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# Charting the Choppy Waters: Navigating Maritime Disputes in the South China Sea

ABBY BARNES, MADELINE CEWE, KATE GIBSON & CAIT KELLEY\*

## *Abstract*

*In January of 2022, the United States Department of State concluded in their Limits in the Seas study that the People's Republic of China (PRC) has asserted unlawful maritime claims in the majority of the South China Sea.<sup>1</sup> In Limits in the Seas, the United States called on the PRC once again to “conform its maritime claims to international law and to cease its unlawful and coercive activities in the South China Sea.”<sup>2</sup> While the legal basis for China's claims is hotly contested, this article seeks to navigate such unlawful and coercive activities in the region by detailing the history, the claims, and the environmental impacts of the dispute, particularly on marine life and the livelihoods of people who depend on the South China Sea for their survival. Additionally, the article analyzes military conflicts in the region and examines a few of the treaties that have resulted from the decades of disputes. Overall, this article provides a comprehensive analysis of the region, highlighting the importance of resolving the dispute in a way that protects the rights of each of the claimants and preserves the fragile marine ecosystem in the region.*

## BACKGROUND

With claims and counterclaims dating back several centuries, the disputes over the South China Sea have had a substantial and complex history. However, modern disputes over the South China Sea emerged in the 20th century as the region's strategic and economic importance increased.<sup>3</sup>

One of the key factors driving the disputes is that the South China Sea is a gold mine of oil and gas resources.<sup>4</sup> It has been estimated that the South China Sea “contains about 11 billion barrels of oil and 190 trillion cubic feet of natural gas as proved or probable reserves.”<sup>5</sup> Whether countries desire to use such resources to generate electricity, heat, or fuel for their country, or export it as a source of income, it is clear as to why so many countries desire to stake their claim in the South China Sea.

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<sup>1</sup> U.S. Dep't of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No. 150 People's Republic of China: Maritime Claims in the South China Sea* (2022).

<sup>2</sup> JUNG H. PAK, CONSTANCE C. ARVIS & ROBERT HARRIS, *CHINA'S MARITIME CLAIMS IN THE SOUTH CHINA SEA*, U.S. Dep't of State (2022).

<sup>3</sup> Bill Hayton, *The Modern Origins of China's South China Sea Claims*, 45 *MODERN CHINA* 127, 128 (2019).

<sup>4</sup> Pang, X., Li, H., Pang, H. *Exploring the mysteries of deep oil and gas formation in the South China Sea to guide Palaeocene exploration in the Pearl River Mouth Basin*, 361 *ADVANCES IN GEO-ENERGY RESEARCH* 6, 5 (2022). Alexander Metelitsa, *Oil and Gas Resources and Transit Issues in the South China Sea*, ASIA SOCIETY POLICY INSTITUTE, (2014).

<sup>5</sup> Alexander Metelitsa, *Oil and Gas Resources and Transit Issues in the South China Sea*, ASIA SOCIETY POLICY INSTITUTE, (2014).

The strategic significance of the South China Sea is crucial. As one of the most frequented ocean areas in the world, the South China Sea is a major shipping route,<sup>6</sup> with approximately a third of the world's maritime trade making its way through the South China Sea.<sup>7</sup> These shipping routes are important not only for trade, but also for traveler's safety and better possibility of rescue.<sup>8</sup> Further, the South China Sea shipping lanes are "regarded as being of comparatively low risk because of lower hazard levels and better mitigation capacity features."<sup>9</sup>

The South China Sea is also home to military ports<sup>10</sup> and bases.<sup>11</sup> A country who would gain control of the area would be provided with significant influence over the region's trade and military activities.

Six different nations stake a claim over parts or all of the South China Sea, including: China, Taiwan, Vietnam, Brunei, the Philippines, and Malaysia.<sup>12</sup> Each country has its own historical, geographical, and legal basis for their claims, centering around conflicting claims to exclusive economic zones (EEZs) and rights to the resources, such as fisheries and potential underwater mineral deposits, that are found in the area.

International law, specifically the United Nations Convention on the Law of the Sea (UNCLOS), is central in legal aspects of the disputes in the South China Sea.<sup>13</sup> UNCLOS defines the rights and duties of states in maritime areas, including the delimitation of maritime boundaries and the determination of a coastal state's rights to resources in its exclusive economic zone.<sup>14</sup> The legitimacy of China's "nine-dash line" claim, which Beijing uses to support its expansive claims in the South China Sea, is one of the issues that involves the interpretation and application of UNCLOS.<sup>15</sup>

In the 1970s, tensions rose when several countries started exploring for oil and gas in the South China Sea.<sup>16</sup> Various incidents resulted in the 1980s and 1990s between China and other nations:

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<sup>6</sup> Xiao Zhou, Liang Cheng & Manchun Li, *Assessing and Mapping Maritime Transportation Risk Based on Spatial Fuzzy Multi-Criteria Decision Making*, 208 MODERN CHINA (2022).

<sup>7</sup> Const. Rts. Found., *The Dispute Over the South China Sea*, <https://www.crf-usa.org/images/pdf/south-china-sea-dispute.pdf> (last visited Mar. 28, 2023).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> SOUTH CHINA SEA PORTS, <http://ports.com/sea/south-china-sea/> (last visited Mar. 28, 2023).

