

CHINA'S HISTORIC RIGHTS IN THE SOUTH CHINA SEA:  
A TIME FOR RECONSIDERATION AND PACIFIC SETTLEMENT

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A Thesis submitted to

The Faculty of  
The George Washington University Law School  
in partial satisfaction of the requirements  
for the degree of Master of Laws  
May 18, 2014

Thesis directed by  
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## Report Documentation Page

*Form Approved*  
*OMB No. 0704-0188*

Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

1. REPORT DATE <b>18 MAY 2014</b>	2. REPORT TYPE	3. DATES COVERED			
4. TITLE AND SUBTITLE <b>CHINA'S HISTORIC RIGHTS IN THE SOUTH CHINA SEA: A TIME FOR RECONSIDERATION AND PACIFIC SETTLEMENT</b>		5a. CONTRACT NUMBER			
		5b. GRANT NUMBER			
		5c. PROGRAM ELEMENT NUMBER			
6. AUTHOR(S) <b>Brian Halliden</b>		5d. PROJECT NUMBER			
		5e. TASK NUMBER			
		5f. WORK UNIT NUMBER			
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) <b>GEORGE WASHINGTON UNIVERSITY, 800 21st Street NW, Marvin Center Ground Floor, Washington, DC, 20052</b>		8. PERFORMING ORGANIZATION REPORT NUMBER			
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)		10. SPONSOR/MONITOR'S ACRONYM(S)			
		11. SPONSOR/MONITOR'S REPORT NUMBER(S)			
12. DISTRIBUTION/AVAILABILITY STATEMENT <b>Approved for public release; distribution unlimited.</b>					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT <b>In recent years, the South China Sea has featured prominently in news headlines concerning territorial disputes and claims to maritime resources involving China, the Philippines and Vietnam. One of the most contentious disputes in the region is China's so-called nine-dash line claiming historic rights deep into the South China Sea. This thesis argues that China's historic rights claims in the South China Sea are not supported by public international law and accordingly China should seek a settlement with the Philippines and Vietnam. China should pursue a settlement because the Philippines and Vietnam can present persuasive legal arguments as to why China is not entitled to historic rights in the South China Sea. Also, the ongoing dispute over rights impedes the ability of China and other claimant states to effectively exploit the rich resources of the South China Sea while significantly raising inter-state tensions and threatening regional economies. Further, China's insistence on maritime claims not in accordance with the provisions of the United Nations Convention on the Law of the Sea encourages other states to assert similar historic rights claims, which could ultimately threaten China's national security. Finally, China's alleged interference with other states' maritime rights in the South China Sea represents an unnecessary litigation risk of having multiple cases brought before international tribunals resulting in damage to China's international standing.</b>					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES <b>86</b>	19a. NAME OF RESPONSIBLE PERSON
a. REPORT <b>unclassified</b>	b. ABSTRACT <b>unclassified</b>	c. THIS PAGE <b>unclassified</b>			



## Acknowledgements

The author wishes to thank Professor Sean Murphy for his guidance in writing this thesis and Professor Maureen Anderson, University of Dayton School of Law, for all of her support.

## Disclaimer

Commander Brian Halliden serves in the U.S. Navy Judge Advocate General's Corps.

This paper was submitted in partial satisfaction of the requirements for the degree of Master of Laws in International Law at The George Washington University Law School.

The views expressed in this paper are solely those of the author and do not reflect official policy or position of the United States Navy, Department of Defense or U.S.

Government.

## Abstract

### CHINA'S HISTORIC RIGHTS IN THE SOUTH CHINA SEA: A TIME FOR RECONSIDERATION AND PACIFIC SETTLEMENT

In recent years, the South China Sea has featured prominently in news headlines concerning territorial disputes and claims to maritime resources involving China, the Philippines and Vietnam. One of the most contentious disputes in the region is China's so-called nine-dash line claiming historic rights deep into the South China Sea. This thesis argues that China's historic rights claims in the South China Sea are not supported by public international law and accordingly China should seek a settlement with the Philippines and Vietnam. China should pursue a settlement because the Philippines and Vietnam can present persuasive legal arguments as to why China is not entitled to historic rights in the South China Sea. Also, the ongoing dispute over rights impedes the ability of China and other claimant states to effectively exploit the rich resources of the South China Sea while significantly raising inter-state tensions and threatening regional economies. Further, China's insistence on maritime claims not in accordance with the provisions of the United Nations Convention on the Law of the Sea encourages other states to assert similar historic rights claims, which could ultimately threaten China's national security. Finally, China's alleged interference with other states' maritime rights in the South China Sea represents an unnecessary litigation risk of having multiple cases brought before international tribunals resulting in damage to China's international standing.

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## I. INTRODUCTION.

The South China Sea has historically been a crossroads of travel, trade and tensions between the bordering states. In recent years, news headlines have been especially dominated by sovereignty disputes between China and neighboring states over islands in the South China Sea and sovereign rights to the resources of the South China Sea.<sup>1</sup> One of the most contentious claims is China's so-called "nine-dash line" claiming historic rights deep into the South China Sea.<sup>2</sup> The Philippines and Vietnam have been strenuous in objecting to China's historic rights claims in the South China Sea. Vietnam's foreign ministry recently stated that Vietnam would apply "all necessary and appropriate peaceful means" to protect its sovereignty and national interests in the South China Sea.<sup>3</sup>

The Philippines has pursued an even stronger policy opposing China's claims and on January 22, 2013, instituted compulsory arbitration proceedings against China before the Permanent Court of Arbitration.<sup>4</sup> The Philippines pursued the arbitration proceedings under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS).<sup>5</sup>

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<sup>1</sup> Jeff Himmelman, *A Game of Shark and Minnow*, N.Y. TIMES, (Oct. 27, 2013), <http://www.nytimes.com/newsgraphics/2013/10/27/south-china-sea/>.

<sup>2</sup> U.N. Doc. CML/17/2009 from the Permanent Mission of the People's Republic of China to the UN Secretary-General, [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf) (last updated May 3, 2011) (hereinafter Note Verbale CML/17/2009).

<sup>3</sup> Greg Torode, *For South China Sea Claimants, A Legal Venue to Battle China*, REUTERS, (Feb. 12, 2014), <http://www.reuters.com/article/2014/02/13/us-china-vietnam-idUSBREA1C04R20140213>.

<sup>4</sup> Note Verbale No. 13-0211 from The Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China (Jan. 22, 2013), <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos> [hereinafter Note Verbale No. 13-0211].

<sup>5</sup> *Id.* at 1. UNCLOS is a comprehensive legal framework regulating uses of the oceans and the sovereignty rights of states. U.N. Convention on the Law of the Sea, *opened for*

The Philippine arbitration claims are that (1) China's rights in regard to maritime areas in the South China Sea, like the rights of the Philippines, are those that are established by UNCLOS; (2) China's so-called nine-dashed line is contrary to UNCLOS and unlawful; (3) China be required to bring its domestic legislation into conformity with its obligations under UNCLOS; and (4) China desist from activities that violate the rights of the Philippines in its maritime domain.<sup>6</sup>

After the Philippines filed the claims, China refused to participate in the proceedings and rejected the arbitration panel's jurisdiction.<sup>7</sup> Despite China's refusal to participate in the process, the arbitration case proceeds and the Philippines filed its initial brief with the secretariat of the tribunal (under the Permanent Court of Arbitration) on March 30, 2014.<sup>8</sup>

This thesis argues that China's historic rights claims in the South China Sea are not supported by public international law and accordingly China should seek a settlement with the Philippines and Vietnam. Several reasons exist for why China should pursue a comprehensive settlement. First, the Philippines and Vietnam can assert persuasive legal arguments as to why China is not entitled to historic rights in the South China Sea. Second, the ongoing dispute over rights impedes the ability of China and other claimant states to effectively exploit the rich resources of the South China Sea while raising inter-

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*signature* Dec. 10, 1982, 1833 U.N.T. S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

<sup>6</sup> Note Verbale No. 13-0211, *supra* note 4, at 17-19.

<sup>7</sup> Department of Foreign Affairs Statement on China's Response to the Philippines Arbitration Case Before UNCLOS, REPUBLIC OF PHILIPPINES DEP'T OF FOREIGN AFFAIRS (Feb. 19, 2013), <http://www.gov.ph/2013/02/19/dfa-statement-on-chinas-response-to-the-ph-arbitration-case-before-unclos/>.

<sup>8</sup> Peter Ford, *Philippines Stares Down China in South China Sea Dispute*, THE CHRISTIAN SCIENCE MONITOR, (Mar. 31, 2014), <http://www.csmonitor.com/World/Asia-Pacific/2014/0331/Philippines-stares-down-China-in-South-China-Sea-dispute-video>.

state tensions. Third, China's insistence on maritime claims not in accordance with the provisions of the UN Convention on the Law of the Sea (UNCLOS) encourages other states to assert similar historic rights claims, which in turn threatens to foreclose China's access to maritime regions beyond the first island chain. Finally, China's alleged interference with other claimant states' maritime rights in the South China Sea (in particular freedom of navigation) represents an unnecessary litigation risk.

Part II of this thesis will examine the geography of the South China Sea and the economic resources in the region. Part III will then turn to the basic principles of law at play in the South China Sea dispute. Part IV sets forth China's historical claims as well as the Philippines and Vietnam's claims. In Part V the legal basis for China's historic rights claims will be examined. In Part VI the role of the Association of South East Asian States (ASEAN) in dispute settlement will be evaluated. In Part VII, the economic, national security and litigation considerations favoring a comprehensive settlement will be explored. Finally in Part VIII, this thesis will examine the recommended provisions of a settlement including creation of joint development zones and a binding Code of Conduct governing relations between claimant states in the South China Sea.

An arbitral ruling in favor of the Philippines has the potential to damage China's international credibility and prestige.<sup>9</sup> In the face of economic damage, national security constraints and liability risk, China should adopt a pragmatic approach to resolution of competing claims in the South China Sea. A pragmatic solution most likely would

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<sup>9</sup> Andrew Browne, *Q & A: Taking China to Court Over the South China Sea*, WALL ST. J. BLOG, (Oct. 15, 2013, 12:56 PM), <http://blogs.wsj.com/chinarealtime/2013/10/15/qa-the-philippines-vs-china-in-south-china-sea-claims/>.

require China to abandon historic rights claims, negotiate joint development zones in areas where it currently asserts full sovereign rights and concede sovereignty over islands in the South China Sea. But the benefit for China in making sovereign rights concessions would be regional stability, expanded economic development and greater regional cooperation. China would find itself in an enhanced position with a far stronger ability to influence neighboring states.

## II. GEOGRAPHY OF THE SOUTH CHINA SEA

In order to understand the competing sovereignty claims of China, Philippines and Vietnam, it is vital to understand the geography of the region. The South China Sea covers a vast swath of water totaling 648,000 square miles from the Luzon Strait in the north to the Malacca Strait in the south.<sup>10</sup> Inside this vast expanse of water are hundreds of islands, including rocks, and reefs, as well as low-tide elevations, which are fully submerged at high tide.<sup>11</sup> These features are distributed across the breadth of the South China Sea and can be grouped into several larger formations. The most prominent disputed formations are the Paracel Islands in the north, which are disputed between China and Vietnam, the Spratly Islands in the south, which are primarily disputed between China, Philippines and Vietnam and Scarborough Shoal in the West disputed between China and Philippines.<sup>12</sup>

The Paracel Islands group of about 130 small coral islands and reefs lie about 250 miles east of Vietnam and about 220 miles south of Hainan Island, China. Apart from a few isolated, outlying islands, they are divided into the Amphitrite group

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<sup>10</sup> VICTOR PRESCOTT & CLIVE SCHOFIELD, *THE MARITIME POLITICAL BOUNDARIES OF THE WORLD* 209 (1985).

<sup>11</sup> U.S. ENERGY INFO. ADMIN., *SOUTH CHINA SEA 1* (2013) [hereinafter *EIA REPORT*].

<sup>12</sup> ZOU KEYUAN, *LAW OF THE SEA IN EAST ASIA: ISSUES AND PROSPECTS* 47 (2005).

in the northeast and the Crescent group in the west. The low, barren islands, none of which exceeds 1 square mile, lack fresh water and there are no permanent human residents<sup>13</sup>

The Spratly Island group, which has been an area of particular competition, “consists of more than 140 islets, rocks, reefs, shoals and sandbanks spread over an area of more than 410,000 square kilometers”.<sup>13</sup> In the Spratly Island group, the Philippines claims 53 features in the eastern portion of the group, which it refers to as the Kalayaan Islands.<sup>14</sup> China claims the entire Spratly Island group (Nansha Qundao to China) and Vietnam also claims the entire island group.<sup>15</sup> The actual physical occupation of the Spratly Islands is a different matter as no one country occupies all of the features. The Philippines has occupied 9 features, China has occupied 7 features and Vietnam is the most active with control over 27 features.<sup>16</sup>

Scarborough Shoal (referred to by China as Huangyan Island) is the remaining disputed feature between China and the Philippines.<sup>17</sup> Scarborough Shoal is located approximately 124 nautical miles west of the Philippines’ Zambales province.<sup>18</sup>

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<sup>13</sup> Grace Young & Gloria Lotha, *Paracel Islands*, ENCYC. BRITANNICA, <http://www.britannica.com/EBchecked/topic/442423/Paracel-Islands> (last updated July 22, 2013).

<sup>13</sup> Robert Beckman, *The South China Sea: 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, 143, (2013).

<sup>14</sup> SARAH RAINE & CHRISTIAN LEMIERE, REGIONAL DISORDER: THE SOUTH CHINA SEA DISPUTES, 32-33 (2013).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Nguyen Dang Thang & Nguyen Hong Thao, *China’s Nine Dotted Lines in the South China Sea: The 2011 Exchange of Diplomatic Notes Between The Philippines and China*, 2012 OCEAN DEVELOPMENT & INT’L L. 35, 39.

<sup>18</sup> Statement of Philippine Position on Bajo de Masinloc (Scarborough Shoal) and the Waters within its Vicinity, REPUBLIC OF PHILIPPINES DEP’T OF FOREIGN AFFAIRS (Apr. 18, 2012), <http://www.gov.ph/2012/04/18/philippine-position-on-bajo-de-masinloc-and->

Scarborough Shoal is a large atoll with an approximately 58 square miles lagoon surrounded by a reef. The reef is mostly either completely submerged or above water only at low-tide.<sup>19</sup>

The South China Sea is home to some of the world's most critical trade routes and is a center of the global economy with approximately \$5 trillion in commerce flowing through the region on an annual basis.<sup>20</sup> The waters are home to some of the world's richest fishing grounds and there are an estimated 11 billion barrels of oil and 190 trillion cubic feet of natural gas in the region.<sup>21</sup> In the Spratly Islands region alone there is an estimated 2.5 billion barrels of oil and 25.5 trillion cubic feet of natural gas.<sup>22</sup> Due to lingering questions over sovereignty in the region, there remain unexplored areas, which may contain even greater hydrocarbon resources.<sup>23</sup>

In light of these substantial unexploited economic resources in the region, it is no surprise that the States bordering the region have been drawn into greater diplomatic and physical conflict regarding sovereign rights over untapped resources.

### III. LAW OF THE SEA REGIME IN THE SOUTH CHINA SEA

All of the claimant states in the South China Sea have ratified UNCLOS.<sup>24</sup> Since all of the states involved in the dispute have assumed obligations under the UNCLOS

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the-waters-within-its-vicinity/ [hereinafter Statement of Philippines Position on Bajo de Masinloc].

<sup>19</sup> Beckman, *supra* note 14, at 145.

<sup>20</sup> JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 313 (2013).

<sup>21</sup> EIA REPORT, *supra* note 11, at 2.

<sup>22</sup> *Id.* at 4.

<sup>23</sup> *Id.*

<sup>24</sup> The UNCLOS dates of ratification of the claimant states are: China, May 7, 1996; the Philippines, May 8, 1984; and Vietnam, July 25, 1994. U. N. Treaty Collection, Status of Treaties, UNCLOS (Mar. 5, 2014, 8:03 AM),

legal regime, in this section I will address briefly the history of UNCLOS and its legal regime.

