispute resolution mechanism in the region. Hanoi's efforts to adjust what had been purely historical claims to the Spratly Islands and strategic areas of the Gulf of Tonkin in line with UNCLOS required a complete revocation of claims to historical waters, which are not allowed under UNCLOS, as well as the designation of territorial seas, continental shelves, and EEZs around strategic shoals and reefs in distant areas of the sea that had previously been anchored by historical claims.<sup>184</sup> Like Chinese efforts to bring historical arguments into compliance with UNCLOS, Vietnamese claims to the Spratly Islands were left intentionally vague with little hope of clarification.<sup>185</sup> Hanoi released several public statements in the 1990s and early 2000s proclaiming Chinese assertions to the region were invalid and that public policy in Vietnam would be amended to reflect UNCLOS principles.<sup>186</sup> Although public laws have been passed, their substance remains ambiguous as to which parts of the Spratly Islands Vietnam ultimately asserts ownership of, suggesting that the Vietnamese government recognizes the gap between its historical claims and its revisions under

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179. See Nguyen, *supra* note 178, at 188–89.

180. See Hai, *supra* note 152, at 86.

181. Innocent passage refers to continuous travel through a coastal state's territorial sea that does not threaten that state's security and does not enter a state's internal waters. See UNCLOS, *supra* note 61, arts. 18–19. For a discussion of the difference between territorial and internal waters, see *supra* Part II.B.2.

182. See Beckman *supra* note 105, at 147; Hai, *supra* note 152, at 97.

183. See Nguyen, *supra* note 178, at 208.

184. See Hai, *supra* note 152, at 93.

185. See *id.*

186. See *id.*

UNCLOS.<sup>187</sup> If competing historical claims cannot be verified, and each country's UNCLOS claims are commensurately vague so as to preclude reconciliation, it follows that the South China Sea conflict could easily devolve into military skirmishes over the most hotly contested regions. Indeed, the skirmishes between Chinese and Vietnamese vessels over reefs and shoals since the beginning of the dispute are examples of the volatility of the situation, as well as the limitations of the international legal regime created by UNCLOS.<sup>188</sup>

### C. *The Philippines*

Although the Philippine government's claims to disputed areas in the South China Sea developed along the same lines of reasoning as other ASEAN claimants, the country's modern claims to the region, in sharp contrast, are almost entirely based on international law.<sup>189</sup> Whereas Chinese and Vietnamese legal arguments are based in varying degrees on a combination of historical claims and UNCLOS international law, the Philippine government asserts that its UNCLOS treaty arguments preclude any customary historical maritime claims.<sup>190</sup> This confidence in the international legal regime's preclusion of historical entitlement reached a boiling point in 2013 when the Philippine government submitted, and the Chinese government promptly rejected, requests for the International Tribunal on the Law of the Sea (ITLOS) to formally arbitrate conflicts between the two countries over disputed parts of the Spratly Islands and other maritime features.<sup>191</sup> The Philippines' reliance on international law is characteristic of the recent trend that has resulted in neighboring ASEAN countries attempting to align their legal claims in the region with UNCLOS.<sup>192</sup> As the Chinese government's effective rejection of the ITLOS arbitration shows, however, aligning legal arguments with international law serves to minimize territorial losses to Chinese aggression at best, but it is not yet a permanent solution. This subpart

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187. *See id.*

188. *See Vietnam Accuses China in Seas Dispute*, BBC (May 30, 2011), <https://www.bbc.com/news/world-asia-pacific-13592508> [<https://perma.cc/SE9Q-P3F7>] (archived Feb. 21, 2021).

189. *See* Angelo A. Jimenez, *Philippines Approaches to the South China Sea Disputes: International Arbitration and the Challenges of a Rule-Based Regime*, in TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: NAVIGATING ROUGH WATERS, *supra* note 2, at 99, 101.

190. *See id.* at 100–01.

191. *See* N. Elias Blood-Patterson, Note, *Smoke on the Water: The Role of International Agreements in the Philippine-Chinese Dispute Over the South China Sea*, 46 N.Y.U. J. INT'L L. & POL. 1207, 1237–38 (2014) (recognizing that the Philippine government has effectively based all of its legal arguments on international law, as an antithesis to Chinese claims).

192. *See, e.g., Beckman, supra* note 105, at 148.

will analyze the Philippines' claims in the region and argue through the case of the failed efforts at arbitration in *Philippines v. China*<sup>193</sup> that a dispute resolution system based solely on existing international law cannot effectively curtail Chinese aggression.

### 1. A Brief Summary of the Philippines' Legal Position

Since the anticipation of the ratification of UNCLOS, the Philippine government has attempted to bring its legal claims entirely within the definition of extant international maritime law.<sup>194</sup> A straightforward application of the concept of EEZs under UNCLOS justified the Philippines' claim to some of the most contested parts of the southern half of the region.<sup>195</sup> The Philippines' claim to the Scarborough Shoal, the subject of a tense standoff between the Chinese military ships and Philippine fishing boats in 2012, for example, argues that important maritime forms in the island chain are located well within the two hundred mile range of the Philippine coast that would allow its exclusive control over these forms.<sup>196</sup> A theoretical two hundred mile EEZ from the Philippine coast would significantly cut into the Chinese nine-dash-line claims. Additionally, the Philippine government has noted that under established international legal precedent, a median line is drawn between two competing claims to delineate the appropriate boundary, placing many important maritime features within the Philippines' economic jurisdiction.<sup>197</sup>

Ignoring most of these claims, the Chinese government sent multiple military expeditions to Scarborough Shoals and other important maritime features to perform surveillance and maritime surveys under the color of territorial right.<sup>198</sup> Indeed, the Chinese and Philippine governments engaged in a multi-day standoff when Chinese fishing vessels were found to have illegally collected rare wildlife from contested parts of the Scarborough Shoal.<sup>199</sup> This standoff resulted in part in the Philippines doubling down on its UNCLOS-based

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193. *Phil. v. China*, PCA Case Repository Case No. 2013-19 (Perm. Ct. Arb. 2016).

194. See Jimenez, *supra* note 189.

195. See *id.*

196. See *id.*

197. See Blood-Patterson, *supra* note 191, at 1233 (citing Maritime Delimitation in the Black Sea (Rom. v. Ukr.), Judgement, 2009 I.C.J. Rep. 61 (Feb. 3), <https://www.icj-cij.org/public/files/case-related/132/132-20090203-JUD-01-00-EN.pdf>

[<https://perma.cc/PD9G-EYEM>] (archived Feb. 21, 2021)) (representing the most recent decision by the ICJ concerning this subject).