<sup>11</sup> BEINA XU, SOUTH CHINA SEA TENSIONS (Council on Foreign Relations, 2014)

<sup>12</sup> Const. Rts. Found., *supra* note 7.

<sup>13</sup> United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), 21 I.L.M. 1261 (1982) [hereinafter UNCLOS].

<sup>14</sup> *Id.*

<sup>15</sup> ROBERT BECKMAN, MOVING FORWARD ON JOINT DEVELOPMENT IN THE SOUTH CHINA SEA (Robert Beckman, Ian Townsend-Gault, Clive Schofield, Tara Davenport & Leonardo Bernard, eds., 2013).

<sup>16</sup> Andrew Chubb, *PRC Assertiveness in the South China Sea*, 45 INTERNATIONAL SECURITY 79, 86 (2021).

- China and Vietnam engaged in a significant naval battle in the Spratly Islands in 1988, where China seized control of the Johnson South Reef away from Vietnam.<sup>17</sup>
- In 1995, the Philippines confronted China, accusing the country of building naval structures on the Scarborough Shoal.<sup>18</sup> In response, China said they were only conducting naval exercises.<sup>19</sup>
- Additionally, China and the Philippines were involved in standoffs over the disputed Mischief Reef. This time, the Philippines accused China of building structures and a military outpost on the reef, while China claimed that it was simply building shelters for fishermen.<sup>20</sup>

More recently, China has taken a confrontational position regarding its claims in the South China Sea. Namely, by creating a network of artificial islands and military outposts there.<sup>21</sup> Other nations and the international community have criticized this, voicing concerns over the possibility of militarization of the area and the impact on global commerce routes that run through the South China Sea.<sup>22</sup>

Another legal aspect of the disputes in the South China Sea is the involvement of the International Tribunal for the Law of the Sea (ITLOS) and Permanent Court of Arbitration (PCA).<sup>23</sup> UNCLOS created both agreements in order to resolve disputes between the states.<sup>24</sup> In 2013, the Philippines filed suit against China in the PCA regarding the maritime disputes in the South China Sea.<sup>25</sup> China believed that the PCA lacked jurisdiction because China had modified recognition of UNCLOS's dispute resolution system.<sup>26</sup> In 2016, the tribunal determined that China's claims to the territory were unconstitutional under UNCLOS.<sup>27</sup> China disagreed with the decision and has since continued to claim its sovereignty.<sup>28</sup>

## THE CLAIMANTS

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<sup>17</sup> John W. Garver, *China's Push through the South China Sea*, 132 THE CHINA QUARTERLY 999, 1010-1014 (1992).

<sup>18</sup> Renato De Castro, *The Phillipines Confronts China in the South China Sea*, 39 ASIAN PERSPECTIVE, 71, 83 (2015).

<sup>19</sup> *Id.*

<sup>20</sup> Daojiong Zha, *Security in the South China Sea*, 26 ALTERNATIVES: GLOBAL, LOCAL, POLITICAL, 33, 33 (2001).

<sup>21</sup> Swaren Singh & Lilian Yamamoto, *China's Artificial Islands in the South China Sea*, 8 PONTIFÍCIA UNIVERSIDADE CATÓLICA DO PARANÁ JOURNAL OF ECONOMIC AND SOCIO-ENVIRONMENTAL LAW, 4, 6, (2017).

<sup>22</sup> *Id.* at 5.

<sup>23</sup> United Nations Convention on the Law of the Sea, *supra* note 13.

<sup>24</sup> *Id.*

<sup>25</sup> CHRISTINE PICHEL MEDINA, LEGAL VICTORY FOR THE PHILIPPINES AGAINST CHINA, Geneva Graduate Institute (2017).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

## China

China has many claims, historical and more current, in the South China Sea. Because these claims go back for millennia, China is of the opinion that the area is wholly within its borders.

China's claim for the South China Sea is the "nine-dash line." This nine-dash line is a demarcation line that China uses to justify their claims in the South China Sea - primarily over the Scarborough Shoal and the Paracel and Spratly Islands, the "most important disputed island groups."<sup>29</sup> The line covers almost all of the South China Sea.<sup>30</sup> China asserts that this claim is based on historical rights, dating back to the Ming dynasty in the 14th century.<sup>31</sup> However, this claim is not recognized under UNCLOS, which China has ratified.<sup>32</sup>

In addition, China also has EEZ claims in the South China Sea.<sup>33</sup> An EEZ is a maritime zone extending 200 nautical miles from a coastal state's baseline, within which the state has special rights to explore, exploit, conserve, and manage the natural resources, both living and nonliving, of the waters, the seabed and its subsoil, and the air space over such waters.<sup>34</sup>

In summary, the "nine-dash line," sovereignty over a number of islands and reefs, as well as EEZ claims are China's claims in the South China Sea; such are not recognized by other nations in the area or by the international community.

## Taiwan

As a non-ASEAN country, like China, Taiwan's claims in the South China Sea reflect China's.<sup>35</sup> Because the South China Sea disputes involve bilateral conflicts (e.g., China vs. the Philippines) and conflicts between the ASEAN countries and non-ASEAN countries, Taiwan's position is particularly contentious.<sup>36</sup> They are faced with the decision standing alone in staking their South China Sea claims, joining the ASEAN countries (Brunei, the Philippines, Malaysia, and Vietnam), or joining China as a fellow non-ASEAN country and refuting the other claimants.<sup>37</sup>

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<sup>29</sup> XU, *supra* note 11, at 2.