The current maritime legal regime applicable in the South China Sea has its origins in the first United Nations Conference on the Law of the Sea in 1958. The 1958 conference resulted in the following conventions: Convention on the Territorial Sea and Contiguous Zone, Convention on the Continental Shelf, Convention on the High Seas and a Convention on Fishing and Conservation of Living Resources of the High Seas.<sup>25</sup> The four conventions did not address certain issues such as the breadth of the territorial sea or fishing rights, but they did serve as a foundation for subsequent state practice and ultimately for UNCLOS negotiations.<sup>26</sup>

UNCLOS established a comprehensive framework “for the allocation of jurisdiction, rights and duties among states that carefully balances the interests of states in controlling activities off their own coasts and the interests of all states in protecting the freedom to use the ocean spaces without undue interference.”<sup>27</sup> UNCLOS was envisioned as a package deal in which individual states could not pick and choose

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[https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en](https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en) [hereinafter UNCLOS Status).

<sup>25</sup> Convention on the Territorial Sea and Contiguous Zone, *opened for signature* Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964); Convention on the Continental Shelf, *opened for signature* Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311 (entered into force June 10, 1964); Convention on the High Seas, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962); Convention on Fishing and Conservation of Living Resources of the High Seas, *opened for signature* Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285 (entered into force Mar. 20, 1966).

<sup>26</sup> JAMES KRASKA, *MARITIME POWER AND THE LAW OF THE SEA*, 97-98 (2011).

<sup>27</sup> KRASKA & PEDROZO, *supra* note 21, at 196-197.

provisions they wished to adopt.<sup>28</sup> In contrast to the 1958 Conventions, China, the Philippines and Vietnam ratified UNCLOS.<sup>29</sup>

#### A. *Baselines and Internal Waters*

The starting point in all analysis of maritime zones under UNCLOS is the baseline of the coastal state. The baseline is defined as the line from which the seaward limits of a state's territorial sea and other maritime zones of jurisdiction are measured.<sup>30</sup> The normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast.<sup>31</sup> Straight baselines may be drawn in instances of deeply indented coastlines or if there is a fringe of islands along the coast.<sup>32</sup> Waters landward side of the baseline of the territorial sea form part of the internal waters of the state.<sup>33</sup> The coastal state exercises with a few limited exceptions the same jurisdiction over internal waters as they do over land territory.<sup>34</sup> In the case of an archipelagic state (a state constituted wholly by one or more archipelagos), the state "may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago".<sup>35</sup> The territorial sea, contiguous zone, exclusive economic zone and continental shelf are measured from the archipelagic baseline.<sup>36</sup>

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

<sup>29</sup> UNCLOS Status, *supra* note 25.

<sup>30</sup> NAVAL WAR COLLEGE, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 1-2 (2007).

<sup>31</sup> UNCLOS, *supra* note 5, art. 5.

<sup>32</sup> *Id.*, art. 7.

<sup>33</sup> *Id.*, art 8.

<sup>34</sup> KRASKA, *supra* note 27, at 114.

<sup>35</sup> UNCLOS, *supra* note 5, arts. 46, 47.

<sup>36</sup> *Id.*, art. 48.

## B. *Territorial Sea and Contiguous Zone*

UNCLOS gave each state the right to establish a territorial sea up to 12 nautical miles in breadth.<sup>37</sup> A nautical mile is 6076 feet in length (compared to 5280 feet length of statute mile).<sup>38</sup> Subject to several important limitations, the coastal state may exercise sovereignty over the waters of the territorial sea, as well as the sea-bed below and airspace above. The most important coastal state limitation is respect for the exercise of innocent passage by vessels when traversing the territorial sea.<sup>39</sup> Passage is “innocent” if, “it is not prejudicial to the peace, good order, or security of the coastal state.”<sup>40</sup> One maritime zone beyond the territorial sea is the contiguous zone, which extends up to a breadth of 24 nautical miles from the baseline. In the contiguous zone, the coastal state may exercise jurisdiction regarding vessels that are circumventing its customs, fiscal, immigration, and sanitation matters.<sup>41</sup>

## C. *Exclusive Economic Zone, Continental Shelf and High Seas*

Separate from the contiguous zone is the exclusive economic zone, which extends up to a breadth of 200 nautical miles from the baseline. In the exclusive economic zone, the coastal state has the sovereign right to explore and exploit, conserve and manage the natural resources living and non-living of the waters and seabed.<sup>42</sup>

The continental shelf “comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea through the natural prolongation of land territory to

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<sup>37</sup> *Id.*, art. 3.

<sup>38</sup> Shiveta Singh, *Mile*, ENCYC. BRITANNICA, <http://www.britannica.com/EBchecked/topic/382183/mile> (last updated July 15, 2013).

<sup>39</sup> UNCLOS, *supra* note 5, art. 17.

<sup>40</sup> *Id.*, art. 19.

<sup>41</sup> *Id.*, art 33.

<sup>42</sup> *Id.*, arts. 56, 57.

the outer edge of the continental margin or a distance of 200 nautical miles from the baseline of the territorial sea.<sup>43</sup> The coastal state has the exclusive right to explore and exploit the natural resources of the seabed and subsoil of its continental shelf.<sup>44</sup>

The areas of the sea not included in the exclusive economic zone, territorial sea, internal waters or archipelagic waters of a state form the high seas in which freedom of navigation and overflight may be exercised with due regard to the interests of other states.<sup>45</sup>

#### *D. Islands, Including Rocks, and Low-Tide Elevations*

Islands are naturally formed areas of land surrounded by water and above water at high tide. They are entitled to the same maritime zones as other land territory.<sup>46</sup> Rocks are islands, which cannot sustain human habitation and correspondingly are not entitled to an exclusive economic zone or continental shelf.<sup>47</sup> A low-tide elevation is a “naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide...it has no territorial sea of its own.”<sup>48</sup> “Artificial islands, installations and structures are not islands and are not entitled to any maritime zones of their own.”<sup>49</sup>

In the South China Sea, there is no current consensus about the nature of the maritime features in the Paracel Islands, Spratly Islands and Scarborough Shoal or the corresponding zones, if any, they would be entitled to under UNCLOS.<sup>50</sup>

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<sup>43</sup> *Id.*, art. 76.

<sup>44</sup> *Id.*, art. 77.

<sup>45</sup> *Id.*, arts. 86, 87.

<sup>46</sup> *Id.*, art. 121.

<sup>47</sup> *Id.*, art. 121.

<sup>48</sup> *Id.*, art. 13.

<sup>49</sup> Beckman, *supra* note 14, at 150.

<sup>50</sup> NONG HONG, UNCLOS AND OCEAN DISPUTE SETTLEMENT: LAW AND POLITICS IN THE SOUTH CHINA SEA, 59 (2012).

### E. *Dispute Resolution*

States are obliged to settle disputes peacefully in accordance with the provisions of Article 2 of the United Nations Charter.<sup>51</sup> If a dispute cannot be settled then any state party to the dispute can request submission to a court or tribunal having jurisdiction.<sup>52</sup> Upon signature, ratification or accession to UNCLOS, a state is free to choose for dispute resolution the International Tribunal for the Law of the Sea, the International Court of Justice (ICJ), an arbitral tribunal constituted in accordance with Annex VII or a special arbitral tribunal constituted in accordance with Annex VIII.<sup>53</sup> “If parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII”.<sup>54</sup> When signing, ratifying, or acceding to UNCLOS, a state may declare it does not accept the binding dispute resolution procedures for disputes involving sea boundary delimitation, historic bays, titles and disputes concerning military activities.<sup>55</sup>

## IV. MARITIME CLAIMS IN THE SOUTH CHINA SEA

### A. *China*

The rich and complex history of the South China Sea provides the basis for China’s current maritime claims. Chinese scholars have stated as a basis for asserting sovereignty that the waters of the South China Sea have been known time immemorial to

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<sup>51</sup> UNCLOS, *supra* note 5, art. 279. The U.N. Charter provides, “All members shall settle their international disputes by peaceful mean in such a manner that international peace and security, and justice, are not endangered.” U.N. Charter art 2, para. 3.

<sup>52</sup> UNCLOS, *supra* note 5, art. 286.

<sup>53</sup> *Id.*, art. 287.

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

<sup>55</sup> *Id.*, art. 298.

Chinese fisherman and seafarers.<sup>56</sup> Since 2009 China has asserted historic rights claims based on a U-shaped or nine-dash line extending hundreds of miles from China's mainland deep into the South China Sea.<sup>57</sup> The origins of the contested nine-dash line can be traced to the beginning of the 20<sup>th</sup> century.

The U-shaped line first appeared on a private map in December 1914. The map, which was republished in the 1920s and early 1930s, contained a line only extending south to Pratas Reef and the Paracel islands.<sup>58</sup> China's position changed post-1933 in response to France (as the colonial protector of Vietnam) occupying nine of the Spratly Islands. China protested this occupation and modified the U-Shaped line to extend further south inclusive of the entire Spratly Island group with the clear intention of asserting that the islands were part of China.<sup>59</sup>

In 1935, China commissioned a geographical survey of the features of the South China Sea. The government commission identified 132 names for islands and insular features in the South China Sea, which were published in an atlas that year.<sup>60</sup> In 1946 following the conclusion of World War II, China sought to exercise control over islands in the South China Sea that had been occupied previously by Japan. China dispatched a naval contingent to Itu Aba Island in the Spratly Islands and erected a stone marker reflecting China's sovereignty.<sup>61</sup> In 1947, China's Ministry of Interior drafted an official

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<sup>56</sup> 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, 100 (2013).

<sup>57</sup> Note Verbale CML/17/2009, *supra* note 2.

<sup>58</sup> KEYUAN, *supra* note 12, at 48.

<sup>59</sup> *Id.* at 49.

<sup>60</sup> Gao & Jia, *supra* note 57, at 102-103.

<sup>61</sup> *Id.*

map (utilized for internal purposes), which reflected the U-shaped line.<sup>62</sup> The U-shaped line was noteworthy in that it replaced a continuous line with 11 separate segments.<sup>63</sup> The People's Republic of China established on mainland China in 1949 reaffirmed the U-shaped line.<sup>64</sup>

In 1951 China's Foreign Minister, Zhou Enlai, stated that the Spratly Islands are inherently Chinese territory – this statement was reiterated in 1956 upon Philippine suggestions that some of the Spratly Islands should belong to them.<sup>65</sup>

The first significant Chinese maritime law was adopted in 1958 with the Declaration on China's Territorial Sea, which proclaimed that the Spratly Islands and Macclesfield Bank belonged to China.<sup>66</sup> In advance of UNCLOS ratification, China promulgated on February 25, 1992 a Law on the Territorial Sea and Contiguous Zone.<sup>67</sup> The 1992 law specifically provided that the land territory of China includes the mainland and its offshore islands including the Spratly Islands and Macclesfield Bank as well as all other islands that belong to China.<sup>68</sup> China claimed Scarborough Shoal as part of the Macclesfield Bank.<sup>69</sup> On May 15, 1996, China published partial base points for measuring its territorial sea and reserved the right to publish future base points for other areas including the Spratly Islands.<sup>70</sup>

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<sup>62</sup> KEYUAN, *supra* note 12, at 49.

<sup>63</sup> *Id.*

<sup>64</sup> KRASKA & PEDROZO, *supra* note 21, at 316-317

<sup>65</sup> Gao & Jia, *supra* note 57, at 103.

<sup>66</sup> KEYUAN, *supra* note 12, at 50-51.

<sup>67</sup> U.S. DEP'T OF DEF., MAR. CLAIMS REFERENCE MANUAL, 130 (2008) [hereinafter MAR. CLAIMS REFERENCE MANUAL].

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

<sup>69</sup> KEYUAN, *supra* note 12, at 61.

<sup>70</sup> *Id.* at 51.

On June 7, 1996 China deposited at the United Nations the UNCLOS instrument of ratification. China stated at that time it reaffirmed its sovereignty over all its islands and archipelagos listed in Article 2 of the 1992 Law on the Territorial Sea and Contiguous Zone.<sup>71</sup> Following ratification, China promulgated a Law on the Exclusive Economic Zone and Continental Shelf on June 26, 1998. The law did not provide coordinates for China's exclusive economic zone, but did specifically state that the provisions of the law would not prejudice China's historic rights.<sup>72</sup>

At the time China ratified UNCLOS, it made no declaration regarding acceptance of one of the dispute resolution forums available under the treaty.<sup>73</sup> On August 25, 2006 China issued a declaration under UNCLOS Art. 298 concerning matters it would not accept as susceptible to international judicial or arbitral jurisdiction to include maritime boundary delimitation, territorial disputes and military activities.<sup>74</sup>

In response to a 2009 joint submission by Vietnam and Malaysia to the Commission on the Limits of the Continental Shelf, China stated in a *note verbale* of May 7, 2009, "China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof".<sup>75</sup>

Accompanying the *note verbale* was the 1947 map of China reflecting a nine-dash line in the South China Sea. The *note verbale* and accompanying map represented the

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<sup>71</sup> UNCLOS Status, *supra* note 25.

<sup>72</sup> MAR. CLAIMS REFERENCE MANUAL, *supra* note 68, at 128.

<sup>73</sup> UNCLOS Status, *supra* note 25.

<sup>74</sup> *Id.*

<sup>75</sup> Note Verbale CML/17/2009, *supra* note 2.

first time China had presented a previously internal document as evidence of its historic rights claims over the South China Sea.<sup>76</sup>

In response to China's *note verbale*, the Philippines challenged on three grounds the justifications China had relied upon in that document. First, it stated the Spratly Islands constituted an integral part of the Philippines. Second, under the Roman principle of *dominium maris* (land dominates the sea), the Philippines exercises sovereignty and jurisdiction over the waters adjacent to each relevant geographic feature in the Spratly Islands. Third, the other relevant waters, seabed, and subsoil in the South China Sea that China claims is without basis in international law.<sup>77</sup> On April 14, 2011, China responded to the Philippine *note verbale* stating, "China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof....supported by abundant historical and legal evidence."<sup>78</sup>

China further stated that, prior to the 1970s, the Philippines had never made any claims to the Spratly Islands.<sup>79</sup> Unlike the 2009 *note verbale*, China did not attach the 1947 nine-dash line map to the 2011 *note verbale*.<sup>80</sup>

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<sup>76</sup> Florian Dupuy & Pierre-Marie Dupuy, *A Legal Analysis of China's Historic Rights Claim in the South Sea*, 107 AM. J. INT'L L. 124, 124-125 (2013).

<sup>77</sup> U.N. Doc. No. 00028 from the Permanent Mission of the Republic of the Philippines to the UN Secretary-General, [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/phl\\_re\\_chn\\_2011.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf) (last updated May, 3, 2011) [hereinafter Note Verbale No. 00028].

<sup>78</sup> U.N. Doc. CML/8/2011 from the Permanent Mission of the People's Republic of China to the UN Secretary-General, [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2011\\_re\\_phl\\_e.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf) (last updated May 3, 2011) [hereinafter Note Verbale CML/8/2011].

<sup>79</sup> *Id.*

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

## B. *Vietnam*

Vietnam claims both the Spratly Islands and Paracel Islands (but not Scarborough Shoal)

based on Vietnam's naval activity in the 17<sup>th</sup>-19<sup>th</sup> centuries.<sup>81</sup> Vietnam has stated,

it has maintained effective occupation of the two archipelagoes Paracel and Spratly islands at least since the 17th century when they were not under the sovereignty of any country and the Vietnamese State has exercised effectively, continuously and peacefully its sovereignty over the two archipelagoes until the time when they were invaded by the Chinese armed forces.<sup>82</sup>

Further, "Vietnam claims that France administered the islands as part of its protectorate, established under a 1884 treaty."<sup>83</sup> In December 1933, France incorporated the Spratly

Islands into Vietnam's Ba Ria province.<sup>84</sup> In June 1956, the government of South

Vietnam reaffirmed its sovereignty over the Spratly and Paracel islands.<sup>85</sup> In January

1974 China "seized control of the remaining Paracel Islands after an air and sea battle with South Vietnamese forces."<sup>86</sup> In 1989 Vietnam increased its occupation in the

Spratly Islands to 21 islets and reefs.<sup>87</sup> In 1994 Vietnam ratified UNCLOS but

reaffirmed sovereignty over the Paracel Islands and Spratly Islands.<sup>88</sup> Vietnam did not

elect dispute resolution procedures under Art. 287 nor any exceptions under Art. 298.<sup>89</sup>

In 2009 Vietnam filed a joint claim with Malaysia to the UN Commission on the

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<sup>81</sup> BEN DOLVEN ET AL., CONG. RESEARCH SERV., R42930, MARITIME TERRITORIAL DISPUTES IN EAST ASIA: ISSUES FOR CONGRESS 12 (2013).