198. See *id.*

199. See Tina G. Santos, *PH, Chinese Naval Vessels in Scarborough Shoal Standoff*, INQUIRER.NET (July 13, 2015), <https://globalnation.inquirer.net/32341/ph-chinese-naval-vessels-in-scarborough-shoal-standoff> [<https://perma.cc/YD9T-VQ2P>] (archived Feb. 21, 2021).

arguments and requesting that the Chinese government participate in binding arbitration over the region.<sup>200</sup>

## 2. *The Philippines v. China* ITLOS Case, Arbitration, and the Aftermath

The Philippine government's decision to arbitrate its claims to the Scarborough Shoal and other key portions of the South China Sea represented a total commitment to the adjudicatory power of international law that had developed since the major territorial claims of ASEAN countries began developing in the 1970s.<sup>201</sup> The enthusiasm for the arbitration process, however, was met with an equivalent amount of indifference on Beijing's part, helping show the limits of the international legal adjudicatory process under UNCLOS and the dispute resolution process under the United Nations enforcement framework.<sup>202</sup> The *Philippines v. China* case demonstrates that if one party in the adjudicatory process under UNCLOS is unwilling to accept the legitimacy of an arbitration or court proceeding, actual enforcement mechanisms are few and far between.

When the Philippine government submitted arbitration materials to ITLOS in the wake of the Scarborough Shoal incident, the arbitration process was unproven and seen as a last resort.<sup>203</sup> Although doubts existed about the arbitration process's efficacy,<sup>204</sup> the Philippine government viewed the process as a way of breaking the norm of Chinese encroachment into the territory of other ASEAN countries.<sup>205</sup> Particularly salient to the Philippine government in anticipation of arbitration were provisions in UNCLOS that allow for immediate relief during the pendency of an arbitration, similar to a preliminary injunction, that recognizes the right of a claimant to protect and conserve its natural resources in territorial claims.<sup>206</sup> In submitting its claims, the Philippines sought to challenge the Chinese nine-dash-line and provide a legal basis for its competing claims against the slow Chinese encroachment into contested parts of the Scarborough Shoal that did not show any signs of stopping.<sup>207</sup>

The Permanent Court of Arbitration issued a scathing arbitral judgment overwhelmingly in favor of the Philippines in the ITLOS case.<sup>208</sup> The Philippine government celebrated the decision, which it

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200. See Jimenez, *supra* note 189, at 109.

201. See *id.* at 108.

202. See Isanga, *supra* note 14, at 151.

203. See Jimenez, *supra* note 189, at 108.

204. See *id.*

205. See *id.*

206. UNCLOS, *supra* note 61, art. 290.

207. See Jimenez, *supra* note 189, at 108.

208. See Isanga, *supra* note 14, at 149.

argued “confirms that no one state can claim virtually an entire sea.”<sup>209</sup> At the same time, however, the Chinese government doubled down on its indifference to the proceedings, refusing to send counsel to the arbitration and issuing countering statements that it would not abide by the decision.<sup>210</sup> Chinese press releases in the wake of the decision made it clear that military construction would continue on the reefs and formations on Scarborough Shoal and that survey expeditions would continue to enforce Chinese maritime claims in the region.<sup>211</sup>

Political pressure from allies in the region and changing politics in the Philippines, however, have caused Filipino leaders to frequently change their position on the country’s initial enthusiasm towards the ITLOS arbitration award. While it had ostensibly been heralded as a method of bolstering the Philippines’ political claims to contested areas of the South China Sea,<sup>212</sup> the transition to the Duterte presidential administration coincided with the weakening of the country’s reliance on the ITLOS arbitration ruling as a source of legitimacy for its claims in the region.<sup>213</sup> At least temporarily, the Philippines broke its long-established ties with the US in the region and halted joint military exercises that were once considered necessary to assert its maritime claims in the Spratly Islands and other important contested areas.<sup>214</sup> President Duterte has since reversed this apparent break with the United States and consequentially, has returned to a reliance on the ITLOS arbitration decision and international law in cooperation with Western powers to combat Chinese aggression in the region.<sup>215</sup>

209. Sue-Lin Wong & Terrence Edwards, *China Tells Japan to Stop Interfering in South China Sea*, REUTERS (July 14, 2016), <http://www.reuters.com/article/us-southchinasea-ruling-idUSKCN0ZV06F> [<https://perma.cc/NS9L-CV8D>] (archived Feb. 21, 2021).

210. See Isanga, *supra* note 14, at 150.

211. See *id.*

212. See Frances Mangosing, *Duterte Optimistic of Favorable Sea Ruling*, INQUIRER.NET (July 5, 2016) <https://globalnation.inquirer.net/140708/Duterte-optimistic-of-favorable-sea-ruling> [<https://perma.cc/DE8T-SCUP>] (archived Feb. 21, 2021).

213. See *The Philippines Pivots to China*, THE ECONOMIST, (Feb. 23, 2017) <https://www.economist.com/asia/2017/02/23/the-philippines-pivots-to-china> [<https://perma.cc/57J8-GP72>] (archived Feb. 21, 2021) (explaining that President Duterte, likely in a raw political response to populist displeasure with American foreign policy decisions in the region, briefly heralded a change in the Philippines’ alignment with the US and Western powers’ reliance on international law, and attempted to compromise with the Chinese government).

214. See Richard C. Paddock, *Rodrigo Duterte, Pushing Split with U.S., Counters Philippines’ Deep Ties*, N.Y. TIMES (Oct. 26, 2016) <https://www.nytimes.com/2016/10/27/world/asia/philippines-duterte-united-states-alliance.html> [<https://perma.cc/ET7T-DF9V>] (archived Feb. 21, 2021).