<sup>30</sup> *Id.* at 1.

<sup>31</sup> SD Pradhan, *South China Sea: Assessing Chinese Historical Justification of Nine Dashed Line*, THE TIMES OF INDIA (June 5, 2020, 5:36 PM IST), <https://timesofindia.indiatimes.com/blogs/ChanakyaCode/south-china-sea-assessing-chinese-historical-justification-of-nine-dashed-line/>.

<sup>32</sup> United Nations Convention on the Law of the Sea, *supra* note 13.

<sup>33</sup> MEDINA, *supra* note 25.

<sup>34</sup> United Nations Convention on the Law of the Sea, *supra* note 13.

<sup>35</sup> Cheng-yi Lin, *Taiwan's South China Sea Policy*, 37 ASIAN SURVEY, 323, 323 (1997).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

It must not be ignored that in this region, Taiwan is both militarily and diplomatically ignored and isolated in the South China Sea.<sup>38</sup> Taiwan has no relations with the other claimants, it is not a member of the Council for Security Cooperation in the Asia Pacific (CSCAP) or of ASEAN and has actually been excluded from joining the ASEAN Regional Forum (ARF).<sup>39</sup> Given this isolation, Taiwan's claims and ability to assert them are limited. While Taiwan desires diplomatic cooperation amongst the claimants, Taiwan does not have access to a forum where their disputes might be resolved and where negotiations may be conducted.<sup>40</sup> Other claimants recognize Taiwan's meager position, articulating that Taiwan has "no jurisdictional standing to make any claim to any territory."<sup>41</sup>

Considering Taiwan's options, Taiwan's position has been to follow the 1992 ASEAN Declaration on the South China Sea principles by "explor[ing] the possibility of cooperation in the South China Sea relat[ed] to the safety of maritime navigation and communication, protect[ing] against pollution of the marine environment, coordination of search and rescue operations, efforts towards combating piracy and armed robbery as well as collaborat[ing] in the campaign against illicit trafficking in drugs."<sup>42</sup> This approach has led Taiwan to "cooperate with other claimants in technical areas such as navigation safety, pollution control, disaster relief, seaborne rescue, oceanographic research, and ecological conservation."<sup>43</sup>

Like China, Taiwan also claims sovereignty over several islands and reefs in the South China Sea, including the previously mentioned Spratly Islands, Paracel Islands, and the Scarborough Shoal.<sup>44</sup> These claims are based on historical and legal grounds, with Taiwan citing its presence in the area dating back to the Ming dynasty in the 14th century.<sup>45</sup> Taiwan additionally claims an EEZ.<sup>46</sup> However, Taiwan's approach to their claims is passive. Unlike its fellow claimants, Taiwan has not sent troops to the region, or built an airstrip, concerned about the impact it might have on the other claimants.<sup>47</sup> Despite Taiwan's possibility for valid claims given their historical and legal grounds, Taiwan cannot afford to devote too much time, money, and manpower to the issue in the South China Sea.<sup>48</sup>

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<sup>38</sup> *Id.* at 328.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*, pg. 328 (quoting B.A. Hamzah, "Conflicting Jurisdictional Problems in the Spratlys: Scope for Conflict Resolution," in *Second Workshop on Managing Potential Conflicts in the South China Sea*, Bandung, Indonesia, July 15-18, 1991, p. 200. See also *The Star* (Kuala Lumpur), January 21, 1992, p. 1, and *Manila Bulletin*, August 12, 1995, p. 6.).

<sup>42</sup> *Id.* at 326 (quoting *ASEAN Documents Series, 1992-1994*, supplementary ed. (Jakarta: The ASEAN Secretariat 1994)).

<sup>43</sup> *Id.* at 326.

<sup>44</sup> Yen-Chiang Chang, *The South China Sea Disputes*, 22 *ASIAN YEARBOOK OF INTERNATIONAL LAW*, 50, 58 (2016)

<sup>45</sup> J. Peter Burgess, *The Politics of the South China Sea*, 34 *SECURITY DIALOGUE*, 5, 5 (2003).

<sup>46</sup> *Id.*

<sup>47</sup> Lin, *supra* note 35 at 329.

<sup>48</sup> *Id.* at 332.

## Vietnam

Vietnam claims sovereignty over several islands and reefs in the South China Sea, including the Spratly Islands and the Paracel Islands.<sup>49</sup> Vietnam's claims to such are based on historical evidence, including the presence of Vietnamese in the area dating back to the 17th century, as well as the administration of the islands and reefs by the Vietnamese government dating back to French colonial rule.<sup>50</sup> Vietnam claims an EEZ, just like China and Taiwan do.<sup>51</sup> Vietnam's EEZ extends two hundred nautical miles and was declared in 1982 and accepted by Malaysia in 2009.<sup>52</sup>

Tensions between China and Vietnam began to escalate in 1986 when Chinese naval vessels patrolled and staged a number of military exercises near Spratly Islands.<sup>53</sup> In February 1988, the Chinese government declared that it had the right to 'survey, study and patrol' the Spratly Islands.<sup>54</sup> After China's claim of sovereignty over the islands, in March of 1988, Chinese and Vietnamese naval vessels exchanged fire resulting in seventy Vietnam fatalities and extensive damage to both country's vessels.<sup>55</sup>

In September 1991, China and Vietnam normalized relationships in the "Secret Summit," ending thirteen years of hostility that began when Vietnam invaded Cambodia and ousted the Chinese-supported Khmer Rouge.<sup>56</sup>

Vietnam joined ASEAN in July 1995, becoming the seventh nation to join.<sup>57</sup> Reflecting on its membership, Vietnam believes that its membership in ASEAN has created security in Southeast Asia and created a favorable environment for economic development.<sup>58</sup>

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<sup>49</sup> RAUL PEDROZO, CHINA VERSUS VIETNAM: AN ANALYSIS OF THE COMPETING CLAIMS IN THE SOUTH CHINA SEA, 37 Center for Naval Analyses (2014).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> GREGORY B. POLING, THE SOUTH CHINA SEA IN FOCUS, 7 Center for Strategic and International Studies (2013).

