



Research Paper

## A Legal Appraisal of the Regimes and Issues Arising from the South China Sea

Victor Nonso Enebeli, Esq. PhD\* & David Chibuike Njoku, Esq. LL.M\*\*

### Abstract

The South China Sea (SCS), a strategic maritime region crucial for global trade and energy security, has been embroiled in a complex web of legal issues for decades. Multiple claimants, including China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei, assert overlapping claims to islands, reefs, and maritime zones within the sea. These competing claims, rooted in historical narratives, geographical proximity, and economic interests, have fueled tensions and raised concerns about potential conflicts. The study, therefore, appraised the geographical location of the region especially the Paracel Islands and Spratly Islands, the claims of the disputing littoral states, China's unilateral actions based on its acclaimed 'historical rights' and the Nine-Dash line, its encroachment and forceful occupation of islands and rocky terrain in the region, the interpretation of the provisions of United Nations Convention on the Law of the Sea (UNCLOS III) on its legal framework governing maritime boundaries such as the Exclusive Economic Zone (EEZ), Territorial sea, Straits and Archipelagic waters and the rights of states, through the lenses of scholars and the 2016 landmark Arbitral Tribunal ruling that China's claims had no legal basis under UNCLOS III, a decision China rejected. The influence of the United States of America and the United Kingdom in the region under the auspices of guardians of international law was also acknowledged along with lessons that Nigeria could learn from the South China Sea debacle for the protection of her Exclusive Economic Zone and International territorial waters. It was found and concluded that China as an emerging world and regional power is over-exerting its powers, carrying on the acquisition of territories and attacking the sovereignty of its weaker neighboring states, while disregarding international laws such as UNCLOS III, and regional agreements as the ASEAN Declaration on Code of Conduct 2002 to which it is a signatory, while these treaties are respected by other claimant states. The study recommended that dispute resolution mechanisms and adjudicatory bodies need to be strengthened and legitimized to encourage principled negotiation by all parties involved in the dispute, and that international treaties should be respected by parties, also there should be equitable and fair utilization of the oceans and its resources, through peaceful cooperation and co-existence globally and in the South China Sea in particular amongst others.

**Keywords:** Legal Appraisal, Regimes and Issues, South China Sea.

Received 01 Feb., 2024; Revised 08 Feb., 2024; Accepted 10 Feb., 2024 © The author(s) 2024.

Published with open access at [www.questjournals.org](http://www.questjournals.org)

### I. Introduction

The South China Sea region has been a site of conflict for decades, with numerous states holding competing territorial claims due to its abundance of resources and strategic importance. Recently, China's construction of artificial islands in the South China Sea has escalated tensions in the region and has strained efforts to bring peace.<sup>1</sup> Sited in the Asia Pacific Ocean Region as a large sea area, the South China Sea, the

\* PhD (Coventry), B.L., (Abuja), LL.M (Coventry), LL.B(Hons) (London Met), Director of Studies, Justice Mary Odili Judicial Institute, Port Harcourt, Rivers State of Nigeria. Lecturer, Faculty of Law, Rivers State University, Port Harcourt, Rivers State of Nigeria. Email Address: victor.enebeli@yahoo.co.uk. Phone No: 09020176657

• \*\* David Chibuike Njoku, Esq. Ph.D (in view), LL.M (RSU), LL.B (UK), Dip-in-Law (UK), BL (Abuja), ACI Arb (UK), Managing Partner, Ebuaga Legal Consult, Port Harcourt, Rivers State. Email: davidcnjoku@gmail.com. Tel: 08065357894

<sup>1</sup> A. Anand and L Forbes, 'Calming the Waters of the South China Sea: Solving Territorial Disputes over Artificial Islands' [2021] 1. <[https://www.researchgate.net/publication/355878381\\_Calming\\_the\\_Waters\\_of\\_the\\_South\\_China\\_Sea\\_Solving\\_Territorial\\_Disputes\\_over\\_Artificial\\_Is](https://www.researchgate.net/publication/355878381_Calming_the_Waters_of_the_South_China_Sea_Solving_Territorial_Disputes_over_Artificial_Is)> accessed 30 October 2023.

fulcrum of geopolitics in the Asia Pacific region, is a subject of discussion at the international level because of its strategic local and the nations that are involved in the conflicts, especially as members of the regional Association of Southeast Asian Nations (ASEAN). Disputed issues range from the claims of maritime territories between countries, the security conditions of the Asian region, especially ASEAN, as some have even put up a show of military power in defence of alleged invasion of territorial integrity, to the declaration of sovereignty over islands, fishing and other socio-economic and cultural uses of the area.