215. Sebastian Strangio, *In UN Speech, Duterte Stiffens Philippines’ Stance on the South China Sea*, THE DIPLOMAT (Sept. 23, 2020), <https://thediplomat.com/2020/09/in-un-speech-duterte-stiffens-philippines-stance-on-the-south-china-sea/> [<https://perma.cc/7P8B-AQVP>] (archived Feb. 21, 2021) (describing President Duterte’s assertion that the ITLOS award should be considered in the legitimacy of the



The Philippines' increased frustration with its approach to maritime sovereignty questions in the South China Sea, as well as Beijing's steadfast rejection of the arbitral award in *Philippines v. China*, demonstrate not only a continuance of the status quo—a slow creeping encroachment into neighboring countries' territories—but that parties in the dispute have very few options to affect permanent change in the region in the face of Chinese aggression. Despite what had ostensibly been a turn away from its cooperation with the US military in favor of bilateral negotiations with Beijing to resolve disputes over contested territory, the Philippines continues to rely on its cooperation with the United States to enforce territorial claims against the Chinese government.<sup>216</sup> Without assistance from the United States or other Western powers, any bilateral agreement with the Chinese would likely result in an asymmetrical compromise that would cede more control to the Chinese government than Filipino political leaders desire. Like the Vietnamese government, in the aftermath of the ITLOS decision, the Philippines has resigned itself to being unable to unilaterally enforce its claims in the region against China through military force or international courts.<sup>217</sup> Beyond China's agreement to UNCLOS principles or a structured settlement that represents a compromise between countries in the region, which seem highly unlikely, the Chinese government will continue enforcing its claims unilaterally.<sup>218</sup> As China expands militarily and discourages unilateral challenges to its claims in the region, ASEAN claimants' window of opportunity is growing smaller. This new status quo necessitates a temporary solution until the enforcement methods in the region can be improved and worked into a more permanent solution.

#### IV. INTERNATIONAL PROTEST AS A TEMPORARY SOLUTION AND THE FUTURE OF THE DISPUTE

As China expands militarily and in turn lessens the ability of surrounding ASEAN claimants to push back against disputed territorial claims,<sup>219</sup> it seems likely that countries will increasingly turn to international law as a dispute resolution system.<sup>220</sup> Although

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Philippines' claims to the region, and that the Philippines would commit to cooperating with Western powers to maintain sovereignty).

216. See Lorenz Langer, *The South China Sea as a Challenge to International Law and to International Legal Scholarship*, 36 BERKELEY J. INT'L L. 383, 392.

217. See Jimenez, *supra* note 189, at 108. (quoting a statement by Philippine president Duterte that the Philippines will not be able to defeat the Chinese in the South China Sea dispute, and thus must essentially concede control of that region).

218. See *China Thanks Countries for Supporting it Over South China Sea*, REUTERS (June 14, 2016), <https://uk.reuters.com/article/uk-southchinasea-china/china-thanks-countries-for-supporting-it-over-south-china-sea-idUKKCN0Z016W> [<https://perma.cc/A55A-FVZB>] (archived Mar. 15, 2021).

219. See *id.*

220. See Jimenez, *supra* note 189, at 110.

it is entirely possible that existing international law will eventually be an effective means for resolving conflicting interests in the South China Sea,<sup>221</sup> the cases described above show that international law is not yet an effective dispute resolution system.<sup>222</sup> Thus, a stopgap solution is needed, at least until the international community can resolve the differences between claimants' territorial goals and legal arguments. This gap in enforcement mechanisms is where outside powers like the United States and Australia can compete with China militarily.<sup>223</sup> Although geographically disconnected from the South China Sea, Western countries with security and diplomatic interests in the region, through unilateral forms of protest based on the principles of international law, can create a documented body of precedent that can be used by future international adjudicatory bodies in territorial delineation systems.<sup>224</sup> Through the example of the U.S. Navy's freedom of navigation operations (FONOPs) and other forms of military protest against excessive ASEAN states' claims in the region, this Part will argue that international protest can be an effective method of filling the enforcement void that currently exists in international law, and it may in fact indirectly build precedent that can be used to justify compromises between competing territorial claims in future adjudicatory proceedings. A discussion of more permanent solutions to the dispute in the region will follow.

### A. How Protest Works

The United States has maintained a formal program that challenges excessive maritime claims since 1979: the Freedom of Navigation Program.<sup>225</sup> The program utilizes diplomatic protest, contact with representatives of involved coastal states, and naval operations in which vessels briefly sail into territorial boundaries and exhibit conduct that is inconsistent with innocent passage normally

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221. See *supra* Section III.A. The Chinese government is admittedly attempting to bring its claims within the reasoning of international law. The fact that the Chinese government has made attempts to argue its claims under UNCLOS, however, is completely overshadowed by its response to documented court rulings and adjudicatory opinions, like *Phillippines. v. China*, PCA Case Repository Case No. 2013-19 (Perm. Ct. Arb. 2016), which shows that China is unwilling to accept the results of the system that UNCLOS has created.

222. See *supra* Section III.

223. See, e.g., Ralf Emmers, *The US Rebalance to Asia and the South China Sea Disputes*, in *THE SOUTH CHINA SEA MARITIME DISPUTE: POLITICAL, LEGAL, AND REGIONAL PERSPECTIVES*, *supra* note 5, at 150, 151 ("Washington can either mitigate or heighten existing tensions through its presence and network of bilateral alliances and security cooperation in the region.").

224. See Isanga, *supra* note 14, at 197–98 (rationalizing that although the United States cannot launch a military assault against the Chinese government or sue under UNCLOS, its presence in the region may ultimately exert pressure on the Chinese government to bring their claims and actions into compliance with international law).

225. See Root, *supra* note 110, at 322.

permitted under UNCLOS, implying that the United States does not view the territorial boundary asserted by the state as legitimate under international law.<sup>226</sup> A brief example is discussed below.