<sup>82</sup> DANIEL DZUREK, THE SPRATLY ISLANDS DISPUTE: WHO'S ON FIRST? 8 (1996).

<sup>83</sup> *Id.* at 9.

<sup>84</sup> *Id.* at 10.

<sup>85</sup> *Id.* at 17.

<sup>86</sup> *Id.* at 18.

<sup>87</sup> *Id.* at 22.

<sup>88</sup> UNCLOS Status, *supra* note 25.

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

Limits of the Continental Shelf claiming an area in the South China Sea beyond their 200 nautical mile exclusive economic zone.<sup>90</sup> In 2012 Vietnam promulgated a maritime law that delineated its maritime boundaries to include the Paracel Islands and Spratly Islands (but not Scarborough Shoal).<sup>91</sup>

### C. *Philippines*

“The Philippines is one among a few mid-ocean archipelagos in the world.”<sup>92</sup> The Philippines comprise approximately 7,107 islands and other geographic features covering 120,000 square miles.<sup>93</sup> The Philippines archipelagic state is bounded by the Luzon Strait in the north and the Surigao Strait south.<sup>94</sup> In recent years, the Philippines has viewed China’s actions at Scarborough Shoal and in the Spratly Islands with significant concern.<sup>95</sup>

The historical origin of Philippine maritime claims can be traced to the 1898 Treaty of Paris settling the Spanish-American War. The Philippines claimed as archipelagic waters the limits of the seas described in the 1898 treaty.<sup>96</sup> Scarborough Shoal and the Spratly Islands were not included in the limits of the 1898 treaty boundaries.<sup>97</sup>

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<sup>90</sup> U.N. Doc. CLCS.33.2009.LOS (Continental Shelf Notification) Joint Submission by Malaysia and the Socialist Republic of Vietnam to the Commission on the Limits of the Continental Shelf, [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/mysvnm\\_clcs33\\_2009e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mysvnm_clcs33_2009e.pdf) (last updated May 3, 2011).

<sup>91</sup> DOLVEN ET AL., CONG. RESEARCH SERV., *supra* note 82, at 12.

<sup>92</sup> Henry Bensurto, *Archipelagic Philippines: A Question of Policy and Law*, in MARITIME BORDER DIPLOMACY 328 (Myron H. Nordquist & John Norton Moore eds., 2012).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 330

<sup>95</sup> DOLVEN ET AL., CONG. RESEARCH SERV., *supra* note 82, at 11.

<sup>96</sup> KEYUAN, *supra* note 12, at 65-66.

The Philippines first affirmatively asserted its claims to the Spratly Islands and Scarborough Shoal in 1956. The Philippine government statement at the time reflected a view that these formations were *terra nullius* and therefore subject to claim by the Philippines.<sup>98</sup> Chinese Foreign Minister Zhou Enlai vigorously protested Philippine claims at that time.<sup>99</sup> In 1961 the Philippines enacted archipelagic baselines legislation enclosing the islands forming the archipelago, but did not include Scarborough Shoal or the Spratly Islands inside the baselines.<sup>100</sup> The Philippines experienced significant difficulties in achieving international recognition of its archipelagic status and domestic political disagreements impeded passage of legislation in accordance with UNCLOS.<sup>101</sup>

The generally cautious approach towards the disputes previously taken by the Philippines changed in 1971. Following a confrontation in the Spratly Islands between Philippine nationals and a Taiwanese patrol vessel, the Philippines issued a protest demanding that “Taiwan withdraw from Itu Aba Island (in the Spratly Islands) and declared ownership of 53 islands, cays, reefs, and shoals.”<sup>102</sup> Subsequently in 1978, Philippine President Ferdinand Marcos issued Presidential Decree No. 1596 annexing the western portion of the Spratly Islands to the Philippines (referred to as the Kalayaan Island Group) and incorporating them as a municipality in Palawan Province.<sup>103</sup> The

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

<sup>98</sup> *Id.* Terra Nullius is “a territory not belonging to any particular country.” BLACK’S LAW DICTIONARY 1483 (7<sup>th</sup> ed. 2007).

<sup>99</sup> KEYUAN, *supra* note 12, at 63.

<sup>100</sup> BUREAU OF INTELLIGENCE AND RESEARCH, U.S. DEP’T OF STATE, LIMITS IN THE SEAS, STRAIGHT BASELINES: THE PHILIPPINES 3-8 (1973).

<sup>101</sup> Bensurto, *supra* note 93, at 332-333.

<sup>102</sup> Thang & Thao, *supra* note 18, at 52.

<sup>103</sup> Declaring Certain Area Part of the Philippine Territory and Providing for Their Government and Administration, Pres. Dec. No. 1596 (June 11, 1978),

Presidential decree was unique in that it not only asserted authority over the insular features of the island group but also the seabed, subsoil, continental shelf and airspace of the area.<sup>104</sup>

The Philippines established an exclusive economic zone in June 1978 by Presidential Decree No. 1599.<sup>105</sup> Scarborough Shoal's location within the claimed Philippine exclusive economic zone has been utilized as a basis for the Philippines asserting sovereignty over the reef.<sup>106</sup> The Philippines was one of the first countries to ratify UNCLOS in 1984.<sup>107</sup> Archipelagic baseline legislation in conformance with UNCLOS was not enacted in the Philippines until March 10, 2009 when Republic Act 9522 (Philippines Archipelagic Baselines Act) was passed.<sup>108</sup> The Spratly Islands and Scarborough Shoal were not included within the Philippine archipelagic baselines and instead were placed under a separate maritime regime.<sup>109</sup> A group of Philippine citizens challenged this legislation as a violation of the maritime boundary under the Treaty of Paris but the Philippine Supreme Court upheld the legality of the Archipelagic Baselines Act in 2011.<sup>110</sup>

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<http://www.gov.ph/1978/06/11/presidential-decree-no-1596-s-1978/> (last visited May 1, 2014).

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

<sup>105</sup> Establishing an Exclusive Economic Zone, Pres. Dec. No. 1599 (June, 11, 1978) (Phil.),

[http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL\\_1978\\_Decree.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1978_Decree.pdf) (last visited May 1, 2014).

<sup>106</sup> KEYUAN, *supra* note 12, at 66.

<sup>107</sup> UNCLOS Status, *supra* note 25.

<sup>108</sup> An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines, and for Other Purposes, Rep. Act No. 9522 (Mar. 10, 2009),

<http://www.gov.ph/2009/03/10/republic-act-no-9522/>.

<sup>109</sup> *Id.* at sec. 2.

<sup>110</sup> Bensusurto, *supra* note 93, at 335-337.

In April 2012, following a confrontation between Chinese fishing vessels and a Philippine coast guard vessel at Scarborough Shoal, the Philippines issued a formal statement reiterating Scarborough Shoal is an integral part of Philippine territory, lies within the Philippines exclusive economic zone, is not an island but rather a group of rocks, is not part of the Spratly Islands and falls under the full sovereignty and jurisdiction of the Philippines.<sup>111</sup>

As previously discussed, on January 22, 2013, the Philippines instituted compulsory arbitration proceedings against China pursuant to UNCLOS Article 287 and in accordance with Annex VII.<sup>112</sup> The Philippine arbitration claims center on China's rights in the South China Sea, China's nine-dashed line under UNCLOS, China's domestic legislation non-conformance with UNCLOS and China's alleged violation of Philippine maritime rights.<sup>113</sup>

## V. CONSIDERATION OF HISTORIC RIGHTS

In order to understand the legal merits of China's historic rights claims, an examination is first necessary of what exactly China is claiming in the South China Sea. Based on the numerous official statements and legislation, it appears China is making historic rights claims inclusive of both historic waters claims over the waters of the South China Sea and historic title claims over the islands, including rocks, and features of the South China Sea.<sup>114</sup> "The concept of historic rights is broader than that of historic waters and includes the latter. It can thus give China the flexibility of pushing forward its claim

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<sup>111</sup> Statement of Philippines Position on Bajo de Masinloc, *supra* note 19.

<sup>112</sup> Note Verbale No. 13-0211, *supra* note 4.

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

<sup>114</sup> Note Verbale CML/17/2009, *supra* note 2; Note Verbale CML/8/2011, *supra* note 79.

from historic rights to historic waters, if necessary.”<sup>115</sup> Therefore, an assessment of China’s broad historic rights claims will first focus on their legitimacy as historic waters claims and then will be followed by a consideration of the legitimacy of China’s historic title claims over the islands, rocks and other features of the South China Sea.

#### A. *Historic Waters*

The first mention of China’s historic waters claims in the South China Sea was a modest reference in the Declaration of Exclusive Economic Zone and Continental Shelf Act of 1998, in which China stated, “the provisions of this act shall not affect the historical rights of the People’s Republic of China”.<sup>116</sup> While the Exclusive Economic Zone Declaration did not provide clarification as to the meaning of this sentence, it provided an indication that China thought it had special rights in the South China Sea. China did not make further official pronouncements about historic waters until over ten years later when in May 2009 it filed the *note verbale* in response to Malaysia and Vietnam’s joint continental shelf submission. In the *note verbale*, China justified its sovereign rights to almost the entire South China Sea on the basis of the 1947 map.<sup>117</sup>

China followed up the historic claims with the 2011 *note verbale* (in response to the Philippines) in which it ambiguously stated, “China’s sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence.”<sup>118</sup> China’s position of historic waters has continued to be touted by

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<sup>115</sup> KEYUAN, *supra* note 12, at 173.

<sup>116</sup> Exclusive Economic Zone and Continental Shelf Act (promulgated by the Standing Comm. Nat’l People’s Cong., June 26, 1998, effective June 26, 1998), [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn\\_1998\\_eez\\_act.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf) (last visited May 1, 2014).

<sup>117</sup> Note Verbale CML/17/2009, *supra* note 2.

<sup>118</sup> Note Verbale CML/8/2011, *supra* note 79.

government officials and academics alike with China's Foreign Minister Yang Jiechi stating in 2012 that there is "plenty of historical and jurisprudence evidence to show that China has sovereignty over the islands in the South China Sea and the adjacent waters."<sup>120</sup>

Historic waters are defined as, "waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of states."<sup>119</sup> The definition of historic waters was further clarified by the International Court of Justice in the *El Salvador v. Honduras* case (over the Gulf of Fonseca) in which the court opined that historic waters are, "waters which are treated as internal waters but which would not have that character were it not for the existence of historic title."<sup>120</sup> In essence historic waters are extension of internal or territorial waters.<sup>121</sup>

The ambiguous nature of historic waters is highlighted by the fact that the concept is not fully codified in UNCLOS and is only mentioned in passing in a handful of articles without any specific definition.<sup>122</sup> Therefore, authority for maritime entitlement based on historic waters must be found solely in customary international law. The International

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<sup>120</sup> Mohan Malik, *History the Weak Link in Beijing's Maritime Claims*, THE DIPLOMAT (Aug. 30, 2013), <http://thediplomat.com/2013/08/history-the-weak-link-in-beijings-maritime-claims/4/>.

<sup>119</sup> L.J. BOUDEZ, *THE REGIME OF BAYS IN INTERNATIONAL LAW* 281 (1964)

<sup>120</sup> *Land, Maritime and Frontier Dispute (El Sal. v. Hond.)*, 1992 I.C.J. 351, 588 ¶ 384, (Sept. 11).

<sup>121</sup> Dupuy & Dupuy, *supra* note 77, at 139.

<sup>122</sup> UNCLOS, *supra* note 5, arts. 10, 298.

Law Commission in 1962 conducted a study of historic rights.<sup>125</sup> The study “examined the elements of title to historic waters, the issues of burden of proof, the legal status of waters regarded as historic waters, and the settlement of disputes.”<sup>123</sup> The study identified three factors necessary for a state to claim sovereignty over maritime areas that otherwise would be international waters; (1) authority must be exercised over the area by the state claiming it as historic waters; (2) such exercise of authority must be continuous; and (3) other states must acquiesce.<sup>124</sup> Further, a state, which is making an exceptional claim such as a claim of historic waters, has generally been seen to bear the burden of proof.<sup>125</sup>

The wording of China’s 2009 and 2001 *note verbales* given plain meaning certainly appear to claim historic waters in the South China Sea. “China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof.”<sup>126</sup> China’s statement represents a direct challenge to the UNCLOS legal regime because UNCLOS has no provisions recognizing such broad historic waters claims.<sup>127</sup>

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<sup>125</sup> *Juridical Regime of Historic Waters, Including Historic Bays*, Rep. of the Int’l Law Comm’n, 14<sup>th</sup> sess, Apr. 24–June 29, 1962, U.N. Doc. A/CN.4/143 (1962), available at [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_143.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf) [hereinafter *Juridical Regime of Historic Waters*].

<sup>123</sup> Zou Keyuan, Harris Chair of International Law, University of Central Lancaster, Presentation at the International Conference of Recent Development of the South China Sea Dispute and Prospects of Joint Development Regime: Historic Rights and Joint Development (Dec. 6-7 2012).

<sup>124</sup> *Juridical Regime of Historic Waters*, *supra* note 125, at 13, ¶ 80.

<sup>125</sup> CLIVE R. SYMMONS, *HISTORIC WATERS IN THE LAW OF THE SEA* 68 (2008).

<sup>126</sup> Note Verbale CML/17/2009, *supra* note 2.

<sup>127</sup> Dupuy & Dupuy, *supra* note 77, at 138.

If China were able to articulate a basis for consideration of its historic waters claims outside the UNCLOS framework then the legitimacy of China's claims must be scrutinized under rules of customary international law. An assessment of China's claims under the International Law Commission's three factors reflects that China fails to meet the basic requirements for satisfying any of the conditions necessary to establish a historic waters claim in the South China Sea. In the following section consideration will be given to each factor to demonstrate how China fails to make a legitimate claim of historic waters.

(1) *Exercise of Authority*

The first factor for consideration is the authority exercised over the area by the state claiming it as historic waters.<sup>128</sup> An initial survey of the geography of the South China Sea undercuts the notion that China exercises authority over the region. In the north portion of the South China Sea, China is faced with competing claims by the Republic of China (Taiwan) in the waters around the Taiwan Strait, Pescadores and Pratas Reef.<sup>129</sup> China does not exercise uncontested authority and has been unable to enforce even basic restrictions on freedom of movement in the waters as evidenced by frequent military activities of the U.S. Seventh Fleet in these waters.<sup>130</sup>

Perhaps to build on its claims of authority in the northern portion of the South China Sea, China in 2013 declared an Air Defense Identification Zone (ADIZ) similar to

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<sup>128</sup> *Juridical Regime of Historic Waters*, *supra* note 125, at 13, ¶ 80.

<sup>129</sup> MAR. CLAIMS REFERENCE MANUAL, *supra* note 68, at 597–601.

<sup>130</sup> *U.S. Risks Drawing Beijing's Ire with Military Cruise in Disputed Waters*, THE GUARDIAN (Oct. 20, 2012, 10:10PM), <http://www.theguardian.com/world/2012/oct/20/south-china-sea-disputed-cruise>.

the one in the East China Sea that China has created in an area disputed with Japan.<sup>131</sup> The establishment of an ADIZ as a step towards consolidating China's authority fit within what has been described as the "salami slicing" strategy. The "salami slicing" strategy involves China establishing authority through small individual measures that alone are not a *casus belli* but collectively have the effect of creating evidence of China's long term presence in the region.<sup>132</sup>

China's recent history of confrontation in the western portion of the South China Sea is reflective of a strategy of military provocation in order to assert total dominance over the region, but does not reflect an uncontested exercise of Chinese authority in the region. In the western region, China occupies the Paracel Islands, which it seized from South Vietnam in 1974 (while that state was in a weakened condition due to internal conflict).<sup>133</sup> However, China does not exercise total authority over the waters and airspace of the western region. Perhaps as part of a deliberate strategy, China has engaged recently in series of high profile confrontations with the United States and Vietnam challenging those states over what otherwise would be lawful activities within China's claimed exclusive economic zone and the high seas.

The first of these incidents occurred on April 1, 2001 when a Chinese fighter collided with a United States Navy EP-3 surveillance aircraft flying in airspace over

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<sup>131</sup> Zachary Keck, *China's Drafting a South China Sea ADIZ*, THE DIPLOMAT (Jan. 31, 2014.), <http://thediplomat.com/2014/01/chinas-drafting-a-south-china-sea-adiz/>. ADIZ defined as "an area of airspace over land or water in which the ready identification, location, and control of aircraft is required in the interest of national security." KRASKA & PEDROZO, *supra* note 21, at 178.