The intersection of sovereignty claims and territorial jurisdiction in the South China Sea region involves six countries namely: China, Taiwan, the Philippines, Vietnam, Malaysia, and Brunei Darussalam. The characteristics of the conflicts are mainly due to each country's interests towards the South China Sea region with the narrative of arguments and the country's legal basis.<sup>2</sup>

The 1982 United Nations Convention on the Law of the Sea (UNCLOS III) is a critical part of the rules-based international system. Its provisions apply to 70% of the surface of the globe and form an essential component of global governance. UNCLOS sets out the definitive legal framework for maritime delimitation, claims and the rules of freedom of navigation. It also sets out obligations for bilateral, regional and international cooperation, including for the conservation and management of living resources, for the protection and preservation of the marine environment, and for the peaceful settlement of disputes. This legal framework applies in the South China Sea as it also applies across the rest of the world's oceans and seas.<sup>3</sup>

The South China Sea stretches from Singapore and the Strait of Malacca in the southwest, to the Strait of Taiwan in the northeast. It is bounded on the east by the Philippine Islands, on the south by Borneo, on the west by Vietnam, and on the north by mainland China. The area includes several hundred small islands, rocks, atolls, islets, cays, shoals, sandbars, and reefs. Many are underwater at high tide, while others are permanently submerged even at low tide. These features, most of which are uninhabitable, are situated in three island chains (the Spratly, Paracel, and Pratas Islands), the Macclesfield Bank, and Scarborough Shoal.

An estimated one-third of global shipping uses routes that traverse the South China Sea. There are at least seven groups of geographical features spread across the South China Sea, five of which are contested. All of the States that claim sovereignty over features in the South China Sea are parties to UNCLOS. The largest groups of features are the Spratly and Paracel groups. The Paracels are located in the northwest of the South China Sea and comprise about 130 individual features. China maintains a human presence in the Paracels, which are also claimed by Vietnam. The Spratly group lies across the southeast flank of the South China Sea. It comprises about 100 individual features. China, the Philippines and Malaysia maintain a human presence on at least 34 of the features. Brunei claims Louisa Reef but does not have a human presence there.<sup>4</sup>

## **II. Legal Regimes and Issues Arising from the South China Sea**

### **2.1 The South China Sea (SCS)**

The South China Sea is one of the world's most important bodies of water, holding an estimated 12 percent of the world's total fish catch. Approximately one-third of all global maritime trade passes through the Strait of Malacca and the South China Sea.<sup>5</sup> In 2017, 40 percent of the world's liquefied natural gas passed through the South China Sea. There are 11 billion barrels of oil and 190 trillion cubic feet of natural gas beneath the South China Sea.<sup>6</sup> Eight littoral states border the South China Sea: China; Taiwan; Vietnam; Philippines; Malaysia; Brunei Darussalam; Singapore; and Indonesia<sup>7</sup> It is also a large marginal sea, approximately 1.4

---

<sup>2</sup> W Kusuma And Others, 'South China Sea: Conflict, Challenge, And Solution' [2021] 3(1) Lampung Journal of International Law (Lajil) 51-62. <[https://www.researchgate.net/publication/349956759\\_South\\_China\\_Sea\\_Conflict\\_Challenge\\_And\\_Solution](https://www.researchgate.net/publication/349956759_South_China_Sea_Conflict_Challenge_And_Solution)> accessed 30 October 2023.

<sup>3</sup> UK Parliament, 'UK government's position on legal issues arising in the South China Sea [2020] 1. <[https://data.parliament.uk/DepositedPapers/Files/DEP20200516/UK\\_govt\\_analysis\\_of\\_legal\\_issues\\_in\\_the\\_South\\_China\\_Sea.pdf](https://data.parliament.uk/DepositedPapers/Files/DEP20200516/UK_govt_analysis_of_legal_issues_in_the_South_China_Sea.pdf)> accessed 30 October 2023.