<sup>53</sup> Marko Milivojevic, *The Spratley and Paracel Islands Conflict*, 31 SURVIVAL, 70, 70 (2008).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Carlyle A. Thayer, *Vietnam: Coping with China*, 21 SOUTHEAST ASIAN AFFAIRS, 351, 353 (1994).

<sup>57</sup> David H.S. Truong & Carolyn L. Gates, *Vietnam in ASEAN*, 13 ASEAN ECONOMIC BULLETIN, 159, 159 (1996).

<sup>58</sup> Charlotte Pho, *26-Year Membership of Vietnam in ASEAN*, VIETNAM TIMES (July 26, 2021 14:24), <https://vietnamtimes.org.vn/26-year-membership-of-vietnam-in-asean-history-vietnams-role-and-contribution-to-asean-34251.html#:~:text=Vietnam%20joined%20ASEAN%20and%20became%20its%20seventh%20member,the%20co-operation%20and%20connection%20process%20of%20the%20region.>

Since 1999, China has imposed a fishing ban in the South China Sea from May 1-August 16.<sup>59</sup> Yearly, Vietnam asserts that the bans impose on their sovereignty, while China claims that the ban is to protect marine life.<sup>60</sup>

Vietnam's claims to sovereignty are consistent with UNCLOS, which it ratified in 1994 and the support of their claims by the PCA in 2016.<sup>61</sup> Hanoi's monitoring of activities in the Spratlys is supported by the Russian signals intelligence facility at Cam Ranh Bay.<sup>62</sup>

## Philippines

Like the other claimants, one of the Philippines' main claims is its sovereignty over islands and reefs in the South China Sea, including the Spratly Islands and the Scarborough Shoal.<sup>63</sup> These claims are based on historical evidence, including Filipinos presence on these islands dating back to the 19th century.<sup>64</sup> The Philippines further argues that these islands and reefs are within its EEZ as defined by UNCLOS.<sup>65</sup>

In 2013, the Philippines filed suit against China in the PCA regarding the maritime disputes in the South China Sea.<sup>66</sup> China believed the PCA lacked jurisdiction because China had modified recognition of UNCLOS's dispute resolution system.<sup>67</sup> In 2016, the tribunal determined that China's claims to the territory were unconstitutional under UNCLOS.<sup>68</sup> The Philippines' claims have been recognized by the international community, specifically by UNCLOS, which the Philippines ratified in 1984.<sup>69</sup>

## Malaysia

Malaysia also claims it has sovereignty over several islands and reefs in the South China Sea.<sup>70</sup> Malaysia is a federation made up of thirteen states and has two geographically separated regions.<sup>71</sup> Peninsular Malaysia consists of eleven states while East Malaysia on the island of

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<sup>59</sup> Sebastian Strangio, *Vietnam Protests China's Imposition of Annual South China Sea Fishing Ban*, THE DIPLOMAT (May 6, 2022), <https://thediplomat.com/2022/05/vietnam-protests-chinas-imposition-of-annual-south-china-sea-fishing-ban/>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*; United Nations Convention on the Law of the Sea, *supra* note 13.

<sup>62</sup> Lin, *supra* note 35 at 328.

<sup>63</sup> Leszek Buszynski, *Rising Tensions in the South China Sea*, 6 SECURITY CHALLENGES, 85, 86 (2010).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*; United Nations Convention on the Law of the Sea, *supra* note 13.

<sup>66</sup> MEDINA, *supra* note 25.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> PRASHANTH PARAMESWARAN, MALAYSIA'S APPROACH TO THE SOUTH CHINA SEA AND IMPLICATIONS FOR THE UNITED STATES, Center for a New American Security 11 (2015).

<sup>71</sup> J. ASHLEY ROACH, MALAYSIA AND BRUNEI: AN ANALYSIS OF THEIR CLAIMS IN THE SOUTH CHINA SEA, 1 Center for Naval Analyses (2014).