<sup>132</sup> RONALD O'ROURKE, CONG. RESEARCH SERV., R42784, MARITIME TERRITORIAL AND EXCLUSIVE ECONOMIC ZONE DISPUTES INVOLVING CHINA: ISSUES FOR CONGRESS 16 (2013). *Casus belli* is "an act or circumstances that provokes or justifies war." BLACK'S LAW DICTIONARY 210 (7<sup>th</sup> ed. 2007).

<sup>133</sup> RAINE & LEMIERE, *supra* note 15, at 61.

China's exclusive economic zone, approximately 65 miles southeast of Hainan Island.<sup>134</sup> The next significant incident was in March 2009 when several Chinese flagged vessels "challenged USNS *Impeccable* while she was conducting a military survey 100 nautical miles off the coast of China".<sup>135</sup> A more recent confrontation occurring between April and May 2011 involved a China Marine Surveillance agency vessel cutting cables to Vietnamese vessels engaged in oil exploration. In response to Vietnamese protests, China asserted that the waters were not within Vietnam's exclusive economic zone and reiterated "China has indisputable sovereignty over the South China Sea islands and adjacent waters."<sup>136</sup>

In the southern portion of the South China Sea, China's authority over the waters surrounding the Spratly Islands is also hotly disputed. As previously discussed, China is not the most active claimant in the Spratly Islands and only occupies seven of the features.<sup>137</sup> Vietnam exercises greater influence in the waters around the Spratly Islands through its occupation of twenty-seven features.<sup>138</sup> The largest island in the Spratly

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<sup>134</sup> O'ROURKE, CONG. RESEARCH SERV., *supra* note 135, at 4-5.

<sup>135</sup> *Id.* at 6. "A military survey is the collecting of marine data for military purposes and, whether classified or not, is generally not made publicly available. A military survey may include the collection of oceanographic, hydrographic, marine geological, geophysical, chemical, biological, acoustic, and related data." NAVAL WAR COLLEGE, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 2-9 (2007).

<sup>136</sup> Edward Wong, *China Navy Reaches Far, Unsettling the Region*, N.Y. TIMES, June 14, 2011, at A11, *available at* [http://www.nytimes.com/2011/06/15/world/asia/15china.html?\\_r=0](http://www.nytimes.com/2011/06/15/world/asia/15china.html?_r=0).

China Marine Surveillance agency is one of several paramilitary maritime law enforcement agencies that in March 2013 were consolidated into a Maritime Police Bureau similar to the United State Coast Guard. O'ROURKE, CONG. RESEARCH SERV., *supra* note 135, at 20-21.

<sup>137</sup> RAINE & LEMIERE, *supra* note 15.

<sup>138</sup> *Id.*

group, Itu Aba, is controlled by Taiwan.<sup>139</sup> In spite of this relatively weak authority in the waters surrounding the Spratly Islands, China has taken steps to exercise greater authority over the region. In particular, China has exercised authority at the expense of the Philippines through actions such as harassing Philippine fisherman off Reed Bank in March 2011.<sup>140</sup>

China's efforts to consolidate authority in the South China Sea were most recently observed in the eastern portion of the South China Sea with the standoff between China and the Philippines at Scarborough Shoal in April 2012. China succeeded in preventing the Philippines from arresting Chinese fisherman and ultimately prevailed in forcing the Philippines to withdraw from the disputed formation.<sup>141</sup>

While all of these actions taken together appear to reflect a deliberate Chinese strategy of consolidating authority over the features and waters of the South China Sea, they also reflect a fundamental weakness in China's historic waters claims. China fails to demonstrate the exercise of full authority in the region and thus fails to satisfy the basic requirements of the first factor for analysis of historic waters claims.

## (2) *Continuity of Authority*

If China succeeded in demonstrating authority over the region, it would still experience significant difficulties in demonstrating the continuity of the exercise of such authority over areas claimed as historic waters. The earliest claims of exercising authority in the South China Sea have often been referenced by Chinese academics and

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<sup>139</sup> *Id.*

<sup>140</sup> THOMAS LUM, CONG. RESEARCH SERV., R33233, THE REPUBLIC OF THE PHILIPPINES AND U.S. INTERESTS 25 (2012).

<sup>141</sup> Jason Miks, *China Philippines in Standoff*, THE DIPLOMAT, (Apr. 11, 2012), <http://thediplomat.com/2012/04/china-philippines-in-standoff/>.

officials as dating to 300 Common Era (C.E.) when Chinese explorers and merchants discovered the Spratly Islands and Paracel Islands.<sup>142</sup> Even if such discovery occurred, there is ample evidence to demonstrate that China has not exercised continuous authority since 300 C.E. There is no doubt that China had extensive diplomatic and trade contacts with South China Sea states from the 5<sup>th</sup> century onward and the South China Sea was often referred to as the “Silk Road on the Sea”.<sup>143</sup> However, these trade contacts did not reflect continuity of authority but merely economic ties, which waxed and waned with the prevailing regime in China. In particular, the authority of China in the region experienced significant diminishment in the period after the 1840s as Western powers constrained China.<sup>144</sup>

The first indication of China’s claim to any portion of the South China Sea is reflected in the 1914 map.<sup>145</sup> But as discussed previously, the 1914 map only reflected a Chinese claim in the northern portion of the South China Sea.<sup>146</sup> If this map were to be accepted as historic evidence then it would be at least be more consistent with the commonly held belief that historic waters can only be an extension of internal water or territorial waters and not waters hundreds of nautical miles away from the coastal state.<sup>147</sup>

The ensuing decades have done little to bolster China’s claim to continuity of control. In the 1930s France, as the colonial protector of Vietnam, occupied the Spratly

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<sup>142</sup> HONG, *supra* note 51, at 70.

<sup>143</sup> “Silk Road on the Sea” was a maritime route of trade and commerce. Gao & Jia, *supra* note 57, at 102.

<sup>144</sup> *Id.*

<sup>145</sup> KEYUAN, *supra* note 12, at 48.

<sup>146</sup> *Id.*

<sup>147</sup> Dupuy & Dupuy, *supra* note 77, at 139.

Islands despite diplomatic protest from China.<sup>148</sup> Vietnam occupied and controlled the Paracel Islands until the early 1970s when China used force to eject them.<sup>149</sup> From the 1950s onward, the Philippines has occupied portions of the Spratly Islands and from the 1970s forward exercised authority over Scarborough Shoal.<sup>150</sup> Only in the last 15 years, beginning with the 1998 Declaration of Exclusive Economic Zone, has China begun vigorously asserting claims of continuity of control.

The watershed moment in China's claim to the entire South China Sea is the 2009 *note verbale* with the attached 1947 map reflecting the nine-dash line. In the absence of actual continuous physical authority over the waters of the region or a historical record that supports continuous authority over the region, China relied on an obscure Ministry of Interior map to demonstrate its long-standing control over the region.<sup>151</sup> If the authenticity of the map is to be accepted then consideration must be given to the intrinsic value of the map in establishing continuity of China's historic waters claims in the South China Sea.

As an initial matter, "the actual weight to be attributed to maps as evidence depends on a range of considerations. Some of these relate to the technical reliability of the maps."<sup>152</sup> If the 1947 map is to be treated as historic evidence before an international court of tribunal then it must meet, "The first condition required of maps that are to serve

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<sup>148</sup> DZUREK, *supra* note 83, at 10.

<sup>149</sup> RAINE & LEMIERE, *supra* note 15, at 61.

<sup>150</sup> KEYUAN, *supra* note 12, at 63-66.

<sup>151</sup> Note Verbale CML/17/2009, *supra* note 2.

<sup>152</sup> Case Concerning the Frontier Dispute (Burk. Faso. v. Mali), 1986 I.C.J. 554, 582, ¶ 55, (Dec. 22).

as evidence on points of law is their geographical accuracy.”<sup>153</sup> Another consideration, “which determines the weight of maps as evidence relate to the neutrality of their sources towards the dispute in question and the parties to that dispute.”<sup>154</sup> Only if the map reflects the agreement between states potentially concerned can a map be seriously considered as evidence.<sup>155</sup> A consideration of China’s 1947 finds it seriously lacking in both instances. The most notable feature is that the map contains no geographic coordinates and defines maritime boundaries in a very imprecise manner.<sup>156</sup> As such, the map is of little to no value in assessing China’s claimed maritime boundary. The map’s apparent lack of neutrality is an equally undermining factor because it is the product of China’s Ministry of Interior and was treated mainly as an internal document for decades.<sup>157</sup> The South China Sea claimant states have rejected the 1947 map and China’s historic claims asserted under it.<sup>158</sup> In light of this rejection by other claimant states and absence of drafting by a neutral cartographer, the relative value of the map in proving China’s claim is negligible.

In sum, China fails to meet the “continuity of authority” requirement in the South China Sea necessary to demonstrate that the waters are of a historic character unique to China. Rather the historical record reflects that China has regularly vied with colonial powers and other claimant states for control of the waters of the South China Sea.

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<sup>153</sup> The Island of Palmas Case, (U.S. v. Neth.), 2 R.I.A.A. 829, 852 (Perm. Ct. Arb. 1928).

<sup>154</sup> Case Concerning the Frontier Dispute, *supra* note 155, at 583, ¶ 56.

<sup>155</sup> Dupuy & Dupuy, *supra* note 77, at 134.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Q & A: *South China Sea Dispute*, BBC NEWS ASIA, (May 15, 2013, 00:23 AM), <http://www.bbc.com/news/world-asia-pacific-13748349>.

### (3) *Acquiescence*

The third factor necessary to establish a historic waters claim is the attitude of foreign states (or acquiescence).<sup>159</sup> Acquiescence, like the continuity factor, is closely interrelated with the concept of the passage of time. Therefore, “the longer a claim has been in existence the less may be the required degree of acquiescence. Conversely, the shortness of period of claim may be compensated for by the speed and extent of foreign state acceptance.”<sup>160</sup> Additional considerations when assessing foreign acquiescence to historic waters claims include whether the state has provided explicit notification of the historic waters claim. “If a state shows no conclusive evidence of an historic claim being established in its internal laws at the relevant time, it is impossible to deduce the acquiescence of states in such a system whether from their action or inaction.”<sup>161</sup> In addition, if the historic waters claim is geographically uncertain this affects other States awareness of the historic claim and so with it their ability to acquiesce.<sup>162</sup>

In the context of China’s historic waters claim in the South China Sea, the requirement of acquiescence presents a near impossibility to it being recognized under international law. As an initial matter, the historic record as discussed in above sections reflects that other than an oblique reference to historic rights in the 1996 Exclusive Economic Zone proclamation, China’s assertion of a historic waters claim is relatively recent.<sup>163</sup> The first explicit notification the world received of China’s asserted historic

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<sup>159</sup> *Juridical Regime of Historic Waters*, *supra* note 125, at 13, ¶ 80.

<sup>160</sup> SYMMONS, *supra* note 128, at 115.

<sup>161</sup> *Id.* at 148.

<sup>162</sup> *Id.* at 133-134.

<sup>163</sup> Dupuy & Dupuy, *supra* note 77, at 129.

waters claims was the 2009 *note verbale*.<sup>164</sup> The vagueness of the 2009 *note verbale* in and of itself proved problematic due to China providing no further explanation beyond the attached nine-dash line map.<sup>165</sup> China did nothing to clarify the uncertainty surrounding the *note verbale* and instead adopted a position of reiterating the basic claim with no further elaboration.<sup>166</sup>

The absence of clarity as to the exact nature and extent of Chinese historic claims created initial confusion in South China Sea claimant States but they eventually responded with forceful rejections of China's claims.<sup>167</sup> In addition to diplomatic protests, the regional States also demonstrated operational protest through actions such as the previously discussed Philippines coast guard patrol of Scarborough Shoal.<sup>168</sup> The most significant non-acquiescence to China's historic claims lies in the compulsory arbitration proceedings instituted by the Philippines against China under UNCLOS in which the Philippines seeks a finding that the nine-dashed line map is contrary to UNCLOS.<sup>169</sup>

Based on the above analysis, China fails to satisfy the third International Law Commission factor for historic waters due to the relatively recent nature of its historic waters claim, the lack of clarity as to its claims and the vocal non-acquiescence of other South China Sea claimant states. China has consistently declined to articulate the basis for its historic waters claim and in failing to do so has failed to demonstrate how it is a special case meriting consideration outside of the UNCLOS framework.

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<sup>164</sup> Note Verbale CML/17/2009, *supra* note 2.

<sup>165</sup> *Id.*

<sup>166</sup> Note Verbale CML/8/2011, *supra* note 79.

<sup>167</sup> Note Verbale No. 00028, *supra* note 78.

<sup>168</sup> DOLVEN ET AL., CONG. RESEARCH SERV., *supra* note 82, at 7.

<sup>169</sup> Note Verbale No. 13-0211, *supra* note 4.

## B. *Historic Title*

In addition to claiming historic waters in the South China Sea, the historic rights claimed by China in the 2009 *note verbale* extended to the islands of the region. This sovereignty claim can be interpreted as being based on a form of historic title.<sup>170</sup> As previously discussed, China has declined to further clarify the nature of the sovereignty claims contained in the 2009 *note verbale*, but since China based the claims on the historic record a consideration will be given to China's claims within the context of historic title.<sup>171</sup>

The general rule on acquisition of territory was stated in the *Eritrea v. Yemen* arbitral decision, where the panel stated, "The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis."<sup>172</sup> Within the doctrine of acquisition of territory is the subsidiary doctrine of historic title. It was defined in the *Eritrea v. Yemen* decision as, "a title that has been created or consolidated, by a process of prescription or acquiescence, or by possession so long as to become accepted by the title of law."<sup>173</sup> In essence, "it amounts to a recognized territorial title established over time in the absence of protest, the provenance of which is unclear".<sup>174</sup> The control must be uncontested and non-controversial over a meaningful period of time.<sup>175</sup> Relying upon the theory of

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<sup>170</sup> Note Verbale CML/17/2009, *supra* note 2; Dupuy & Dupuy, *supra* note 77, at 139.

<sup>171</sup> *Id.*

<sup>172</sup> *Eritrea v. Yemen, Territorial Sovereignty and Scope of the Dispute*, XXII R.I.A.A. 211, 282 ¶ 239 (Perm. Ct. Arb. 1998).

<sup>173</sup> *Id.* at 243, ¶ 106.

<sup>174</sup> MALCOLM N. SHAW, *TITLE TO TERRITORY*, XX (2005).

<sup>175</sup> *Id.*

historic title, it would be possible for a state to engage in the acquisition of sovereignty over land territory through a process of consolidation of historic title.<sup>176</sup> Under this theory, “a state’s sovereignty over a given territory could be established by focusing on factors such as the state’s long-standing vital interests and the general tolerance or recognition by other states of the claim to sovereignty, rather than on effective and continuing exercise of authority.”<sup>177</sup> The acquisition of territory by consolidation of historic title is controversial and the International Court of Justice (ICJ) in *Cameroon v. Nigeria* stated historic consolidation “cannot replace the established modes of acquisition of title under international law, which take into account many other important variables of act and law.”<sup>178</sup>

While it is not unusual for historical evidence to be utilized as a basis for a contemporary claim, the limited value of historic evidence in ultimately determining sovereignty was discussed by the tribunal in *Eritrea v. Yemen*, in which the tribunal stated that amongst competing parties where there has been, “much argument about claims to very ancient titles, it is the relatively recent history of use and possession that ultimately proved to be a main basis of the tribunal decisions.”<sup>179</sup>

The evidentiary value of the 1947 map in proving historic title must also be given consideration. One of the first opinions addressing the relative value of maps was the 1928 *Island of Palmas* case before the Permanent Court of Arbitration, which was considering a dispute between the Netherlands and the United States over an island

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<sup>176</sup> Dupuy & Dupuy, *supra* note 77, at 137.

<sup>177</sup> *Id.*

<sup>178</sup> Land and Maritime Boundary Between Cameroon and Nigeria (*Cameroon v. Nigeria*), 2002 I.C.J. 303, 352, ¶ 65 (Oct. 10).

<sup>179</sup> *Eritrea v. Yemen*, *supra* note 175 at 337, ¶ 450; SHAW, *supra* note 177 at XXI.

located between Indonesia and the Philippines.<sup>180</sup> The arbitrator in that case stated, “only with the greatest caution can account be taken of maps in deciding a question of sovereignty.”<sup>181</sup> The value of maps in sovereignty disputes was further considered by the ICJ in the 1986 *Burkina Faso v. Mali* case where the Court stated, “maps merely constitute information” and “of themselves and by virtue solely of their existence, they cannot constitute territorial title.”<sup>182</sup> In view of this international legal precedent, the map rather than demonstrating China’s historic title does little to prove China’s sovereignty claims and at best reflects the internal historic perspective of the Chinese government.