For the purposes of this example, assume that China asserts a territorial boundary around a feature that the United States believes is not entitled to territorial sea boundaries. Assume further that China, using the principles of UNCLOS, claims a twelve-nautical-mile territorial sea around a marine feature (such as a reef that is not naturally above the high tide line, reinforced with a military garrison)<sup>227</sup> that the United States does not consider an “island” under UNCLOS.<sup>228</sup> This claim is inconsistent with the principles of UNCLOS, which only allows territorial sea boundaries to be drawn around low tide features that are within twelve nautical miles of land or another island, as defined by UNCLOS.<sup>229</sup> The US FONOP program would protest this excessive claim by sailing within twelve nautical miles of the claimed territory.<sup>230</sup> This conduct, by itself, is allowed under UNCLOS, which provides that other states can conduct “innocent passage” by passing through the twelve-nautical-mile territorial sea boundary around a maritime formation.<sup>231</sup> The United States would protest this boundary, however, by operating within the claimed territorial sea in a manner inconsistent with innocent passage, such as performing emergency drills or launching a helicopter.<sup>232</sup> As Freund argues in her analysis of FONOP utility as a method of protest, “[b]y deliberately transiting in a manner inconsistent with innocent passage . . . the United States would send the message that it does not consider the [maritime feature] to be entitled to a territorial sea.”<sup>233</sup> This principle can be expanded and applied to most baselines and territorial delineations that the Chinese government might claim around features that it considers are entitled to territorial boundaries.<sup>234</sup>

### B. Why Protest is Helpful

A critic of unilateral efforts at international protest may point out that the same actors repeatedly protest the same states’ excessive claims, in the same manner, for years on end, without any

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226. See Eleanor Freund, *Freedom of Navigation in the South China Sea: A Practical Guide*, HARV. KENNEDY BELFER CTR. FOR SCI. & INT’L AFFS. (June 2017), <https://www.belfercenter.org/publication/freedom-navigation-south-china-sea-practical-guide> [<https://perma.cc/U6LW-FXZ7>] (archived Feb. 21, 2021).

227. See, e.g., See Wallace, *supra* note 80, at 141–42.

228. See *supra* Section II.B. (discussing islands).

229. See Freund, *supra* note 226; see also *supra* Section II.B. (discussing islands).

230. See *id.*

231. See UNCLOS, *supra* note 61, art. 3. 17–19.

232. See Freund, *supra* note 226.

233. See *id.*

234. See *id.*

commensurate change in the law.<sup>235</sup> Although this is probably true,<sup>236</sup> the point of international protest is not necessarily to encourage ASEAN claimants in the region to bring their claims into compliance with international law. In fact, international protest, particularly in the form of FONOP exercises is probably most effective if viewed as a method of maintaining the status quo in a region.<sup>237</sup> Indeed, many commentators have noted that persistent objection to the excessive claims should be aimed at preventing such claims from becoming valid through acquiescence, rather than to convince a particular country to bring its claims into the framework of international law.<sup>238</sup> This principle is particularly salient in the South China Sea, where neighboring ASEAN claimants are not in a strong position to utilize military strength to contest the Chinese government's competing claims in the region.<sup>239</sup> Interested parties, such as the United States, who assert that the Chinese government's claims are not legitimate under international law, can use the techniques described above to protest claimed baselines on even the most challenging maritime formations, anywhere in the region.<sup>240</sup> By keeping a record of objections to territorial boundaries asserted against other ASEAN claimants, the United States would be able to provide an anchor for future legal claims against Chinese encroachment, ensuring that these boundaries are not acquiesced to and consequently lost forever.

Additionally, protest can be performed against any state, ally or enemy, without taking sides in the debate over territorial boundaries.<sup>241</sup> The United States has performed FONOPs against China and indeed several of the ASEAN claimants in the region since the start of program in 1979.<sup>242</sup> By protesting against what it believes to be invalid claims under international law on both sides of a potential dispute, a country can support legal claims that it determines are excessive, without the appearance of impropriety when an adjudicatory

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235. See, e.g., Freund, *supra* note 226 (observing that the US uses the same FONOP framework for countries like Malaysia, the Philippines, and Brunei year after year without any country bringing their claims any closer into conformity with international law).

236. See Root, *supra* note 110, at 347 (arguing that if FONOPs are evaluated based on the amount of change they effect in countries' legal claims, they do not work).

237. See Dennis Mandsager, *The U.S. Freedom of Navigation Program: Policy, Procedure, and Future*, 72 INT'L L. STUD. 113, 115 (1998) (describing that excessive claims that are not objected to are eventually considered as binding law).

238. See Root, *supra* note 110, at 348–349.

239. See *supra* Section III.A. (discussing the relative inability of the Philippines to protest Chinese encroachment in contested areas, particularly in the Spratly Islands).

240. See Freund, *supra* note 226. FONOPs often take the form of flying a low-altitude aircraft into disputed airspace over difficult-to-access maritime formations, such as reefs and shoals. The US documents each of these flights and has built a record of persistent objection to protested boundaries in the Spratly and Paracel Islands.

241. See, e.g., *id.*

242. See Root, *supra* note 110, at 348 (describing examples of FONOPs against Indonesia, Burma (Myanmar), and Libya, among others).

body eventually steps in to adjudicate a dispute under international law. The South China Sea is an excellent example of how these principles work in operation. The United States' overall diplomatic position in the South China Sea has not fundamentally changed over the past few decades.<sup>243</sup> Washington has refused to take a stand on the sovereignty question in the conflicts that have arisen over the Spratly and Paracel Island conflicts that have reached boiling points in the past few decades.<sup>244</sup> Concurrently, however, the United States has increasingly denounced what it characterizes as bullying on the part of the Chinese government in asserting and enforcing excessive claims under international law.<sup>245</sup>

By committing only to unilateral protest without taking a formal stance on the territorial dispute in the South China Sea, countries with security interests in the region can utilize international protest to maintain the status quo, while concurrently enforcing boundaries on both sides of a dispute that do not conform to international law. This in turn lends legitimacy to the very system of international law under UNCLOS that ASEAN countries hope to utilize in resolving disputes in the region.<sup>246</sup> By enforcing claims that it believes to be objectively in conflict with UNCLOS and avoiding taking an official position in the various disputes that have arisen under international law, the United States has been able to continue its diplomatic assistance with partner countries and help broker internal agreements between China and other ASEAN claimants.<sup>247</sup> Although these steps are a far cry from all ASEAN countries actually bringing their claims into compliance with UNCLOS, they are steps in the right direction, and provide a necessary stopgap buffer to Chinese encroachment in the region until a better solution can be implemented.

### C. Shortcomings of Protest

Critics of FONOPs in the South China Sea assert that these operations can be misplaced given the complexities of competing legal claims in the region. Such operations, as the argument goes, give the appearance of impropriety and bias against Beijing despite Washington's claimed neutrality, and place the country undertaking

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243. See Emmers, *supra* note 223, at 155.

244. See *id.*

245. See *supra* Section I (discussing comments made by then National Security Advisor John Bolton).

246. See Root, *supra* note 110, at 326 (quoting former US Secretary of Defense William S. Cohen: "Freedom of Navigation assertions . . . oftentimes have persuaded States to bring their practices into conformity with [international law]"). I do not argue that FON is a direct causation of ASEAN states' enactment of policies that are in line with UNCLOS. There is very little evidence of this occurring in the South China Sea. Instead, protests can create situations that indirectly lead to agreements that more closely align with UNCLOS.