Borneo is made up of two states, these regions are separated by some 640 miles of the South China Sea.<sup>72</sup>

Their claims in the South China Sea include ten atolls in the Spratlys archipelago, all of which lie within Malaysia's EEZ.<sup>73</sup> Malaysia also claims jurisdiction over submerged features, the James Shoal and the Luciona shoals. Malaysia's claims to these are "based on its corresponding claim to a continental shelf... and a 2009 joint submission with Vietnam to the Commission on the Limits of the Continental Shelf."<sup>74</sup> Malaysia currently occupies five of the atolls in the Spratlys and has planted sovereignty markers over two unoccupied features.<sup>75</sup> Malaysia in 2009 seems to have ceded its claim over an eleventh feature, the Louisa Reef, in a bilateral agreement with Brunei.<sup>76</sup>

Malaysia has consistently advocated for peaceful resolution of the disputes in the South China Sea through diplomatic means.<sup>77</sup> It also upholds the rules and principles of UNCLOS, which it ratified in 1996.<sup>78</sup> The state supports international arbitration to resolve disputes in the South China Sea and has abided by arbitration rulings.<sup>79</sup> Malaysia has also expressed a policy of protecting their territorial sovereignty and their sovereign rights in their EEZ.<sup>80</sup>

To achieve these policy goals, Malaysia has pursued certain strategies.<sup>81</sup> They have stationed military personnel on their five occupied atolls and conduct regular patrols to monitor

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<sup>72</sup> *Id.*

<sup>73</sup> Ian Storey, *Malaysia and the South China Sea Dispute: Policy Continuity amid Domestic Political Change*, 18 PERSPECTIVE 1, 2 (2020).

<sup>74</sup> National Bureau of Asian Research, *Country Profile from the Maritime Awareness Project: Malaysia*, (last visited Mar. 28, 2023) <https://www.nbr.org/publication/malaysia/>; "The Continental Shelf (Article 76 Part VI of the 1982 UNCLOS) is defined as "the natural prolongation of the land territory to the outer edge continental margin, or 200 NM from the coastal state's baseline, whichever is greater". Therefore, a State's continental shelf may exceed 200 NM until the natural prolongation (the land mass of the coastal State) ends." see, N A Z Yahaya et. al, *In Search of the Malaysian Continental Shelf*, 37 IOP Conf. Series: Earth and Env't Science (2016).

<sup>75</sup> Storey, *supra* note 73.

<sup>76</sup> *Id.*

<sup>77</sup> See Linh Pham, *Malaysia and Australia advocate peaceful solution of South China Sea matters*, HANOI TIMES (July 17, 2020, 14:22), <https://hanoitimes.vn/malaysia-and-australia-advocate-peaceful-solution-of-south-china-sea-matters-313293.html>; Reuters, *Malaysia urges peaceful resolution to South China Sea stand-off with Beijing*, SOUTH CHINA MORNING POST (Apr. 23, 2020, 3:53 PM) <https://www.scmp.com/news/asia/southeast-asia/article/3081234/malaysia-urges-peaceful-resolution-south-china-sea-stand>; Lynn Kuok, *Taiwan and the South China Sea: More steps in the right direction*, BROOKINGS INSTITUTE (Aug. 24, 2015), <https://www.brookings.edu/opinions/taiwan-and-the-south-china-sea-more-steps-in-the-right-direction/>.

<sup>78</sup> See Dalila Abu Bakar, *Malaysia Fully Supports A Rules-Based Maritime Order*, MARITIME FAIRTRADE (Mar. 27, 2022), <https://maritimefairtrade.org/malaysia-fully-supports-rules-based-maritime-order/>; Permanent Mission of Malaysia to the United Nations, *Statement: 31st Meeting of States Parties to UNCLOS (Item 13)*, KLN.GOV.MY (June 25, 2021, 3:30 PM), [https://www.kln.gov.my/web/usa\\_un-new-york/news-from-mission/-/blogs/9108384](https://www.kln.gov.my/web/usa_un-new-york/news-from-mission/-/blogs/9108384); Maritime Institute of Malaysia, *The 45th Annual Conference on Oceans Law & Policy*, MIMA (Mar. 18, 2022), <https://www.mima.gov.my/news/the-45th-annual-conference-on-oceans-law-policy-unclos>.

<sup>79</sup> Storey, *supra* note 73.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

China's activities.<sup>82</sup> However, since the early 1990's Malaysia has desired to forge closer economic ties with China. This policy has led to a string of denials and downplaying of the tensions between Chinese and Malaysian government vessels in its EEZ.<sup>83</sup> Malaysia has also not submitted disputes to arbitration out of fear that China would view these as hostile.<sup>84</sup>

In 2020, Malaysia experienced political turmoil in which the Pakatan Harapan government collapsed.<sup>85</sup> The new Prime Minister Muhyiddin Yassin, who was appointed in 2020, is not expected to announce any major changes in Malaysia's policy in the South China Sea.<sup>86</sup> It is expected that Malaysia's position will remain unchanged going forward.<sup>87</sup>

## Brunei

Brunei has been referred to as the "silent claimant" to the South China Sea.<sup>88</sup> Shortly after gaining its independence from Britain, in 1984 the small Islamic sultanate state asserted its claims to a rectangular chunk of the disputed sea that overlaps with China's nine-dash line.<sup>89</sup> This includes claims to the Louisa Reef, Owen Shoal, and Rifleman Bank, however, unlike other claimants, Brunei does not claim sovereignty over the islands and has no military presence in the area.<sup>90</sup>

Brunei's silence can be partially attributed to China's "charm offensive."<sup>91</sup> China sought to take advantage of Brunei's declining economy by investing millions in oil refineries, funding infrastructure projects, and promising cooperation and planning future projects.<sup>92</sup> These investments have seemed to buy Brunei's silence until recently.

In 2020, the Brunei Darussalam Ministry of Foreign Affairs issued a rare statement urging states to take a bilateral approach in discussing issues based on the UNCLOS and international law.<sup>93</sup> It seems that Brunei has a conflicting position as it desires to be a trustworthy member of the Association of Southeast Asian Nations (ASEAN), a long-standing

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Voice of America, *Disputed Waters*, VOA <https://projects.voanews.com/south-china-sea/recent/> (last visited Mar. 28, 2023).