Regardless of claims to historic title consolidated by long use of a territory, a state is still required to demonstrate authority over the territory as well as acquiescence by neighboring states. It can also be considered a corollary requirement that the acquisitive state be peaceful in its exercising sovereignty.<sup>183</sup>

The use of force by China in occupying the Paracel Islands in 1974 presents a challenge in advancing the legitimacy of China’s historic title claim. China is an original member of the United Nations.<sup>184</sup> In joining the United Nations, China obliged itself to refrain from the use of force or the threat of the use of force and committed itself to resolving disputes peacefully.<sup>185</sup> The use of force against Vietnam in occupying the Paracel Islands could be viewed as a breach of the peace, which violates the spirit and

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<sup>180</sup> See *The Island of Palmas Case*, *supra* note 156.

<sup>181</sup> *Id.* at 851.

<sup>182</sup> Dupuy & Dupuy, *supra* note 77, at 133 (*quoting* Burk. Faso v. Mali, *supra* note 155, at 582, ¶ 54).

<sup>183</sup> Dupuy & Dupuy, *supra* note 77, at 138.

<sup>184</sup> Originally China was represented by the Nationalist Government, but in 1971 the Government of the Peoples Republic assumed that representation. See G.A. Res. 2758 (XXVI), U.N. GAOR, 26<sup>th</sup> Sess., U.N. Doc. A/53/145, (Oct. 25, 1971).

<sup>185</sup> U.N. Charter art. 2, para. 3, 4.

letter of the United Nations Charter thus delegitimizing any legal bases China asserts to historic title. In addition, China would be unable to satisfy one of the basic elements of proving a claim to historic title that the state was peaceful in exercising its authority.<sup>186</sup> A final consideration for China's historic title claim in the Paracel Islands regards the principle of *uti possidetis*.<sup>187</sup> The post-colonial history of Vietnam resulted in the country being divided and not achieving reunification until 1975.<sup>188</sup> Therefore, if China were to claim that there was a single successor state to French Indochina, which fixed territorial boundaries in China's favor, it would be nearly impossible to support this assertion based on the historical record of Vietnam being divided for twenty years post-independence.

Regarding claims of Chinese historical title in the Spratly Islands, the historical evidence is even weaker. The Spratly Islands remained an essentially uninhabited island group until the early 1930s.<sup>189</sup> The first significant territorial acquisition in the Spratly Islands was in 1933 when France treated the islands as *terra nullius* and occupied them.<sup>190</sup> While China vigorously protested this action, the inability to prevent the occupation reflected the weak to non-existent Chinese presence in the island group at that time.<sup>191</sup> In the intervening years, Vietnam and the Philippines took substantial action to occupy features in the Spratly Islands and have been vigorous in non-acquiescence to China's claims of sovereignty.<sup>192</sup> Finally, the principle of *uti possidetis* would run

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<sup>186</sup> RAINE & LEMIERE, *supra* note 15, at 61.

<sup>187</sup> *Uti possidetis* is the legal doctrine that holds "old administrative boundaries will become international boundaries when a political subdivision achieves independence." BLACK'S LAW DICTIONARY 1544 (7<sup>th</sup> ed. 2007).

<sup>188</sup> DZUREK, *supra* note 83, at 17.

<sup>189</sup> *Id.* at 8-9.

<sup>190</sup> *Id.* at 9-10.

<sup>191</sup> KEYUAN, *supra* note 12, at 49.

<sup>192</sup> RAINE & LEMIERE, *supra* note 15, at 32-34.

counter to China's claims in the Spratly Islands and in favor of Vietnam if substantive weight is given to the historical evidence of France having occupied and the Spratly Islands in 1933 as *terra nullius*.

A final consideration concerns the acquisition of a low-tide elevation as territory by historic title. The ICJ in the *Qatar v. Bahrain* case considered this question and stated, "international treaty law is silent on the question whether low-tide elevations can be considered to be territory."<sup>193</sup> The ICJ went on to state, "The few existing rules do not justify a general assumption that low tide elevations are territory in the same sense as islands....It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory."<sup>194</sup> The question of acquisition of sovereignty over low-tide elevations was further addressed in the *Nicaragua v. Colombia* case in which the ICJ stated, "It is well established in international law that islands, however small, are capable of appropriation. By contrast, low-tide elevations cannot be appropriated"<sup>195</sup>.

In the dispute between the Philippines and China over Scarborough Shoal, the very geographical nature of the feature is contested. The Philippines has emphatically stated, "Bajo de Masinloc (Scarborough Shoal) is not an island....Bajo de Masinloc is a ring-shaped coral reef, which has several rocks encircling a lagoon."<sup>196</sup> China has asserted the position that Scarborough Shoal is Huang Yung Island which it has always

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<sup>193</sup> Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (*Qatar v. Bahrain*), 2001 I.C.J. 40, 101, ¶ 205 (Mar. 16).

<sup>194</sup> *Id.* at 102, ¶ 206.

<sup>195</sup> Territorial and Maritime Dispute (*Nicar. v. Colom*), 2012 I.C.J. 624, 641, ¶ 26 (Nov. 19).

<sup>196</sup> Statement of Philippines Position on Bajo de Masinloc, *supra* note 19.

had historic sovereignty over it.<sup>197</sup> If an independent assessment of Scarborough Shoal found it to be a low-tide elevation then it would appear acquisition of it by any sovereign would be impossible and China's claim to acquisition by historic title would be delegitimized.

In light of the foregoing considerations, China cannot demonstrate that it has historic title in the South China Sea. Despite broad claims of rights over the islands of the South China Sea, the historical record, as discussed above, is more nuanced and reflects a long history of the region being dominated by sea-faring traders who did not necessarily demonstrate significant territorial aspirations for China in the South China Sea. As discussed above, the Spratly Islands and Paracel Islands have an extensive history of not being dominated by any one country to the exclusion of all others. In the Paracel Islands, China only was able to achieve consolidation of authority over the islands by the forcible eviction of South Vietnam in 1974.<sup>198</sup>

The history of the past eighty years of competing claims, partial occupation of islands, operational confrontations and routine diplomatic protests all combine to prevent China from successfully proving it has historical title to the regions islands (and other formations) based solely on historic evidence.

## VI. ASEAN'S ROLE IN SOUTH CHINA SEA DISPUTE RESOLUTION

The Association of Southeast Asian Nations (ASEAN) is a regional organization that provides an existing framework in which South China Sea claimant states can

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<sup>197</sup> Tang Rui, Letter to the Editor, *Huangyan Island Belongs to China*, WALL ST. J. (June. 26, 2012, 12:49 PM), <http://online.wsj.com/news/articles/SB10001424052702304870304577488713068832048>.

<sup>198</sup> DZUREK, *supra* note 83, at 17.

peacefully resolve their disputes.<sup>199</sup> This section will examine the relationship between China and fellow ASEAN states, the relative position of ASEAN states on the South China Sea disputes and efforts to date by ASEAN to peacefully resolve the disputes.

The historical relationship between China and neighboring states has been one of suspicion and mistrust that Communist China represented a danger to the existing regional regimes; in particular Indonesia attributed China's support to the failed 1965 Communist coup in that country.<sup>200</sup> Compounding the regional frustration with China has been China's repeated insistence over the past two decades that the South China Sea dispute can only be resolved through bilateral negotiations, notwithstanding the multilateral nature of the sovereignty issues.<sup>201</sup> The result of this historical mistrust has been that no substantive negotiations between China and any of the Southeast Asian claimants have occurred during the past two decades.<sup>202</sup> The other claimant states have engaged in bilateral negotiations with each other, but China has been the primary proponent of bilateral instead of multilateral negotiations.<sup>203</sup>

The lack of substantive negotiations by ASEAN member states, "can largely be attributed to power asymmetries, a perceived lack of sincerity on China's part, the absence of effective diplomatic mechanisms and, most recently, hardening positions by

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<sup>199</sup> "The Association of Southeast Asian Nation, or ASEAN, was established on 8 August 1967 in Bangkok, Thailand, with the signing of the ASEAN Declaration (Bangkok Declaration) by the Founding Fathers of ASEAN, namely Indonesia, Malaysia, Philippines, Singapore and Thailand." Overview, ASSOCIATION OF SOUTHEAST ASIAN STATES, <http://www.aseansec.org/overview/> (last visited May 1, 2014).

<sup>200</sup> HONG, *supra* note 51, at 187.

<sup>201</sup> Ian Storey, *China's Bilateral and Multilateral Diplomacy in the South China Sea*, 2012 Ctr. for New Am. Security 59.

<sup>202</sup> *Id.*

<sup>203</sup> HONG, *supra* note 51, at 191.

the major players.”<sup>204</sup> Of all the regional claimant states, only Vietnam and China have established a formal mechanism to address the dispute. In 1994, they established a joint working group to discuss maritime disputes in the South China Sea. Past bilateral negotiations between China and Vietnam have successfully resolved disputes, including issues related to the land border and the Gulf of Tonkin.<sup>205</sup>

However, as a general rule regional states resent China’s insistence on a bilateral approach, fearing that China as the strongest party will engage in a divide and rule approach.<sup>206</sup> Further, it can be safely assumed that China would only support bilateral negotiations in which it is one of the parties, but would be unlikely to recognize the validity of an agreement negotiated between two other South China Sea claimant states.<sup>207</sup>

China has consistently rejected involvement from outside the region in the South China Sea disputes, including by the United States. After U.S. Secretary of State Hillary Clinton’s 2010 affirmation of freedom of navigation in the South China Sea as a vital U.S. national interest, China followed a policy seeking to discourage United States involvement and the internationalization of the claims in the South China Sea out of fear that China would be isolated and hindered from achieving the outcome it desires.<sup>208</sup>

Against this backdrop of China’s general policy of unwillingness to engage in multilateral dispute resolution regarding South China Sea issues, there has been a subtle

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<sup>204</sup> Storey, *supra* note 204.

<sup>205</sup> *Id.* at 60.

<sup>206</sup> *Id.* at 59.

<sup>207</sup> *Id.*

<sup>208</sup> O’ROURKE, CONG. RESEARCH SERV., *supra* note 135, at 9-10.

shift in China's engagement policy of the last two decades. The origin of the change could be rooted in the crushing of the Tiananmen Square democracy protests, which proved a foreign relations debacle for China.<sup>209</sup> Regardless, China adopted a less confrontational approach in the early 1990s and the only feature China has occupied in the Spratly Island group since that time was the Philippines-claimed Mischief Reef in 1995 (though China has continued to consolidate its presence in the features it does control in the Spratly Islands).<sup>210</sup>

In line with this less confrontational approach, China inaugurated in the early 1990s a new relationship with ASEAN. ASEAN seeks to promote, "the twin goals of Southeast Asian autonomy and ASEAN's centrality in the region's security affairs."<sup>211</sup> In furtherance of the goal of Southeast Asian autonomy, ASEAN adopted the Treaty of Amity and Cooperation in Southeast Asia in 1976.<sup>212</sup>

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<sup>209</sup> HONG, *supra* note 51, at 190.

<sup>210</sup> Storey, *supra* note 204.

<sup>211</sup> Carlyle A. Thayer, Emeritus Professor, University of New South Wales, Address at Regional Conference on ASEAN and the South China Sea: Achievements, Challenges and Future Direction: Incorporating a Code of Conduct for the South China Sea into ASEAN's Political-Security Community: The Road Ahead (Sept. 13, 2013).

<sup>212</sup> The Treaty of Amity and Cooperation in Southeast Asia of 1976 provides in part: 1. Mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations; 2. The right of every State to lead its national existence free from external interference, subversion or coercion; 3. Non-interference in the internal affairs of one another; 4. Settlement of difference or disputes by peaceful manner; 5. Renunciation of the threat or use of force; and 6. Effective cooperation among themselves. *see* Treaty of Amity and Cooperation in Southeast Asia, Feb. 24, 1976, 1025 U.N.T.S. 15063 [hereinafter Treaty of Amity and Cooperation].

In order to enhance Southeast Asian security, ASEAN initiated the ASEAN Regional Forum in 1994, the East Asia Summit in 2005, the ASEAN Defense Ministers' Meeting Plus in 2010 and the Enlarged ASEAN Maritime Forum in 2012.<sup>213</sup>

ASEAN member states can be divided into different groups depending on how they view South China Sea sovereignty claims. The first group would be the claimant states of Vietnam, the Philippines, Malaysia and Brunei. This group could be further sub-divided into active claimants (Vietnam and the Philippines) and quieter claimants (Malaysia and Brunei).<sup>214</sup> Vietnam and the Philippines are the most vigorous claimant states in the sovereignty disputes with China having higher tensions and a more charged political atmosphere.<sup>215</sup> Malaysia and Brunei have been more reluctant to confront China over disputed sovereignty in the South China Sea, but have challenged China on occasion such as the 2009 joint Vietnam-Malaysia claim on the extended continental shelf.<sup>216</sup>

The remaining ASEAN states are non-claimants in the South China Sea dispute and can be divided into a group actively engaged on the issues (Indonesia, Singapore and Thailand) and a disengaged group (Cambodia, Burma and Laos).<sup>217</sup> Indonesia is historically the most actively involved non-claimant state and since 1990 has hosted workshops focused on managing South China Sea disputes.<sup>218</sup> The disengaged ASEAN

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<sup>213</sup> “The ASEAN Maritime Forum (AMF) under the terms of the ASEAN Political Security Community Blueprint is focused on a comprehensive approach to maritime issues.” Thayer, *supra* note 214.

<sup>214</sup> RAINE & LEMIERE, *supra* note 15, at 111-113.

<sup>215</sup> *Id.* at 113.

<sup>216</sup> *Id.* at 120.

<sup>217</sup> *Id.* at 122-126.

<sup>218</sup> *Id.*

group is distinguished by their close relations with China, “which usually discourages non-claimants from involvement in the disputes”.<sup>219</sup>

In the mid-1990s China was first invited to be a consultative partner with ASEAN and in 1996 was made a full dialogue partner.<sup>220</sup> Subsequently, China was a founding participant in the ASEAN Regional Forum (ARF), which engages in dialogue on political and security matters with both ASEAN members and non-ASEAN participants including the United States, Russia, Japan and Australia.<sup>221</sup> Another key development for China within the ASEAN framework was the inauguration of the ASEAN-China dialogue, which represented the first time China had consented to multilateral negotiations.<sup>222</sup>

China’s relationship with ASEAN has been at times strained. In the late 1990s ASEAN sought to defuse tensions over the 1995 Mischief Reef confrontation by developing a Code of Conduct for the South China Sea.<sup>223</sup> The proposed code was viewed as a useful conflict management tool that in the future might create an environment conducive to resolution of the sovereignty claims.<sup>224</sup> ASEAN invited China in 1999 to participate in negotiations for development of the code but China rejected the invitation relying upon the 1997 ASEAN-China Joint Statement as representing the highest-level political dialogue on the issue.<sup>225</sup>

China subsequently changed position and participated in the ASEAN negotiations resulting in an ASEAN Declaration on November 4, 2002. ASEAN’s 10 member states

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<sup>219</sup> *Id.* at 126.

<sup>220</sup> HONG, *supra* note 51, at 188.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 189.

<sup>223</sup> Storey, *supra* note 204, at 61.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 62.

and China signed in Phnom Penh, Cambodia a non-binding “Declaration on the Conduct of Parties in the South China Sea”(DOC).<sup>226</sup> One of the asserted successes of China during the negotiations was having the document described as a “Declaration” rather than a “Code” to further emphasize its political rather than legal nature.<sup>227</sup> The Declaration on Conduct provided in part that the parties to it would,

[R]eaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations;

The Parties reaffirm their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;

The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;

The Parties undertake to exercise self-restraint in the conduct of activities that

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<sup>226</sup> Declaration on the Code of Conduct, ASSOCIATION OF SOUTHEAST ASIAN NATIONS, <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea> (last visited May 1, 2014) [hereinafter Declaration on Conduct].