247. See Emmers, *supra* note 223, at 161.

protest in unnecessary danger of provoking conflict.<sup>248</sup> Chief among the concerns of critics is that the use of international protest by the United States, while supposedly neutral in its application, is just one of the elements in a multilateral strategy to contain Chinese aggression in the region.<sup>249</sup> It is impossible, these critics argue, for the United States to remain completely neutral in its application of protest while maintaining an active diplomatic strategy of containing Chinese aggression in the region.<sup>250</sup> Protest in the form of FONOPs undertaken by geographically disconnected parties, like the U.S. Navy, unnecessarily increases the tension in the region,<sup>251</sup> and creates international incidents that bring the process of diplomatic negotiation to a grinding halt.<sup>252</sup> If diplomatic protest alone suffices to show objection, why should actual military operations, which threaten the sovereignty of the Chinese government, and risk eviscerating the diplomatic process, be used in conjunction with diplomacy?

The simple answer to these objections is that unilateral operational protest sends a stronger message. The physical presence of US warships or aircraft in the territorial zone of a strategic maritime formation which does not have claimed boundaries within UNCLOS clearly delineates the exact boundaries of disapproval.<sup>253</sup> In situations where the US military has deemed protests necessary, the scholar Mandsager has noted that even formal diplomatic protests are seldom enough to provide an incentive to change a country's excessive claim.<sup>254</sup> Although it is entirely possible that operational protests do and will continue to raise tensions at the expense of some diplomatic bargaining power in the region, their necessity arises out of their ability to create tangible evidence of non-acquiescence to precise territorial boundaries. The documentation of exact normative territorial assertions in the region on the part of the United States is also particularly helpful in the South China Sea, where zig-zagging territorial delineations and

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248. See, e.g., Sam Bateman, *The Risks of US Freedom of Navigation Operations in the South China Sea*, E. ASIA FORUM (June 1, 2015), [eastasiaforum.org/2015/06/01/the-risks-of-us-freedom-of-navigation-operations-in-the-south-china-sea/](http://eastasiaforum.org/2015/06/01/the-risks-of-us-freedom-of-navigation-operations-in-the-south-china-sea/) [<https://perma.cc/DP5Z-B7KK>] (archived Feb. 21, 2021).

249. See Emmers, *supra* note 223, at 160 (describing Beijing's concern that US operations in the South China Sea are attempts to interfere in what should be a bilateral issue between China and the other claimant ASEAN countries).

250. See Bateman, *supra* note 248.

251. See Emmers, *supra* note 223, at 160 (quoting a Chinese Defense Ministry White Paper which noted that "[the US] has strengthened its Asia-Pacific military alliances, expanded its military presence in the region, and frequently makes the situation tenser").

252. See, e.g., Margaret K. Lewis, Note, *An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident*, 77 N.Y.U. L. REV. 1404 (2002) (diplomatic relations in the region suffer after clashes between US and Chinese forces, such as when an American EP-3 surveillance plane and a Chinese Army F-8 jet collided over the South China Sea in 2001).

253. See Root, *supra* note 110, at 321-29.

254. See Mandsager, *supra* note 237, at 121.

converging circles around small island chains can mean that competing claims overlap by only a few miles.

The circumstances of the South China Sea conflict have shown that international law under UNCLOS has not yet developed a dispute resolution system that can fairly adjudicate disputes between countries and create tangible results.<sup>255</sup> The lack of such a dispute resolution system has accordingly created an atmosphere of resignation and acquiescence to Chinese encroachment in the region, in which China's ASEAN neighbors at best can hope to minimize further losses of territory. In many of the territorial disputes in the region, once territory is lost, acquiescence over time means that it can never be taken back. International protest in the form of FONOPs provides a stopgap solution that will maintain the status quo until international adjudicatory bodies or diplomatic channels can create a more permanent solution.

#### D. *The Future of the Dispute*

The temporary solution of unilateral protests by countries with security interests in the South China Sea is illustrative of the larger problems posed by the arguments—and actions—of ASEAN countries in the dispute up until the early 2020s. China's continued insistence that the ITLOS arbitration award, and in fact UNCLOS itself, cannot adjudicate issues of sovereignty and greater issues of "historic rights" represents a catch-22 for ASEAN neighbors that hope to rely on international law as a dispute resolution method.<sup>256</sup> Without an appropriate historic rights argument that directly contradicts China's historical sovereignty basis of its claims to the region, countries like the Philippines are seemingly forced to choose between a few options that will only exacerbate political rhetoric about the conflict on both sides: (1) countries can continue to advocate for international law as a solution to the problem, which China has made clear that it will not accept as it applies to historical claims to areas within the nine-dash-line;<sup>257</sup> (2) countries can accept that international law will not solve the problem and resort to bilateral talks with the Chinese government that will inevitably result in at least some implicit acquiescence to the

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255. See *supra* Section II.

256. See, e.g., THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE 149–52 (Bing Bing Jia & Talmon Stefan eds., 2014) (describing the details of the Philippines' concession that UNCLOS does not address issues of historic rights and sovereignty).

257. See Ministry of Foreign Affairs, People's Republic of China, *China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea*, THE SOUTH CHINA SEA ISSUE ¶¶ 114, 119 (July 13, 2016) [https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/t1380615.htm](https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1380615.htm) [<https://perma.cc/BLD5-3C59>] (archived Feb. 21, 2021).

Chinese government's claims to the region as a concession;<sup>258</sup> or (3) countries can align themselves with Western powers that also have security interests in the region and can unilaterally contest territorial losses.<sup>259</sup> None of these options are ideal, and while goals of international protest in the form of FONOP operations should be effectuating a temporary solution to the loss of maritime claims and minimizing the loss of territory in the region,<sup>260</sup> each of the countries involved should put effort into affecting a permanent solution.<sup>261</sup> Although it seems unlikely that one individual method will prevail,<sup>262</sup> the remainder of this Part will survey different methods of approaching the dispute that can offer realistic solutions.