<sup>89</sup> *Id.*

<sup>90</sup> Joshua Espeña & Anne Uy, *Brunei, ASEAN and the South China Sea*, LOWY INST. (Aug. 3, 2020), <https://www.lowyinstitute.org/the-interpretor/brunei-asean-south-china-sea>.

<sup>91</sup> *Id.*

<sup>92</sup> Michael Hart, *Brunei Abandons South China Sea Claim for Chinese Finance*, GEOPOLITICAL MONITOR (Apr. 4, 2018), <https://www.geopoliticalmonitor.com/brunei-abandons-south-china-sea-claim-for-chinese-finance/>.

<sup>93</sup> Sofia Tomacruz, *Brunei, the quiet claimant, breaks its silence on the South China Sea*, RAPPLER (July 22, 2020, 11:42 AM PHT) <https://www.rappler.com/world/asia-pacific/brunei-breaks-silence-south-china-sea/>.

special relationship with Britain, and an economic reliance on China.<sup>94</sup> It seems, however, that Brunei intends to be reliant upon the UNCLOS and the ASEAN China Code of Conduct.<sup>95</sup>

## THE UNITED STATES' POSITION

The United States upholds the “freedom of the seas in a manner consistent with international law,”<sup>96</sup> while “stand[ing] with the international community in defense of freedom of the seas and respect for sovereignty.”<sup>97</sup> Emphasizing that the claimants ought to follow the application of UNCLOS in the pursuit of peaceful resolution,<sup>98</sup> the United States has called on all parties to “protect their sovereign rights.”<sup>99</sup>

In order to challenge excessive maritime claims, the United States has conducted Freedom of Navigation Operations (FONOPs) in the South China Sea.<sup>100</sup> these FONOPs, the United States argues, are necessary to ensure that the rights, freedoms, and lawful uses of the sea are protected to maintain a rules-based international order.<sup>101</sup>

Finally, the United States further requests that all claimants avoid militarization and the use of force in the South China Sea.<sup>102</sup> Additionally, the United States supports efforts made by regional organizations like ASEAN to assist diplomatic negotiations and confidence-building measures, while promoting conversation and collaboration among the countries in the region with the goal of settling conflicts peacefully.<sup>103</sup>

## SEA LIFE

The marine life in the area has also been impacted by the disputes over the South China Sea. The destruction of coral reefs and other delicate marine habitats brought on by China and other nations building artificial islands and military sites is one of the main issues.<sup>104</sup> The health of coral reefs, which are crucial habitats for a range of marine animals, has been demonstrated to be significantly harmed by the dredging and filling of these features.<sup>105</sup>

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<sup>94</sup> Espeña, *supra* note 76.

<sup>95</sup> *Id.*

<sup>96</sup> See Press Release, Michael R. Pompeo, Secretary of State, U.S. Position on Maritime Claims in the South China Sea (July 13, 2020), <https://2017-2021.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/index.html>.

<sup>97</sup> *Id.*

<sup>98</sup> *America's Security Role in the South China Sea: Hearing Before the Subcomm. On Asia and the Pac. of the H. Comm. on Foreign Aff.*, 114th Cong. (2014).

<sup>99</sup> Press Release, *supra* note 96.

<sup>100</sup> ELEANOR FREUND, FREEDOM OF NAVIGATION IN THE SOUTH CHINA SEA, Harv. Kennedy Sch. Belfer Ctr. For Sci. & Int'l Aff 18 (2017).

<sup>101</sup> Lynn Kuok, *The U.S. FON Program in the South China Sea A lawful and necessary response to China's strategic ambiguity*, East Asia Policy Paper 9 (2016) <https://cil.nus.edu.sg/wp-content/uploads/2009/08/Lynn-Kuok-The-US-FON-Program-in-the-South-China-Sea.pdf>.

<sup>102</sup> Press Release, *supra* note 96.

<sup>103</sup> S. Hrg. 112-610 2012.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

The disputes have also increased the number of vessels operating in the South China Sea. Among these are illicit, unreported, and unregulated fishing vessels, which further reduce fish populations and their breeding habitats.<sup>106</sup> Overfishing is another problem.<sup>107</sup> Local fishermen have found it more difficult to support themselves as a result.<sup>108</sup>

The hawksbill sea turtle,<sup>109</sup> the dugong,<sup>110</sup> and the Chinese White Dolphin<sup>111</sup> are just a few of the South China Sea's resident species that are thought to be in risk of extinction.<sup>112</sup> Overfishing, pollution, and coastal development are already hazards to these species, and the additional maritime activity and coastline development brought on by the South China Sea disputes only makes these dangers worse.<sup>113</sup>

The disputes in the South China Sea also have an effect on local populations, whose livelihoods depend on marine resources,<sup>114</sup> as well as their cultural traditions, which are closely tied to those marine resources.<sup>115</sup> Such effects have a profound social influence on the communities that depend on the sea for their life in addition to economic effects.