<sup>227</sup> Storey, *supra* note 204, at 62.

would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.<sup>228</sup>

While the Declaration on Conduct had high aspirations, the declaration suffered from the fact that it was not a binding treaty, it had no enforcement provisions for violations and it failed to specify geographic scope.<sup>229</sup>

The Declaration on Conduct ushered in a period of relative calm and stability in the South China Sea with no state taking actions to antagonize other claimant states. Reflective of this more cooperative environment, China acceded in 2003 to the ASEAN Treaty of Amity and Cooperation.<sup>230</sup> But the relative calm of the first few years following the Declaration on Conduct also represented a period when little progress was made towards implementing the provisions of the Declaration. The state parties to the Declaration had agreed to “reaffirm their commitment to sincerely and faithfully implement the DOC in order to contribute to regional peace and stability in the South China Sea.”<sup>231</sup> The main task of the ASEAN-China joint working group is “to study and

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<sup>228</sup> Declaration on Conduct, *supra* note 229.

<sup>229</sup> HONG, *supra* note 51, at 193.

<sup>230</sup> MARK E. MANYIN, ET AL., CONG. RESEARCH SERV., R40583, U.S. ACCESSION TO THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS TREATY OF AMITY AND COOPERATION 2 (2009).

<sup>231</sup> Terms of Reference of the ASEAN – China Joint Working Group on the Implementation of the Declaration on the Conduct of the Parties in the South China Sea, ASSOCIATION OF SOUTHEAST ASIAN NATIONS, <http://www.asean.org/news/item/terms-of-reference-of-the-asean-china-joint-working-group-on-the-implementation-of-the-declaration-on-the-conduct-of-parties-in-the-south-china-sea> (last visited May 1, 2014).

recommend measures to translate the provisions of the DOC into concrete cooperative activities that will enhance mutual understanding and trust.”<sup>232</sup>

It was not until 2004 that senior officials agreed to establish a joint working group to draw up implementation guidelines. Over the next four years, this group met only three times – in 2005, in 2006 and, informally, in 2008 – and it failed to reach a consensus on the way forward.<sup>233</sup>

The stumbling block to development of guidelines to implement the Declaration on Conduct was China’s unwillingness to deal with ASEAN collectively on the issue and its preference to deal bilaterally with claimant states.<sup>234</sup>

In July 2011 ASEAN and China finally agreed to guidelines to implement the Declaration on Conduct.<sup>235</sup> The agreed implementation guidelines are extremely vague and state “that the DOC will be implemented in a “step-by-step” manner, that participation in cooperative projects will be voluntary and the CBMs [confidence building measures] will be decided by consensus. In short, the guidelines do not go beyond similar clauses contained in the DOC.”<sup>236</sup> The implementing guidelines specifically avoided addressing sovereignty issues, which ASEAN member states

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<sup>232</sup> The joint working group is specifically tasked to address “cooperative activities in the South China sea, particularly in the following areas: marine environmental protection; marine scientific research, safety of navigation and communication at sea; search and rescue operation; and combating transnational crime.” *Id.*

<sup>233</sup> Storey, *supra* note 204, at 62.

<sup>234</sup> HONG, *supra* note 51, at 193.

<sup>235</sup> Daniel Ten Kate & Karl Lester Yap, *Risk of Conflict in South China Sea is Set to Prompt ASEAN Pact with China*, BLOOMBERG, (July 21, 2011, 06:34 AM), <http://www.bloomberg.com/news/2011-07-20/china-asean-to-agree-on-incomplete-s-china-sea-rules.html>.

<sup>236</sup> Storey, *supra* note 204, at 63.

appeared to think would be better addressed in a treaty-like Code of Conduct.<sup>237</sup>

ASEAN member states viewed the implementing guidelines as a step towards a formal, binding code of conduct, but China did not see it as a natural evolution and preferred to just focus on implementing the Declaration on Conduct.<sup>238</sup> Despite China's opposition, ASEAN began discussing a Code of Conduct in November 2011 and the Philippines released its own draft Code of Conduct in January 2012.<sup>239</sup>

In January 2012, ASEAN and China commenced discussions in Beijing on the implementation of the DOC Guidelines. The participants,

agreed to set up four expert committees on maritime scientific research, environmental protection, search and rescue and transnational crime. These committees were based on four of the five cooperative activities included in the 2002 DOC. Significantly no expert committee on safety of navigation and communication at sea was established due to its contentious nature. Not a single cooperative project has been undertaken.<sup>240</sup>

In July 2012, ASEAN's foreign ministers met and released a six-point program intended to advance the negotiation process with China for a binding treaty-like Code of Conduct. The ASEAN program emphasized commitment to implement the Declaration on Conduct, the guidelines on implementation of the declaration, respect for international law and UNCLOS, self-restraint and peaceful resolution of disputes in accordance with

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<sup>237</sup> Carlyle Thayer, *ASEAN's Code of Conduct in the South China Sea: Litmus Test for Community Building?* ASIA-PAC. J.: JAPAN FOCUS (Aug. 20, 2012), [http://www.japanfocus.org/-Carlyle\\_A\\_-Thayer/3813](http://www.japanfocus.org/-Carlyle_A_-Thayer/3813).

<sup>238</sup> *Id.*

<sup>239</sup> Thayer, *supra* note 214.

<sup>240</sup> *Id.*

international law.<sup>241</sup> However, the ASEAN announcement on the Code of Conduct negotiation process was marred by the first instance of the member states not releasing a final summit communiqué due to vocal protests by the Philippines over the wording of the draft communiqué, which stated ASEAN participants had agreed not to internationalize the South China Sea issue.<sup>242</sup>

China has proceeded slowly and with caution towards negotiation of a binding Code of Conduct. In August 2013, China's Foreign Minister Wang Yi, in a reflection of China's cautious approach stated that China had "agreed to hold consultations on moving forward the process on the Code of Conduct in the South China Sea."<sup>243</sup> He further stated early agreement was unrealistic and set out four principles on China's approach; (1) reasonable expectations; (2) consensus through negotiation; (3) elimination of interference; and (4) step by step approach.<sup>244</sup>

A multitude of factors and an unwillingness of member states to cooperate on issues of joint concern have frequently resulted in ASEAN being unable to effectively address the disputes in the South China Sea. However, despite ASEAN's previous lack of success, the ASEAN organization does offer the best framework within which South China Sea claimant states can work with one another.

## VII. CHINA'S MOTIVATIONS FOR PACIFIC SETTLEMENT

There are a number of compelling reasons why China should be willing to reach a comprehensive settlement under the auspices of ASEAN with other South China Sea

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<sup>241</sup> *Id.*

<sup>242</sup> RAINE & LEMIERE, *supra* note 15, at 130.

<sup>243</sup> Carl Thayer, *To Isolate Philippines, China Woos ASEAN*, THE DIPLOMAT, (Oct. 1, 2013), <http://thediplomat.com/2013/10/to-isolate-philippines-china-woos-asean/>.

<sup>244</sup> *Id.*

claimant states. In this section the economic, national security and liability concerns that give China incentive to negotiate a comprehensive settlement will be given consideration.

#### A. *Economic Factors*

One of the most compelling arguments in favor of China settling disputes with her neighbors is the impact that these disputes can and will have on economic relations within the Southeast Asian region. “Regional integration between China and the states of Southeast Asia is a priority for China, as part of its overall policy of peaceful rise.<sup>245</sup> The peaceful rise policy,

also referred to as "peaceful development," states that China will develop economically by taking advantage of the peaceful international environment, and at the same time maintain and contribute to world peace by its development.

The policy was articulated by Chinese leaders in 2003 to counter international fears about Beijing's growing economic and political might.<sup>246</sup>

“Regional integration with other South China Sea states, therefore, has both political and economic aspects. To achieve growth, it is helpful for a state to have peaceful borders so that resources can be channeled into economic development rather than armies and border defense systems.”<sup>247</sup> The relatively small size of each of the Southeast Asian countries belies the fact that they collectively represent a fast growing economy with a combined population of 580 million people.<sup>248</sup> Trade between China and ASEAN

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<sup>245</sup> Peter Dutton, *Three Disputes and Three Objectives*, 64 NAVAL WAR COLL. REV. 42, 55 (2011).

<sup>246</sup> Esther Pan, *The Promise and Pitfalls of China's Peaceful Rise*, COUNCIL ON FOREIGN RELATIONS (Apr. 14, 2006), <http://www.cfr.org/china/promise-pitfalls-chinas-peaceful-rise/p10446>.

<sup>247</sup> Dutton, *supra* note 248.

<sup>248</sup> RAINE & LEMIERE, *supra* note 15, at 108.

countries has soared from as little as \$8 billion U.S. dollars in 1991 to \$231 billion U.S. dollars in 2008.<sup>249</sup> The economic incentive for China to maintain good relations with her neighbors is therefore quite high and very real. The leaders of Southeast Asian states are not entirely oblivious to the risks and challenges that the economic power of a rising China represents. The former Singapore Prime Minister Lee Kuan Yew asserted in 1996 that states should, “engage, not contain China, but also quietly set pieces into place for a fall-back position should China not play in accordance with the rules as a good global citizen.”<sup>250</sup> A threat remains that China could pursue South China Sea claims too vigorously resulting in regional states initiating an economic boycott of China’s products. A foreshadowing of the type of economic damage that could result from unchecked political ambitions can be seen in the frayed relations between China and Japan. Since 2012 when a dispute erupted over the Senkaku Islands (Diaoyu Islands in China) in the East China Sea, trade between China and Japan dropped 3.9% in 2012 and a further 5.1% in 2013.<sup>251</sup>

In addition to the prospect of an economic boycott that China and neighboring states can ill afford, the ongoing unresolved sovereignty issues have impeded economic exploitation of resources in the South China Sea. The continental shelf of the Spratly Islands contains significant deposits of unexploited hydrocarbons estimated up to 5.4 billion barrels of oil and 55.1 trillion cubic feet of natural gas.<sup>252</sup> China has taken a hard-

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<sup>249</sup> Dutton, *supra* note 248.

<sup>250</sup> RAINE & LEMIERE, *supra* note 15, at 108

<sup>251</sup> Gordon Chang, Op-Ed., *The Chinese and Japanese Economies are Delinking: Prelude to Conflict*, FORBES, (Feb. 16, 2014, 2:36 PM), <http://www.forbes.com/sites/gordonchang/2014/02/16/the-chinese-and-japanese-economies-are-delinking-prelude-to-conflict/>.

<sup>252</sup> EIA REPORT, *supra* note 11, at 4.

line approach on energy development by other regional States; “China’s Foreign Ministry reiterated on Tuesday that China opposed oil and gas development by other countries in disputed waters of the sea.”<sup>253</sup> In light of this inflexible position, the hydrocarbon energy reserves in the South China Sea remain unexploited and unavailable to promote vital economic development in Southeast Asian economies.<sup>254</sup>

### B. *National Security Implications*

A second and equally important factor that should compel China to alter current position and assume a more conciliatory approach is the national security implications of the current approach to the South China Sea. “China’s...objective appears to be to enhance its control over the South China Sea in order to create a maritime security buffer zone that protects the major population centers, industry, and rich cultural sites of China’s developed eastern coastal area.”<sup>255</sup> In furtherance of this objective, China has implemented a policy in recent years of expanding military holdings in the South China Sea. “In 2012, China expelled Filipino fishermen from traditional fishing grounds around Scarborough Shoal, less than 125 miles from the main Philippine islands, and has used its coast guard to maintain control. In 2012, it established an administrative and military district covering portions of the claimed Paracel Islands.”<sup>256</sup> China recently announced a

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<sup>253</sup> Jane Perlez, *Dispute Flares Over Energy in South China Sea*, N.Y. TIMES, Dec. 5, 2012, at A12, available at [http://www.nytimes.com/2012/12/05/world/asia/china-vietnam-and-india-fight-over-energy-exploration-in-south-china-sea.html?\\_r=0](http://www.nytimes.com/2012/12/05/world/asia/china-vietnam-and-india-fight-over-energy-exploration-in-south-china-sea.html?_r=0).

<sup>254</sup> DOLVEN ET AL., CONG. RESEARCH SERV., *supra* note 82, at 21-22.

<sup>255</sup> Dutton, *supra* note 248, at 57.

<sup>256</sup> Jeffrey A. Bader, *The U.S. and China’s Nine-Dash Line: Ending the Ambiguity*, BROOKINGS INSTITUTION (Feb. 6, 2014), <http://www.brookings.edu/research/opinions/2014/02/06-us-china-nine-dash-line-bader>.

12.2% increase in defense spending to \$131.6 billion U.S. dollars for modernization of its forces and enhanced defense of its land, sea and air territory.<sup>257</sup>

China's increased military spending and posturing fails to take into account the security needs and concerns of its regional neighbors. A more assertive China creates the risk of a regional arms race. "China's increased spending will alarm neighbors and has already prompted some, such as Vietnam and Japan, to boost their own military budgets".<sup>258</sup> The potential for a regional arms race also naturally creates the potential for armed conflict in the South China Sea. "The conflict would be either planned or unplanned, and involve, initially, either China and the U.S. or China and a Southeast Asia state."<sup>259</sup> In the event of a regional conflict in which China was viewed as an aggressor, the credibility of China as a major world power who adheres to international norms on peaceful resolution of disputes would be undermined.<sup>260</sup> A regional conflict also creates the risk of United States involvement if a U.S. defense treaty partner is involved. The most significant defense treaty relationship is the 1951 Mutual Defense Treaty between the United States and the Philippines. The treaty provides, "Each Party recognizes that an armed attack in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes."<sup>261</sup> The common defense obligation under the Mutual Defense Treaty was recently reaffirmed by U.S. Secretary of State Hillary

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<sup>257</sup> Henry Sanderson & Neil Western, *China Military Spending Rise Signals Firm Stand on Dispute*, BLOOMBERG, (Mar. 5, 2014, 11:56 PM), <http://www.bloomberg.com/news/2014-03-05/china-boosts-defense-spending-as-xi-pushes-for-stronger-military.html>.

<sup>258</sup> *Id.*

<sup>259</sup> RAINE & LEMIERE, *supra* note 15, at 187.

<sup>260</sup> U.N. Charter art. 2, para. 3, 4.

<sup>261</sup> Mutual Defense Treaty, U.S.–Phil., Aug. 30, 1951, 3 U.S.T. 3947, 177 U.N.T.S. 133.

Clinton on November 16, 2011 at a ceremony onboard the USS *Fitzgerald* in Manila Bay.<sup>262</sup>

In light of the potential for an unintentional conflict, China could find itself in the position of experiencing both military losses and a loss of international credibility. An issue related to risks associated with China's military expansion is the controversial position China has taken regarding military activities in the exclusive economic zone. China's exclusive economic zone policies have been described by some observers as, "the most expansive security and sovereignty EEZ claim on the planet – a serial violator of the regime of high seas freedoms in the zone, China purports to regulate military activities, hydrographic surveys, and laying of cables and pipelines."<sup>263</sup> Another scholar in discussing the UNCLOS negotiation history on military activities in the exclusive economic zone has stated, "at UNCLOS III unsuccessful proposals were made to restrict the holding of foreign military exercises in the EEZ despite the highly held view that such exercises fell under the freedom of navigation concept. The Convention includes no such limitation."<sup>264</sup>

While China has sought to restrict military activities in its exclusive economic zone, observers have noted that it has shown no such restraint in engaging in military activities in the exclusive economic zones of other nations. "Maritime legal scholars and some of China's neighbors have catalogued through open sources a series of PRC state

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<sup>262</sup> Signing of the Manila Declaration, U.S. DEP'T OF STATE, (Nov. 16, 2011), <http://www.state.gov/r/pa/prs/ps/2011/11/177226.htm>.

<sup>263</sup> KRASKA & PEDROZO, *supra* note 21, at 279.

<sup>264</sup> DAVID J. ATTARD, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW 84-85 (1987).

actions in recent years where China's military forces have repeatedly operated in waters off the coast of third-party nations like Japan and the Philippines.”<sup>265</sup>

The national security risk China takes in pursuing an aggressive policy on sovereignty in the South China Sea is that it may ultimately find itself constrained by neighboring States that adopt similar positions. “China’s maritime geography is quite constrained, with access to the Pacific Ocean partially blocked by the first island chain, which leaves too few exits to the open sea. The straits, channels, and EEZs overlapping the exits to the open sea are controlled by other nations.”<sup>266</sup> If regional states were provoked into adopting hard-line positions, China “would not be able to even enter the open sea without the consent of neighboring coastal states.”<sup>267</sup> The most prudent course of action would be for China to recognize that adopting a more conciliatory attitude towards other regional states and avoiding an arms build-up is vital to avoid an unnecessary conflict or being militarily constrained.