### 1. The Legitimacy of International Bodies' Legal Determinations Needs to be Strengthened

If ASEAN and Western countries alike hope to address Chinese aggression in the South China Sea through the use of international law, as was the case in the ITLOS arbitration, dispute resolution mechanisms and adjudicatory bodies need to be strengthened and legitimized to encourage principled negotiation by all parties involved in the dispute. Although the Chinese government is unlikely to agree to an adjudicatory body's evaluation of the country's sovereignty claims to the region, international bodies could seek to clarify maritime claims and, at the very least, document and delineate where disputed maritime claims lie. Patrick Cornin has suggested that if maritime claims are clarified, rather than disputed, the Chinese government may succumb to some international pressure to relinquish maritime

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258. See Langer, *supra* note 216, at 390. For a view into how Chinese scholars have approached negotiations about contested claims, especially in detailed maritime contexts, see generally Zhang Xinjun, "Setting Aside Disputes and Pursuing Joint Development" at Crossroads in South China Sea, in TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: NAVIGATING ROUGH WATERS, *supra* note 2, at 39.

259. See *supra* Section III.C (discussing the Philippines' recent decision to align with Western powers that have security interests in the South China Sea).

260. See *supra* Section IV.A–C.

261. For a cynical, yet realistic, account of what can be gleaned by the ITLOS arbitration award and principles that can be applied to the dispute in future, see Prashanth Parameswaran, *Beware the Illusion of China-ASEAN South China Sea Breakthroughs*, THE DIPLOMAT (Aug. 17, 2016), <https://thediplomat.com/2016/08/beware-the-illusion-of-china-asean-south-china-sea-breakthroughs/> [https://perma.cc/Z3UE-L9JP] (archived Feb. 21, 2021).

262. This Note does not assert a final solution to the complex intersection between maritime law, international disputes resolution mechanisms, and sovereignty issues. Instead, I attempt here to build upon what I believe to be some of the more realistic solutions to the problem.



boundaries that were egregiously taken in past disputes or are independent from its “historical rights” claims.<sup>263</sup>

The problem of the nine-dash-line could be illustrative of this point. If China contends that it controls a maritime feature like an island or a shoal, but cannot claim with any legal certainty that it should also control the waters outside of the feature’s prescribed boundaries under maritime law, there may be an opportunity to advocate for where the appropriate boundaries should lie purely under international law principles.<sup>264</sup> This could break the status quo of countries unilaterally pursuing arbitration and releasing statements that assert the invalidity of Chinese claims in the region, while the Chinese government publishes vague responses by its legal scholars that do not advance the narrative about where maritime boundaries should be drawn.<sup>265</sup> By focusing only on the principles of international law under UNCLOS, outlined and discussed above, an independent body could clarify the boundary lines of the dispute, and break the cycle of the parties arguing past each other, failing to come to a consensus about whether historical sovereignty or current principles of international law should provide the answer.<sup>266</sup> If China and neighboring ASEAN claimants have the opportunity to use principled arguments about the merits of each claimants’ maritime claims under international law, there could be an opportunity to determine “who is wrong,” rather than continuing the stalemate of disagreements about the fundamentality of the competing theories. In short, an independent body tasked with clarifying, rather than arbitrating and unilaterally remedying claimants’ grievances—could move the ball toward negotiations that may stop further Chinese encroachment of maritime boundaries—a goal discussed in connection with unilateral protest and other international sanctions above. What is more, such a body would allow Western powers, such as the United States, who in many cases have been the only actors documenting countries’ competing maritime claims in the region through international protest, to present objective data about vessel and ordinance movements throughout the region to help adjudicate countries’ claims.<sup>267</sup>

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263. Patrick M. Cornin, *The United States, China, and Cooperation in the South China Sea*, in TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: NAVIGATING ROUGH WATERS, *supra* note 2, at 149, 154–55.

264. *See id.*

265. *See* the discussion of the ITLOS arbitration award above. *Supra* Section III.C.

266. *See* Ryan Mitchell, *An International Commission of Inquiry for the South China Sea?: Defining the Law of Sovereignty to Determine the Chance for Peace*, 49 VAND. J. TRANSNAT’L L. 749, 782–83 (2016).

267. This use of objective data would be subject to Western countries’ ability to present collected data without political bias. *See* Emmers, *supra* note 223, at 160 (contending that Beijing would likely rebuff Western countries’ attempts to participate in the dispute as a political effort to destabilize the region away from Chinese control). On the other hand, however, the data collected from Western countries’ FONOP

Establishing and maintaining the legitimacy of a body that would inquire into key aspects of the South China Sea dispute solely under principles of international law could create significant challenges to such a body's effectiveness. Especially considering the near-complete aversion of the Chinese government to recognize the underlying principles of adjudicatory proceedings under international law in the case of the *Philippines v. China* arbitration, such an adjudicatory body would have to confine itself to the clarification of the boundary lines of maritime claims under UNCLOS and other international law principles, and would likely need to include the voluntary participation of ASEAN nations with maritime interests in the disputed regions. Ryan Mitchell has proposed an "international Commission of Inquiry," composed of states involved in the dispute, that could adjudicate claims under subject matter that is predetermined by the body.<sup>268</sup> Although Mitchell asserts that such a commission would be able to adjudicate the sovereignty claims of each involved state based on historical entitlement arguments that stretch back to Japanese claims to the region in the Second World War,<sup>269</sup> the principle of such a body in the context of maritime law would remain the same. Such a body could limit its jurisdiction to the clarification of international legal boundaries, and would create incentives, at the very least, for the Chinese government to articulate its maritime law justifications for its territorial assertions in the region.

An inquiry commission into the maritime boundaries surrounding the South China Sea dispute would serve several important purposes. First, such a commission would avoid the problems that arose out of the *Philippines v. China* arbitration, which led to both parties in the dispute doubling down on their arguments and furthering what Mitchell appropriately dubs a "dissensus" between China's use of historical and sovereignty rights arguments, and the Philippines' advocacy for territorial rights under UNCLOS and the ITLOS arbitration ruling.<sup>270</sup> Second, building off of an inquiry with a prearranged jurisdictional mission would likely allow such a commission to develop a summary of the dispute from an independent starting point that the Chinese government may be more likely to accept. By pressing a "reset" button, and forming a mutually agreed starting point to an inquiry of maritime boundaries under international law, progress toward defining the points of contention in the dispute could start.<sup>271</sup> An inquiry commission would require its

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operations and similar programs may be the only objective data available about the dispute.