## PEOPLE

Local communities that depend the most on the marine resources in the area for their livelihoods have been majorly affected.<sup>116</sup> The conflicts have caused overfishing, which has damaged fish populations and their breeding grounds as well as made it more difficult for local fishermen to support their livelihoods.<sup>117</sup> Additionally, many of these local communities have a long history of habitation, and the marine resources play a significant role in their cultural legacy.<sup>118</sup>

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<sup>106</sup> Kathryn Anne Gwiazdon, *International Law and Human Security: The Environmental and Geopolitical Impacts of China's Artificial Island-Building at Fiery Cross Reef* (2017).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Nguyen Chu Hoi & Vu Hai Dang, *Building a Regional Network and Management Regime of Marine Protected Areas in the South China Sea for Sustainable Development*, 18 *J. of Int'l Wildlife Law and Policy* 2, 128.

<sup>111</sup> Porfirio Aliño, *National Report on Coral Reefs in the Coastal Waters of the South China Sea Philippines*, United Nations Environmental Programme, 55

[http://www.unepscs.org/components/com\\_repository\\_files/downloads/National-Report-Coral-Reefs-Philippines.pdf](http://www.unepscs.org/components/com_repository_files/downloads/National-Report-Coral-Reefs-Philippines.pdf).

<sup>112</sup> Kathryn Anne Gwiazdon, *International Law and Human Security: The Environmental and Geopolitical Impacts of China's Artificial Island-Building at Fiery Cross Reef* (2017).

<sup>113</sup> *Id.*

<sup>114</sup> Aliño, *supra* note 111.

<sup>115</sup> Mike Ives, *The Rising Environmental Toll of China's Offshore Island Grab* (Oct. 10, 2016).

<sup>116</sup> Julius Cesar Trajano, *Resource Sharing and Joint Development in the South China Sea: Exploring Avenues of Cooperation* (2019).

<sup>117</sup> Kathryn Anne Gwiazdon, *International Law and Human Security: The Environmental and Geopolitical Impacts of China's Artificial Island-Building at Fiery Cross Reef* (2017).

<sup>118</sup> See Elena Perez-Alvaro and Craig Forrest, *Maritime Archaeology and Underwater Cultural Heritage in the Disputed South China Sea*, 35 *Int'l J. of Cultural Property*, 375; EDYTA ROSZKO NAVIGATING STATE, RELIGION AND THE SOUTH CHINA SEA IN CENTRAL VIETNAM (2020); RUHANAS HARUN AND

Tourism might be impacted, as increased tensions could deter some visitors from traveling. The disputes and militarization created concerns about freedom of navigation and ship's safety in the area, which has affected maritime trade and international shipping lanes, a major source of income for many of the countries in the region.<sup>119</sup>

The disputes have also had a broader impact on the international community, with concerns about the potential for militarization of the region and the impact on global trade routes that pass through the South China Sea. The disputes have led to an increase in tensions between the countries involved, which have implications for regional stability and security.

### MILITARY CONFLICTS

Skirmishes and a few minor clashes between the parties involved in the South China Sea have taken place; and while there have been a number of significant occurrences, these episodes have not yet reached the threshold of a full-scale war.

One of the most notable incidents was the 1988 clash between China and Vietnam on the Johnson Reef in the Spratly Islands.<sup>120</sup> Following Vietnam's occupation of several reefs to keep an eye on China's presence on the Fiery Cross Reef, Chinese naval and air force units fought a battle with the Vietnamese naval and air force units, resulting in the sinking of three Vietnamese ships and the deaths of seventy-four sailors.<sup>121</sup> The Chinese occupied the reef afterwards and thus this incident is often seen as the most violent in the disputed areas.<sup>122</sup>

Just eight years later, in 1996, the Chinese fought against the Philippines at Mischief Reef in the Spratly Islands.<sup>123</sup> Significantly, this was the first time that China had "engage[d] in a military confrontation with an ASEAN member other than Vietnam."<sup>124</sup> Tensions over Mischief Reef would abate, as China and the Philippines would sign a "nonbinding code of conduct that calls for a peaceful resolution to the territorial dispute and the promotion of confidence-building measures."<sup>125</sup>

Another notable incident was the 2013 Scarborough Shoal standoff. This maritime standoff occurred following the Philippines' dispatch of a warship to confront China's fishing

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SABIRIN JA'AFAR, MALAYSIA: A MARITIME NATION (2021); W. -Y. The Protection of Underwater Heritage in Taiwan: Recent Initiatives and Major Issues, 79 WIT Transactions on The Built Environment, 179.

<sup>119</sup> Christian Wirth, *Whose 'Freedom of Navigation'?* *Australia, China, the United States and the making of order in the 'Indo-Pacific'*, 32 THE PACIFIC REVIEW, 475, 475 (2019).

<sup>120</sup> Council on Foreign Relations, *China's Maritime Disputes* <https://www.cfr.org/timeline/chinas-maritime-disputes> (last visited Mar. 28th, 2023).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

boats in the Scarborough Shoal.<sup>126</sup> In response, China dispatched their own vessels.<sup>127</sup> The standoff lasted for several months; meanwhile China quarantined fruit from the Philippines and spoke ill of Philippines tourism.<sup>128</sup> As a result, the Philippines lost approximately \$34 million in banana exports, and ultimately the Philippines withdrew their vessels while China continued to maintain a presence in the area.<sup>129</sup> This incident also led to an increase in tensions between the two countries and their allies in the region.<sup>130</sup>

In addition, there have been several other clashes, including ramming of ships, deployment of missiles, seizures of drones, and ships spending months in other claimants' EEZs, though these have been relatively minor in nature.<sup>131</sup>