### C. *Litigation Concerns*

A third reason for China to seek to a settlement in the South China Sea is pending litigation with the Philippines before a special arbitral panel under Annex VII of UNCLOS as well as the potential for future litigation between China and other regional states. The first portion of this section will consider the arbitral tribunal’s jurisdiction in the current Philippine case followed by a consideration of potential litigation risks based on China’s current policies in the South China Sea.

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<sup>265</sup> 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, 231 (2012).

<sup>266</sup> KRASKA, *supra* note 27, at 427.

<sup>267</sup> *Id.* at 428.

As discussed earlier, on January 22, 2013, the Philippines informed China by a *note verbale* it was instituting arbitral proceedings “before an Arbitral Tribunal under Article 287 and Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) in order to achieve a peaceful and durable solution to the dispute over the West Philippine Sea (WPS).”<sup>268</sup> The Philippines asserted that China’s claimed nine-dash line is contrary to UNCLOS. The Philippines further asserted China unlawfully has “laid claim to, occupied and built structures on certain submerged banks, reefs and low tide elevations that do not qualify as islands under UNCLOS, but are part of the Philippine continental shelf.”<sup>269</sup> Finally, the Philippines claimed “China has occupied small, uninhabitable coral projections that are barely above water at high tide, and which are rocks under Article 121 (3) of UNCLOS...and that China has interfered with the lawful exercise by the Philippines of its rights within its legitimate maritime zones.”<sup>270</sup>

The Philippines asserted the arbitral tribunal has jurisdiction, because “the dispute is about the interpretation and application by States Parties of their obligations under the UNCLOS” and Article 287 (1) of UNCLOS provides that “settlement of disputes concerning the interpretation and application of this Convention” may be referred by the Parties for resolution under Part XV of UNCLOS.”<sup>271</sup> Further, “the Philippines is conscious of China’s Declaration of August 25, 2006 under Article 298 of UNCLOS [regarding optional exceptions to the compulsory proceedings], and has

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<sup>268</sup> Note Verbale No. 13-0211, *supra* note 4.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

avoided raising subjects or making claims that China has, by virtue of that Declaration, excluded from arbitral jurisdiction.”<sup>272</sup>

China’s response to the Philippines notification came on February 20, 2013 in which China’s Foreign Ministry stated,

China's position on the South China Sea issue is clear and consistent. China's sovereignty over the Nansha Islands and their adjacent waters is based on sufficient historical and jurisprudential evidence...The Philippines' note and its attached notice not only violate the consensus, but also contain serious errors in fact and law as well as false accusations against China, which we firmly oppose. Chinese Ambassador to the Philippines Ma Keqing called a meeting with officials of the Philippine Foreign Ministry today, made clear that China refused to accept the note and its attached notice and returned them.<sup>273</sup>

China has taken a consistent position since that date it will not participate in the arbitral proceedings and declined to appoint an arbitrator to the tribunal. “On 19 February, China stated its rejection of the request for arbitration by the Philippines and returned the latter's *note verbale* and the attached notification. The position of China, as indicated above, will not change.”<sup>274</sup>

UNCLOS provides under Art. 287 four means for settlement of disputes; (1) the international tribunal for the law of the sea established in accordance with Annex VI; (2) the International Court of Justice; (3) an arbitral tribunal constituted in accordance with

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<sup>272</sup> *Id.*

<sup>273</sup> Zhi Chen, *Foreign Minister’s Press Conference*, XINHUA, (Feb. 26, 2013), [http://news.xinhuanet.com/english/bilingual/2013-02/26/c\\_132193652.htm](http://news.xinhuanet.com/english/bilingual/2013-02/26/c_132193652.htm).

<sup>274</sup> Zhi Chen, *China Reiterates to Resolve Territorial Disputes via Bilateral Negotiations*, XINHUA, (Apr. 26, 2013), [http://news.xinhuanet.com/english/china/2013-04/26/c\\_132343314.htm](http://news.xinhuanet.com/english/china/2013-04/26/c_132343314.htm).

Annex VII; and (4) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified.<sup>275</sup> If the states have not made an election of dispute resolution procedures or have opted for different dispute resolution procedures then any claims go to the ad hoc arbitration under Annex VIII.<sup>276</sup> Further, under UNCLOS Art. 298, a state may opt out of compulsory arbitration proceedings concerning sea boundary delimitations or those concerning historic bays and titles, military activities and law enforcement activities in regard to the exercise of sovereign rights.<sup>277</sup>

China and the Philippines have not exercised an option under Article 287 regarding dispute settlement forum, so each State is deemed to have accepted Annex VII arbitration.<sup>278</sup> However, in 2006 China did make a declaration under Article 298 that it “does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1(a) (b) and (c).”<sup>279</sup>

China has rested its objections to the compulsory arbitration proceedings on two grounds. First, the request for arbitration proceedings are, “essentially concerned with maritime delimitation between the two countries...and thus involve the territorial sovereignty over certain relevant islands and reefs”, which per China’s declaration in 2006 are excluded from the compulsory dispute settlement procedures.<sup>280</sup> Second, the

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<sup>275</sup> UNCLOS, *supra* note 5, art. 287.

<sup>276</sup> RAINE & LEMIERE, *supra* note 15, at 218.

<sup>277</sup> UNCLOS, *supra* note 5, art. 298.

<sup>278</sup> UNCLOS Status, *supra* note 25.

<sup>279</sup> *Id.*

<sup>280</sup> Yu Mincai, *China’s Responses to the Compulsory Arbitration on the South China Sea Dispute: Legal Effects and Policy Options*, 45 OCEAN DEV. & INT’L. L. 1, 3-4 (2014).

Philippines by commencing arbitration proceedings has violated the consensus between China and ASEAN member states to directly negotiate the relevant dispute and that this is stipulated in the Declaration on Conduct.<sup>281</sup>

China's argument that "the Philippines case primarily deals with a territorial dispute over which the tribunal has no jurisdiction is likely not to be accepted by the tribunal."<sup>282</sup> The Philippines in crafting its notification chose to focus on China's nine-dash line as contrary to UNCLOS but did not treat it as a maritime boundary dispute. China could assert the nine-dash line is a territorial boundary, but this disagreement of perspective alone would be sufficient to trigger jurisdiction for the arbitral panel.<sup>283</sup> Also, the Philippines does not seek a declaration of sovereignty over the islands and maritime zones, but rather seeks a ruling that China has illegally interfered with the Philippines maritime spaces and right of navigation.<sup>284</sup> UNCLOS Art. 297 specifically provides that disputes concerning the application of the Convention shall be subject to the procedures, "when it is alleged that a coastal state has acted in contravention of the provisions of this Convention in regard to freedoms and rights of navigation".<sup>285</sup>

China's second basis for objecting the tribunal's jurisdiction, which asserts that the Philippines violated the China-ASEAN consensus on direct negotiation of the dispute may also fail to persuade the tribunal. China rests its argument on a provision in UNCLOS Art. 283 which states, "when a dispute arises between State Parties concerning the interpretation or application of the Convention, the parties to the dispute shall proceed

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 8.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 9.

<sup>285</sup> UNCLOS, *supra* note 5, art. 297.

expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.”<sup>286</sup> However, the Philippines is not obliged to continue negotiations with China if, “one party concludes that all possibilities of settlement have been exhausted.”<sup>287</sup>

A second avenue of pursuit for China would be to rely upon UNCLOS Article 281, which states,

If the State Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.<sup>288</sup>

China could argue that the 2002 Declaration on Conduct in the South China Sea is an agreement under Art. 281 that excludes compulsory arbitration.<sup>289</sup> However, the 2002 Declaration on Conduct does not provide for a dispute resolution mechanism and the declaration was non-binding in nature.<sup>290</sup> Thus, there is a strong Philippines argument that the Declaration on Conduct is not an agreement within the meaning of UNCLOS Art. 281 requiring continued negotiations and the Philippines could unilaterally refer the matter to arbitration. Based upon the above, it would be highly unlikely that China would be able to avoid jurisdiction under UNCLOS Art. 298 grounds.

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<sup>286</sup> UNCLOS, *supra* note 5, art. 283.

<sup>287</sup> Mincai, *supra* note 283, at 9.

<sup>288</sup> UNCLOS, *supra* note 5, art 281.

<sup>289</sup> Mincai, *supra* note 283, at 9.

<sup>290</sup> Declaration on Conduct, *supra* note 229.

Non-participation by China represents an unnecessary risk that the Philippines could fully or partially obtain a favorable judgment from the tribunal that would damage China's reputation and delegitimize China's claims in the South China Sea. The default appearance of a party does not prevent the proceedings from continuing (but also does not result in an automatic adverse ruling).<sup>291</sup> If in the face of an unfavorable ruling, China took the more radical step of withdrawing from UNCLOS, it would not affect the current proceedings with the Philippines. "Proceedings in accordance with the Convention which are pending when the Convention terminates for a party to the dispute following denunciation are not affected by the denunciation."<sup>292</sup>

The participation of China in the proceedings "may be conducive to the creation of a positive atmosphere for cooperative settlement of the dispute" and result in termination of the proceedings.<sup>293</sup> "Under Article 105 of the (ITLOS) Rules, the proceedings are discontinued if the parties, either jointly or separately, notify the tribunal in writing that they have agreed to discontinue the proceedings. This possibility exists up until the final judgment on the merits has been delivered".<sup>294</sup> This occurred in the *MOX Plant Case* in which Ireland notified the tribunal that it was withdrawing its claim against the United Kingdom. The tribunal subsequently issued an order terminating the proceedings.<sup>295</sup>

Therefore in order to avoid the arbitral tribunal establishing jurisdiction over the Philippines claims and proceeding to a ruling, which could be unfavorable to China, the

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<sup>291</sup> GUDMUNDUR EIRIKSSON, *THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA* 161 (2000).

<sup>292</sup> *Id.* at 116.

<sup>293</sup> Mincai, *supra* note 283, at 11.

<sup>294</sup> EIRIKSSON, *supra* note 294, at 248.

<sup>295</sup> Mincai, *supra* note 283, at 11.

more prudent course of action would be for China to participate in the proceedings. China could then seek to either have the Philippines withdraw the claims in return for a negotiated settlement or China could argue the merits of its legal position while fully operating within the UNCLOS framework.

In addition to the risks posed by the arbitral tribunal finding jurisdiction over the Philippines claims, China also faces litigation risks due to what some commentators have observed as China's current policies in the South China Sea regarding the right of navigation.

Chinese ships and aircraft have harassed numerous U.S. naval ships and aircraft operating beyond the Chinese territorial sea and airspace in the...South China Sea. Japanese, Australian, Malaysian, British, and Indian warships have been similarly harassed. Chinese government vessels also have interfered with Vietnamese and Filipino resource exploration and exploitation activities within their respective exclusive economic zones.<sup>296</sup>

A recent incident indicative of this pattern of conduct occurred on January 27, 2014 in the vicinity of Scarborough Shoal when China utilized water cannons to harass and deter Philippine fishing vessels.<sup>297</sup>

Freedom of navigation of all states in the exclusive economic zone and high seas is a fundamental right guaranteed by UNCLOS.<sup>298</sup> The right of navigation includes the right to pass through the oceans unhindered by other states, subject to certain constraints

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<sup>296</sup> KRASKA & PEDROZO, *supra* note 21, at 315.

<sup>297</sup> Zachary Keck, *China Fires Water Cannons at Philippine Fishermen*, THE DIPLOMAT, (Feb. 25, 2014), <http://thediplomat.com/2014/02/china-fires-water-cannons-at-philippine-fishermen/>.

<sup>298</sup> UNCLOS, *supra* note 5, arts. 58(1), 87(1).

relating to the contiguous zone and exclusive economic zone.<sup>299</sup> The right of freedom of navigation was primarily codified in UNCLOS Articles 58, 87 and 90.<sup>300</sup> The other right of freedom of navigation is the exclusive jurisdiction of the flag state to exercise jurisdiction over a vessel of its nationality, though subject to some exceptions.<sup>301</sup> While freedom of navigation has always held a prominent position in international law, it has not been an unfettered right and has always been subject to restrictions. The primary state concern has been fear of lawlessness and insecurity on the high seas.<sup>302</sup> The primary bases for interference with free navigation have been suspected piracy, slave trade and ships flying more than one flag.<sup>303</sup>

The legal authority of a state to interfere with freedom of navigation in the exclusive economic zone and high seas is assessed under a test of reasonableness.<sup>304</sup> A determination that state conduct was unreasonable without any resulting consequences would render the right of freedom of navigation meaningless. “States are likely to use

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<sup>299</sup> PHILIPP WENDEL, *STATE RESPONSIBILITY FOR INTERFERENCES WITH THE FREEDOM OF NAVIGATION IN PUBLIC INTERNATIONAL LAW* 5-6 (2007).

<sup>300</sup> UNCLOS, *supra* note 5, arts. 58, 87, 90.

“In the exclusive economic zone, all states, whether coastal or land-locked, enjoy subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight.” UNCLOS art. 58(1).

“The high seas are open to all states, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked states: (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, (d) freedom to construct artificial islands, (e) freedom of fishing; (f) freedom of scientific research.” UNCLOS art. 87 (1)

“Every state, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.” UNCLOS art. 90.

<sup>301</sup> WENDEL, *supra* note 302, at 6; UNCLOS, *supra* note 5, arts. 91, 94.

<sup>302</sup> WENDEL, *supra* note 302, at 17.

<sup>303</sup> UNCLOS, *supra* note 5, arts. 92, 99, 100.

<sup>304</sup> WENDEL, *supra* note 302, at 51.

their powers with caution as they may risk having to compensate the vessel for loss or damage sustained by unjustifiable enforcement action.”<sup>305</sup>

The right of compensation for unreasonable interference with the right of navigation is codified in UNCLOS Art. 101, which states, “If the suspicions prove to be unfounded, and provided the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.”<sup>306</sup>

UNCLOS Art. 110 provides, “where a ship has been stopped or arrested outside the territorial sea in circumstances, which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.”<sup>307</sup> The flag state of the vessel holds the right to seek compensation for wrongful interference, “since the freedom of navigation constitutes an exclusive right of the flag state and since this right is so closely linked to any right to compensation in cases of interferences on the high seas”.<sup>308</sup>

China’s actions of restricting military activity in its claimed exclusive economic zone, prohibiting survey activity in the disputed exclusive economic zone with Vietnam and restricting Philippine access to the vicinity of Scarborough Shoal creates a risk that a regional state or outside maritime power will challenge China’s actions as an unreasonable interference with freedom of navigation under UNCLOS. In the event that China (unrelated to the prevention of illegal fishing in the exclusive economic zone) unreasonably harassed, boarded or detained the crew of a foreign vessel, such as the previously mentioned 2009 harassment of the civilian Vietnamese survey vessel, a state

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<sup>305</sup> *Id.* at 53.

<sup>306</sup> UNCLOS, *supra* note 5, art. 101.

<sup>307</sup> UNCLOS, *supra* note 5, art. 110.

<sup>308</sup> WENDEL, *supra* note 302, at 91.

could conceivably bring a claim seeking damages under UNCLOS Articles 101 and 110.<sup>309</sup> An arbitral tribunal under UNCLOS Annex VII would have jurisdiction over the claim of unreasonable interference with freedom of navigation (if the claim did not fall within the small number of exceptions claimed by China under Article 298).<sup>310</sup> In such a case for unreasonable interference with the right of navigation, China potentially could lose and be required to pay damages. The effect of an arbitral loss on China would be to needlessly damage China's international reputation. China's ability to state that it is a good state actor that adheres to public international law would be undermined. Also, the success of one state in bringing a claim may encourage other similarly situated states to seek compensation.

The double prospect of the arbitral tribunal finding jurisdiction over the Philippines claim against China and the potential that another regional state will seek compensation at an arbitral tribunal under UNCLOS Articles 101 and 110 provide sufficient incentive for China to reassess its current policies and actions. In light of the above litigation considerations, China may want to adopt a more conciliatory approach towards other regional states, working within the UNCLOS treaty framework and seek a settlement to South China Sea claims.

#### VIII. JOINT DEVELOPMENT AGREEMENTS AND A CODE OF CONDUCT

The prospects for an unfavorable arbitral tribunal ruling, the continued constraints on exploitation of natural resources in the South China Sea and the ongoing negative impact on ASEAN member state relations all provide incentives for China to seek some

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<sup>309</sup> UNCLOS, *supra* note 5, arts. 101, 110.