268. See Mitchell, *supra* note 266.

269. See *id.* at 749.

270. See *id.* at 769-70.

271. See Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, 11 CARDOZO L. REV. 920, 971 (1990) (arguing that when a legal situation arises where

members to operate with permission from all parties to the dispute, including China, ASEAN neighbors, and Western powers with interests in the region, and would need to avoid operating unilaterally to avoid resolutions without arguments or justification by a key party, as was the case with the ITLOS arbitration process in *Philippines v. China*.<sup>272</sup> This could be accomplished gradually, with the commission starting in areas of less strategic importance, detailing maritime claims and creating datapoints upon which countries could rest future legal arguments. Although some may argue that the concessions required by each of the parties in a commission operating with such divergent interests would render it ineffective, starting with the basics and using international law to solve relatively small problems is a necessary step to building upon the legitimacy of such an organization.

## 2. Western Countries Should Continue to Supervise the Development of International Dispute Resolution Mechanisms

Although a common criticism of an international commission of inquiry is that such a mechanism would result only in negotiations that are susceptible to political pressure and unilateral decision-making by bodies that are biased against a particular side of the dispute, Western countries with security interests and experience in the region can utilize their resources and data gathered in the course of protest operations to supervise and maintain the legitimacy of such a commission.<sup>273</sup> Western countries such as the United States and Australia, which have previously operated FONOPs in the region with the goal of directly challenging the sovereignty of the Chinese government as unilateral actors, could begin to shift their focus to strengthening equal and active participation of ASEAN countries in such an inquiry, with unilateral FONOPs used only as a method to encourage Chinese compliance with developing inquiries under international law.

This shift toward encouraging compliance with commissions or dispute resolution systems under international law can be achieved in several ways. First, Western countries that have previously operated unilateral military protests against the Chinese government and have

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no apparent basis for a decision about a dispute is available, parties should come together and decide how *future* adjudication should work).

272. See Mitchell, *supra* note 266, at 787 (describing how critics of the international commission approach warn that the mechanism could be construed as “arbitration in disguise” and accordingly detracting from the legitimacy of this approach).

273. For a detailed discussion about the details of such a supervision program, see JAMES KRASKA, U.S. NAVAL WAR COLL. SOUTH CHINA SEA RULING: IMPLICATIONS FOR QUAD INTERESTS 3, [http://thf\\_media.s3.amazonaws.com/2017/PDFs/FINAL%20Kraska%20-%20Heritage%20SCS%20Paper%20February%208.pdf](http://thf_media.s3.amazonaws.com/2017/PDFs/FINAL%20Kraska%20-%20Heritage%20SCS%20Paper%20February%208.pdf) [https://perma.cc/Q2D6-9VNG] (archived Feb. 21, 2021).

comparable information advantages in the maritime disputes involved in the region should endeavor to assist neighboring ASEAN countries in boosting defense capabilities, with a particular eye towards enforcement of ASEAN claimants' independent maritime claims against Chinese aggression in the region.<sup>274</sup> By operating with the priority of creating an enforcement system by ASEAN neighbors, rather than unilateral protest by the United States with independent legal justification, Western countries can actually encourage compliance with international commissions or adjudicatory bodies by allowing ASEAN countries to create independent legal justifications for enforcing claims in the region, rather than relying on US military operations, which may have diverging or conflicting security interests in the region.<sup>275</sup> The goal of such military operations should be to strengthen neighboring countries' enforcement of Chinese compliance in the region, and should reframe the conflict away from a dispute between the United States and China to one that encourages ASEAN nations to enforce their own boundary disputes.<sup>276</sup>

Second, Western countries should endeavor to legitimize any international commissions or inquiry bodies by recognizing the independent goals of ASEAN claimants' participation in such bodies and should use their historical information advantage about disputed maritime boundaries to contribute to such bodies.<sup>277</sup> If an international inquiry commission is based on international law and UNCLOS principles, for example, the United States could use datapoints that it has collected over years of FONOP operations to create the basis of disputes between China and ASEAN neighbors that could be negotiated by both sides in a dispute. If such information is shared and used as the basis of an inquiry by a body under international law, rather than unilaterally by the United States in advancing its own position in the region, such information could form the basis of legal arguments that can be negotiated and disputed by both sides, rather than invoking political arguments about neighboring countries' alliances in the region.

Although these mechanisms do not by any means represent a perfect dispute resolution framework that will guarantee success in the South China Sea, they represent the most likely start to meaningful progress. International law in the form of unilateral arbitration has proven unreliable, and ASEAN claimants and other powers in the region must agree to approaching the dispute from a common ground before any progress can be made toward a meaningful resolution. If

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274. See Cornin, *supra* note 263, at 156–57.

275. See *id.*

276. See KRASKA, *supra* note 273, at 6.

277. See Cornin, *supra* note 263, at 156–57 (asserting that information inequality and the legitimacy of the efforts of ASEAN regional bodies should be recognized in order to contribute to the legitimacy of dispute resolution systems).

international law is to provide such a resolution to the dispute going forward, countries must start small and focus inquiries on issues that can be resolved, like maritime boundary disputes under UNCLOS principles. None of these bodies can function, however, without the support of Western nations in shifting the framework of the dispute away from unilateral enforcement toward cooperative inquiry and adjudication.

## V. CONCLUSION

Rapid Chinese military and economic expansion has led to a commensurate decrease in the bargaining power of neighboring ASEAN countries and their ability to object to excessive maritime boundary claims in the South China Sea. The existing framework of international law under UNCLOS provides an anchoring point for coastal states' legal claims to the region, but it does not adequately address complicated diplomatic challenges created by unilateral military action and unique geographical issues that allow states to assert claims to maritime features, such as artificial islands, that were not anticipated at the time of ratification.

Coastal states' legal and operational assertions to territorial boundaries in the region largely reflect this disarray. The Chinese government has attempted to bring some aspects of its territorial assertions into compliance with UNCLOS, but these efforts have largely proven to be superficial. China continues to unilaterally enforce its historical claims, expressly disavowed under UNCLOS, based on the infamous nine-dash-line that overlaps with neighboring countries' coastal claims to islands and other important features. Faced with growing Chinese military superiority, these neighboring countries have no choice but to further entrench their legal arguments in international law and its imperfect dispute resolution systems. This dynamic creates a recurring cycle; once neighboring countries acquiesce to these territorial losses, they are nearly impossible to get back. Accordingly, countries that cannot unilaterally enforce their territorial claims can at best minimize their territorial losses and hope that international law develops an effective resolution before it is too late.