## TREATIES

As mentioned throughout, one of the most important treaties is the UNCLOS, which defines the rights and responsibilities of states in maritime areas, including the delimitation of maritime boundaries and the determination of a coastal state's rights to resources in its EEZ.<sup>132</sup> Several of the disputes in the South China Sea concern the interpretation and application of UNCLOS, and the tribunal established under UNCLOS has issued several rulings on disputes related to the South China Sea.<sup>133</sup> The 1976-adopted ASEAN Treaty of Amity and Cooperation in Southeast Asia (TAC), aims to advance stability, security, and peace in the region, and is another significant agreement.<sup>134</sup> Since several ASEAN nations are directly involved in the conflicts over the South China Sea, ASEAN as a whole has played a key role in attempting to resolve them diplomatically.<sup>135</sup>

Additionally, the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC), was adopted by China and the ASEAN countries and provides for peaceful resolution of disputes and for the claimants to refrain from behavior that could escalate tensions in the

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>133</sup> See Hoa Duy Phan and Lan Ngon Nguyen, *The South China Sea Arbitration: Bindingness, Finality, and Compliance with UNCLOS Dispute Settlement Decisions*, 8 Asian J. of Int'l Law 1, 33; Leszek Buszanski, *Rising Tensions in the South China Sea: Prospects for a Resolution of the Issue*, 6 Security Challenges 2, 85; Robert Beckman, *The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea*, American J. of Int'l Law 1, 142; Duncan French, *In the Matter of the South China Sea Arbitration: Republic of Philippines v. People's Republic of China, Arbitral Tribunal Constituted under Annex VII of the 1982 United Nations Law of the Sea Convention, Case No. 2013-19*, Award of 12 July 2016, 19 Environmental Law Review, 48.

<sup>134</sup> 1976 Treaty of Amity and Cooperation in Southeast Asia, <https://asean-aipr.org/wp-content/uploads/2018/07/Treaty-of-Amity-and-Cooperation-in-Southeast-Asia-1976-TAC.pdf>.

<sup>135</sup> Jim Della-Giacoma, *Preventive Diplomacy in Southeast Asia: Redefining the ASEAN Way*, International Peace Institute, 2011, 28.

region.<sup>136</sup> Despite the limited success of the agreement in resolving disputes over the South China Sea, DOC has served as a framework for further and future diplomatic efforts.<sup>137</sup>

In addition, there are also bilateral agreements between claimants. These agreements tend to focus on cooperation and joint development in the disputed areas and have the aim of lowering tensions and creating a framework for peaceful resolution of disputes.<sup>138</sup>

## MAJOR LEGAL IMPLICATIONS AND HOW LAWYERS SHOULD PREPARE

The disputes over the South China Sea have several major legal implications. Many of these have been discussed at length above, including the interpretation and application of the UNCLOS. Several of the disputes in the South China Sea involve UNCLOS, including disputes over the legality of China's "nine-dash line" claim, which Beijing uses to justify its expansive claims in the South China Sea.

Another legal implication is the involvement of the ITLOS and the PCA, which were created under UNCLOS to resolve disputes between states. In 2013, the Philippines filed a case against China with the PCA regarding the maritime disputes in the South China Sea. In 2016, the tribunal ruled that China's claims to the area were invalid under UNCLOS and that its actions in the region were illegal. However, China rejected the ruling and continues to assert its sovereignty over the disputed areas, which is an ongoing legal implication.

Additionally, the disputes have raised questions about the legal status of maritime features in the South China Sea, such as artificial islands and low-tide elevations, and their ability to generate maritime rights under UNCLOS. The disputes also have implications for the delimitation of maritime boundaries in the South China Sea and the determination of coastal state's rights to resources in the area.

Given these legal implications, lawyers should be prepared to address the following legal issues in the future:

- Familiarity with UNCLOS, including the rights and responsibilities of states in maritime areas, and the delimitation of maritime boundaries;
- Understanding the legal implications of disputes related to the interpretation and application of UNCLOS, including the legal status of maritime features and the delimitation of maritime boundaries;
- Familiarity with the legal procedures for dispute resolution under UNCLOS, including the procedures before the ITLOS and PCA;

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<sup>136</sup> Declaration on the Conduct of Parties in the South China Sea (May 14th, 2012) <https://asean.org/declaration-on-the-conduct-of-parties-in-the-south-china-sea-2/>.

<sup>137</sup> Zong Haihe, DOC: The Cornerstone for South China Sea Peace and Stability (Jun. 16th, 2022 05:40 PM) <https://www.globaltimes.cn/page/202206/1268287.shtml>.

<sup>138</sup> Leszek Busuniski, Rising Tensions in the South China Sea: Prospects for a Resolution of the Issue, 6 Security Challenges 2, 84.

- Knowledge of the jurisprudence on maritime disputes under UNCLOS, including prior decisions of tribunals and courts;
- Understanding of the political and strategic dimensions of the disputes, as these are often closely related to the legal aspects of the disputes; and
- Familiarity with other relevant international law, such as the Law of State Responsibility, which may be invoked in disputes over the South China Sea.

Overall, the disputes over the South China Sea have significant legal implications, which are complex and multifaceted. Lawyers should be familiar with UNCLOS and other relevant international law, and be prepared to address the legal, political, and strategic dimensions of the disputes in order to advise clients effectively on these matters.