<sup>310</sup> UNCLOS, *supra* note 5, art. 288 (1) "A court or tribunal referred to in Article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this convention...".

form of settlement with other South China Sea claimant nations. This section will consider a framework for settlement in the form of a broad South China Sea joint development agreement and conclusion of the proposed binding ASEAN Code of Conduct to address sovereignty disputes over the islands and waters of the South China Sea.

#### A. *Joint Development Agreements*

The best prospect for settlement of the disputes is to follow the advice of the late Deng Xiaoping, who in 1988, in addressing the ongoing dispute with the Philippines stated, "In view of the friendly relations between our two countries, we can set aside this issue for the time being and take the approach of pursuing joint development."<sup>311</sup> Under China's approach,

The concept of "setting aside dispute and pursuing joint development" has four elements; (1) The sovereignty of the territories concerned belongs to China; (2) When conditions are not ripe to bring about a thorough solution to territorial dispute, discussion on the issue of sovereignty may be postponed so that the dispute is set aside. To set aside dispute does not mean giving up sovereignty. It is just to leave the dispute aside for the time being; (3) The territories under dispute may be developed in a joint way; (4) The purpose of joint development is to enhance mutual understanding through cooperation and create conditions for the eventual resolution of territorial ownership.<sup>312</sup>

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<sup>311</sup> Statement to Set Aside Dispute and Pursue Joint Development, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, [http://www.fmprc.gov.cn/mfa\\_eng/ziliao\\_665539/3602\\_665543/3604\\_665547/t18023.shtml](http://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18023.shtml) (last visited May 1, 2014).

<sup>312</sup> *Id.*

China reiterated in 2011 calls for joint development of oil, gas and other resources in areas disputed with the Philippines but offered no flexibility on sovereignty claims.<sup>313</sup> While China, like other claimant states, will need to limit its claims of entitlement in the South China Sea, provisional arrangements such as a joint development zone of resources would be a good starting point.<sup>314</sup>

The legal basis for promoting the creation of zones of cooperation can be found in UNCLOS Articles 74 and 83, which address provisional agreements concerning the delimitation of exclusive economic zone and continental shelf.<sup>315</sup>

Pending agreement as provided...the states concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.<sup>316</sup>

States “may decide to establish co-operative arrangements for the exploitation and management of the resources of the delimitation area either in place of a boundary or to facilitate the drawing or continuing of a boundary.”<sup>317</sup> The co-operative arrangements can take several forms with one of the most attractive in a disputed sovereignty area being a “co-operative arrangement for the exploitation of seabed and fishing resources in

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<sup>313</sup> LUM, CONG. RESEARCH SERV., *supra* note 143, at 26.

<sup>314</sup> Beckman, *supra* note 14, at 158-159.

<sup>315</sup> Ian Townsend-Gault, *Rationales for Zones of Co-Operation*, in *BEYOND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: LEGAL FRAMEWORKS FOR THE JOINT DEVELOPMENT OF HYDROCARBON RESOURCES* 115 (Robert Beckman, Ian Townsend-Gault, Clive Schofield, Tara Davenport & Leonardo Bernard eds., 2013).

<sup>316</sup> UNCLOS, *supra* note 5, arts. 74(3), 83(3).

<sup>317</sup> ROBIN CHURCHILL & VAUGHAN LOWE, *THE LAW OF THE SEA* 198 (1999).

place of a boundary line.”<sup>318</sup> There have been several instances of this type of arrangement being established with the most prominent being the 1974 agreement between South Korea and Japan on joint development of the northern portion of the continental shelf between the two countries.<sup>319</sup> “The agreement, which is to last for fifty years and applies to an areas of some 24,000 square nautical miles, provides that concessionaires from each party are to enter into operating agreements to carry out joint exploration and exploitation of the area”.<sup>320</sup> The agreement established a joint commission to administer the exploration and exploitation of the area.<sup>321</sup>

China has some history in establishing a joint co-operative agreement with a neighboring state, so the conclusion of such an agreement with the Philippines and Vietnam would not be entirely unprecedented. In June 2008, China and Japan reached a significant agreement in the dispute over hydrocarbon resources in the East China Sea.<sup>322</sup> The 2008 agreement concerned joint development in the northern part of the East China Sea, continued commitment to talks to attain development in other areas of the East China Sea and Japanese participation in development of the existing Shirakaba (Chunxiao) oil and gas field. The agreement was premised on the idea that it did not prejudice the legal position of either side concerning final maritime delimitation.<sup>323</sup>

While the 2008 Japan–China agreement in the East China Sea represents a positive precedent for China to resolve peacefully development of natural resources in

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<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 199.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> Moritaka Hayashi, *The 2008 Japan-China Agreement on Cooperation for the Development of East China Sea Resources*, in *MARITIME BORDER DIPLOMACY* 35 (Myron H. Nordquist & John Norton Moore eds., 2012).

<sup>323</sup> *Id.* at 36.

disputed areas, it must be viewed with a degree of caution since, “ In the last three years, there has been little progress in the bilateral follow-up talks on the basis of the agreement, reportedly due to the cautious attitude of the Chinese side.”<sup>324</sup> Also, the legal nature of the 2008 agreement is unclear, since it was not signed by each nation’s representatives, has been described by China as a principled consensus (rather than an international agreement) and the agreement does not have a date of entry into force.<sup>325</sup>

The only other significant step by China towards such joint development is the 2005 Joint Marine Seismic Undertaking (JMSU) between China, the Philippines and Vietnam.<sup>326</sup> The JMSU provided for a three-year period to conduct seismic studies in the South China Sea in order to identify areas of oil and gas exploration.<sup>327</sup> The JMSU generated controversy in the Philippines and was not renewed after the three-year period.<sup>328</sup>

While the negotiations for a joint development arrangement in the South China Sea would be difficult, “The starting point for any consideration of joint development should always be a thorough understanding of the overlapping claims.”<sup>329</sup> The joint development process would be furthered if states brought their maritime zone claims into conformity with UNCLOS, so that areas of overlapping claims are clarified and the stage

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<sup>324</sup> *Id.* at 37.

<sup>325</sup> *Id.* at 45.

<sup>326</sup> HONG, *supra* note 51, at 184.

<sup>327</sup> *Id.*

<sup>328</sup> DOLVEN ET AL., CONG. RESEARCH SERV., *supra* note 82, at 22.

<sup>329</sup> Gavin Maclaren & Rebecca James, *Negotiating Joint Development Agreements, in BEYOND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: LEGAL FRAMEWORKS FOR THE JOINT DEVELOPMENT OF HYDROCARBON RESOURCES* 140 (Robert Beckman, Ian Townsend-Gault, Clive Schofield, Tara Davenport & Leonardo Bernard eds., 2013).

is properly set for negotiations on provisional joint development areas.<sup>330</sup> Next, “a consensus must emerge on the location, size and shape of the area to be jointly developed.”<sup>331</sup> China potentially could enter into joint development in particular areas of the South China Sea, including “Reed Bank with the Philippines, Brunei-Shaba Basin and James Shoal Basin with Malaysia or Brunei, and North and West Vanguard Bank with Vietnam.”<sup>332</sup> Prospects for cooperative arrangements would also be possible in the vicinity of Scarborough Shoal and to a lesser extent the Paracel Islands. The Philippines and China could negotiate an agreement to share fishery resources within 12 nautical miles of Scarborough Shoal (based on the assumption that it is a rock entitled to only a territorial sea within the meaning of UNCLOS Art. 121). They could employ common regulations on fishing and implement seasonal fishing bans to conserve stock for each country.<sup>333</sup> The Paracel Islands would prove more problematic due to China’s current occupation of the islands and refusal to even acknowledge that a sovereignty dispute exists.<sup>334</sup>

Once the relevant states have agreed upon the area to be jointly developed the next important issue is the basis for sharing revenue. The typical agreement has involved an equal division of the revenues.<sup>335</sup> The states must then agree on the structural model for the joint development agreement. The three generally recognized forms are; (1) single-state model (in which one state manages the joint development area on behalf of all states); (2) the joint venture model (the states form compulsory joint ventures to

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<sup>330</sup> Beckman, *supra* note 14, at 159.

<sup>331</sup> Maclaren & James, *supra* note 332, at 144.

<sup>332</sup> HONG, *supra* note 51, at 182.

<sup>333</sup> Beckman, *supra* note 14, at 160.

<sup>334</sup> *Id.*

<sup>335</sup> Maclaren & James, *supra* note 332.

exploit resources); and (3) the joint authority model (an institutional framework for a joint authority with delegated powers to manage the resources is established).<sup>336</sup> There is no preferred form for a joint development agreement, so the states can tailor it according to the circumstances of the underlying dispute.<sup>337</sup> Other common terms addressed in joint development agreements are the law to apply to the area, the duration of the agreement, termination, dispute resolution, environmental and health issues, taxation, preservation of territorial rights in future delimitation disputes, fisheries, customs and immigration.<sup>338</sup>

In situations such as the South China Sea disputes, where China and the other claimant states are not prepared to allow any one country to have a disproportionate level of control or influence, the joint authority model is the most attractive comprehensive joint development model. However, “significant expertise is required to develop a stand-alone oil and regulatory framework” and this will often cause negotiation of the joint development agreement to be time-consuming and difficult.<sup>339</sup>

#### B. *Code of Conduct*

Once joint development agreements have been initiated in disputed areas, China and other claimant states could turn to addressing other mechanisms for dispute resolution within the ASEAN framework. While in the past ASEAN has contributed ineffectual statements on the South China Sea dispute, ASEAN’s proposed binding Code of Conduct presents the best key elements for comprehensive settlement of the dispute.<sup>340</sup> There have been some recent encouraging signs regarding the prospects for a binding

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<sup>336</sup> *Id.* at 145.

<sup>337</sup> *Id.* at 146.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> RAINE & LEMIERE, *supra* note 15, at 130.

Code of Conduct with a recent meeting resulting in a Chinese statement about “gradual progress and consensus through consultation”<sup>341</sup> While relying upon ASEAN for the political framework for a comprehensive settlement, there is no need to duplicate a legal framework, because “UNCLOS provides an integrated legal framework on which to build sound and effective regulations for the different uses of the ocean.”<sup>342</sup>

As an initial matter, ASEAN should form a multinational independent panel of legal and technical experts drawn from academia, governmental and non-governmental entities to consider equitable delimitation of territorial disputes in the South China Sea.<sup>343</sup> The independent panel at minimum should contain representatives from China, the Philippines and Vietnam with the balance of representatives coming from neutral ASEAN member states such as Indonesia or Singapore. Further, the panel should contain an odd number of members, perhaps five total, and any decision would be taken by majority vote. The independent panel would determine sovereignty over islands, including rocks, and other maritime features. After sovereignty determinations were reached then the independent panel could proceed to equitable delimitation of territorial seas and exclusive economic zones. A provision could be agreed that if states did not accept the sovereignty determinations and maritime boundary delimitations of the independent panel then the dispute would be referred within a specific time period to an UNCLOS Annex VII arbitral tribunal.<sup>344</sup>

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<sup>341</sup> Deep Pal, *A Code of Conduct for the South China Sea*, THE DIPLOMAT, (Sept. 25, 2013), <http://thediplomat.com/2013/09/a-code-of-conduct-for-the-south-china-sea/>.

<sup>342</sup> HONG, *supra* note 51, at 222.

<sup>343</sup> Thayer, *supra* note 214.

<sup>344</sup> *Id.*

Once the independent panel has initiated a process of equitable consideration of territorial claims and maritime delimitation, ASEAN could focus on other provisions for peaceful settlement. One of the most important actions would be a multilateral agreement to demilitarize islands, including rocks, and other features in the South China Sea. Removing the dispute from the sphere of regional militaries and making them a topic of civilian concern and control would aid in reducing hard-line attitudes.<sup>345</sup>

A legally binding ASEAN Code of Conduct should also address cooperation in other areas such as marine scientific research, marine pollution, fisheries management, search and rescue and anti-piracy.<sup>346</sup> In the event of disputes regarding interpretation and application of the Code of Conduct, ASEAN could establish a dispute resolution mechanism but there is a danger of “too many organizations operating under the auspices of ASEAN”.<sup>347</sup> Rather, ASEAN should instead utilize the existing UNCLOS dispute resolution framework, which represents the most practical and institutionally robust choice for resolution of disputes that arise under the Code of Conduct.<sup>348</sup>

While the implementation of complex regional joint development agreements and a binding Code of Conduct represent a significant challenge for the South China Sea claimant states, they present the best opportunity for a durable and equitable peace between China and other claimant states.

## IX. CONCLUSION

China’s historic rights claims in the South China Sea based on assertions of historic waters or historic title are both unreasonably broad and lack legitimacy under

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<sup>345</sup> RAINE & LEMIERE, *supra* note 15, at 210.

<sup>346</sup> Thayer, *supra* note 214.

<sup>347</sup> RAINE & LEMIERE, *supra* note 15, at 131.

<sup>348</sup> Thayer, *supra* note 214.

public international law. While the sweep of China's nine-dash line claim in the South China Sea is wide, it cannot reasonably be expected that any international tribunal or court would recognize sovereignty over the islands or rights in the waters based on the current historical record. The historical evidence advanced by certain academics (in support of contemporary historic rights) that trade and exploration by China several hundred years ago support China's claims is weak at best.<sup>349</sup> Of course, historical evidence offered by China should be considered in making sovereignty determinations, but rather than being the determinative factor, the historic evidence should merely be relevant to establishing whether China has exercised authority over the waters, islands, rocks and features of the South China Sea.<sup>350</sup>

In addition, the nine-dash line that China asserted in the 2009 *note verbale* appears to be based on historic rights that predate UNCLOS ratification in 1996 and are potentially contrary to China's obligations under UNCLOS.<sup>351</sup> China entered UNCLOS with the understanding that it was negotiated out of "the desire to settle, in the spirit of mutual understanding and cooperation, all issues relating to the law of the sea".<sup>352</sup> China in now asserting that UNCLOS does not restrain a historic rights claim threatens to undermine the entire legal regime established by UNCLOS.<sup>353</sup>

In light of this potential subversion of the entire UNCLOS legal regime and the thus far unpersuasive arguments put forward by China regarding its historic rights, the

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<sup>349</sup> Gao & Jia, *supra* note 57.

<sup>350</sup> Dupuy & Dupuy, *supra* note 77, at 141.

<sup>351</sup> Note Verbale CML/17/2009, *supra* note 2.

<sup>352</sup> UNCLOS, *supra* note 5, pmb1.

<sup>353</sup> Beckman, *supra* note 14, at 163.

concern arises as to what kind of major power does China intend to be.<sup>354</sup> China has currently placed itself on a path of confrontation with other regional states and obstruction of any efforts at peaceful settlement of disputes in the South China Sea. However, China has the opportunity to cooperate with other regional states, within the ASEAN framework, to peacefully resolve long-standing disputes. Perhaps echoing the hopeful sentiments of many ASEAN member states, President Obama stated in February 2012, “we welcome China’s peaceful rise, that we believe that a strong and prosperous China is one that can help to bring stability and prosperity to the region and to the world”.<sup>355</sup>

In pursuing joint development arrangements and a legally binding Code of Conduct with South China Sea claimant states, China has a unique opportunity to reasonably manage the disputes in the South China Sea. China can ensure that any maritime delimitation of disputed areas will be in accordance with the goal of equitable resolution and that China will equitably share in the natural resources of the region.

It is inevitable that leaders in the region will change, public opinion will shift and military capabilities will rise or decline, but the geography of the South China Sea dictates that it will always be a vital transit route and resource zone.<sup>356</sup> China embracing a comprehensive multilateral settlement now will be able to shape an agreement that is advantageous to China while fostering cooperative regional relationships with other regional states.

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<sup>354</sup> Dutton, *supra* note 248, at 63.

<sup>355</sup> President Barack H. Obama, Remarks at Bilateral Meeting with President Xi Jinping (Feb. 14, 2012), <http://www.whitehouse.gov/the-press-office/2012/02/14/remarks-president-obama-and-vice-president-xi-peoples-republic-china-bil>.

<sup>356</sup> RAINE & LEMIERE, *supra* note 15, at 202.

The alternative is continued confrontation with neighboring states, greater involvement by outside powers such as the United States in the dispute and further challenges before international tribunals, which will only serve to undermine China's international stature. The advisable course of action for China is to relinquish historic rights claims, reasonably settle disputes, enter into conformance with UNCLOS and have an opportunity to lead in writing the history of the Western Pacific for the 21<sup>st</sup> Century.

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