A stopgap solution is necessary to mitigate excessive territorial losses. International protest in the form of freedom of navigation operations by interested parties in the South China Sea can prevent excessive territorial losses by creating an accurate record of disapproval that can be referenced in future adjudicatory proceedings. These operations can be performed to objectively note disapproval of territorial delineations under international law, without necessitating that the operating country take sides in a dispute. By objecting to claims that are excessive under international law by all actors in the South China Sea dispute, countries can document their disapproval of

excessive claims and preserve the status quo until a more permanent solution is implemented.

This Note, however, does not argue that unilateral protest should replace dispute resolution mechanisms through international law in the long run. Although international protest can serve as a temporary solution that maintains the status quo and prevents further territorial losses, more permanent solutions should start with small inquiries that can be approached under a common legal understanding that the parties to the dispute adhere to throughout the inquiry into the conflict. By approaching the dispute from a mutually understood starting point, with Western powers assisting in developing legal arguments and the administration of security interests in the region, the nature and course of the dispute can move in a positive direction.

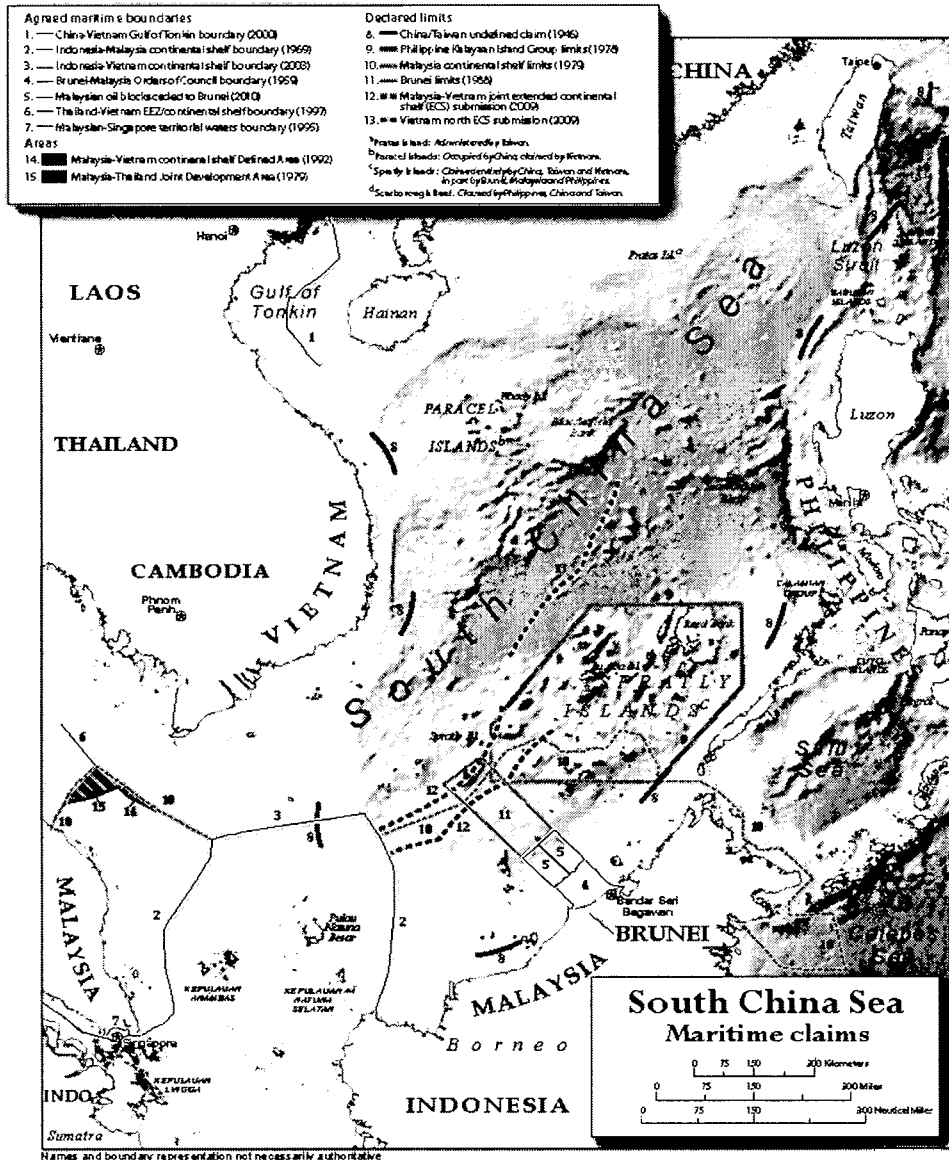
*Kevin Leddy\**

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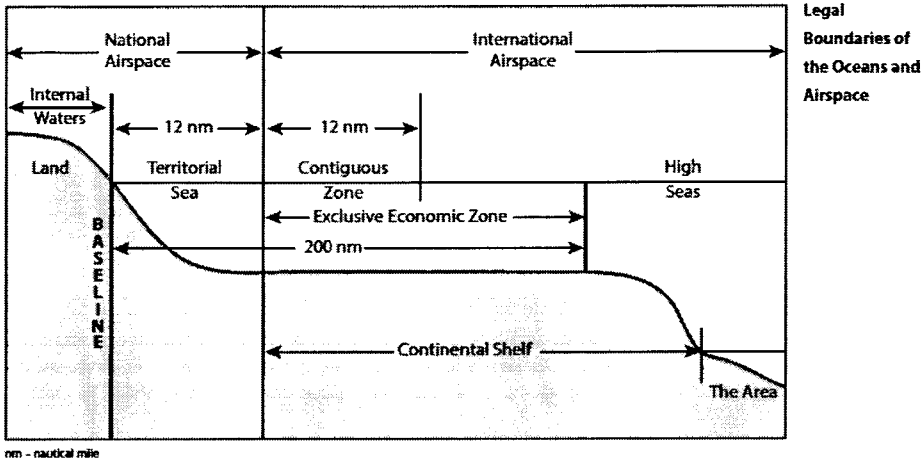
## Appendix 1

[http://www.southchinasea.org/files/2013/02/maritime\\_claims\\_map-US-EAI-2013-a.png](http://www.southchinasea.org/files/2013/02/maritime_claims_map-US-EAI-2013-a.png)



Appendix 2

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