<sup>4</sup> R P Pedrozo China versus Vietnam: An Analysis of the Competing Claims in the South China Sea [2014]1 <<https://www.cna.org/reports/2014/iop-2014-u-008433.p>> accessed 30 October 2023.

<sup>5</sup> D Yergin, 'The World's Most Important Body of Water,' *The Atlantic* (15<sup>th</sup> December 2022) <<https://historynewsnetwork.org/article/178533>> accessed 2 November 2023

<sup>6</sup> U.S. Energy Information Administration, 'South China Sea.' [2019]<[https://www.eia.gov/international/analysis/regions-of-interest/South\\_China\\_Sea](https://www.eia.gov/international/analysis/regions-of-interest/South_China_Sea)> accessed 2 November 2023.

<sup>7</sup> Alec Caruana, ICAS - Maritime Affairs Program (MAP) Handbill Spotlight – Nine-dash line. The Institute for China-America Studies' <<https://chinaus-icas.org>> accessed 8 November 2023.

million square miles (3.6 million square kilometers) in size,<sup>8</sup> and home to more than 250 land features that are collectively organized into six major groups: the Paracel Islands, the Spratly Islands, the Pratas Islands, Scarborough Shoal, Macclesfield Bank, and the Natuna Islands,<sup>9</sup> and their highest point, on Rocky Island, is 14 meters above sea level.

**The Paracel Islands** are located roughly 115–150 miles from the Vietnamese coastline and China’s Hainan Island. They are subdivided into two clusters: the Amphitrite group and the Crescent group. The Amphitrite group includes West Sand, Tree Island, Middle Island, South Island, South Sand, and Woody Island. The Crescent group includes Pattle Island, Money Island, Robert Island, Drummond Island, Duncan Island, Vuladdore Reef, Discovery Reef, and Passu Key Reef. The Paracels also include Triton Island to the southwest and North Reef to the southeast. Woody Island is home to approximately 1,000 Chinese nationals.<sup>10</sup>

**The Spratly Islands** comprise more than 100 features spread over 158,000 square miles (410,000 kilometers) of the South China Sea, and their highest point, on Southwest Cay, is only 6 meters above sea level. The Spratly Island Chain curves along the South China Sea’s southern rim, and a few of the islands are within the exclusive economic zones (EEZs) of Brunei, Malaysia, and the Philippines.<sup>11</sup> Unlike some of the Paracel Islands, almost none of the Spratly Islands are thought to be able to naturally “support habitation” without human alteration—meaning, legally, that they may be rocks or low-tide elevations rather than proper islands in international law. Taiwan (or the Republic of China) controls the largest feature in the Spratlys, Itu Aba (Taiping), one of the few Spratly Islands that are potentially able to naturally support human life.<sup>12</sup>

**The Pratas Islands**, also under Taiwanese control, comprise the wedge-shaped Pratas Island itself and two largely submerged coral reefs some 140 miles southwest of Hong Kong in the northeastern South China Sea.

**Scarborough Shoal** is a small, high-tide elevation about 140 miles west of the Philippines, on the northeast edge of the sprawling Spratly Islands. It is triangle-shaped and is considered a rock feature, not an island. Like much of the Spratlys, Scarborough Shoal is known for its substantive fishing Grounds.<sup>13</sup> China (or the People’s Republic of China) controls the Scarborough Shoal. Macclesfield Bank is an expansive underwater reef east of the Paracel Islands and north of the Spratly Islands. It is considered one of the world’s largest underwater submerged atolls and has an area of approximately 9,073 square miles (23,500 square kilometres).<sup>14</sup>

## 2.2 Importance of the South China Sea

### a. Economic

#### i. Natural Resources

The South China Sea area is rich in oil, natural gas, and fisheries. The vast area of the South China Sea also consists of islands scattered so far from each other. It has been described above that the island dispute that has attracted much attention is the Spratly and Paracel Islands. The land area of the island also has the value of international legal conflicts, the requirements for land features to be used as the basis for the delimitation of areas are taken into account in international maritime law such as rocks, coral reefs, sand, and several others that are under the sea, even though the island’s land standards are not suitable for farming. There is no historical record of these islands being inhabited because they cannot support human life and activities. However, in 1968

---

<sup>8</sup> G Austin, ‘Explainer: Why Is the South China Sea Such a Hotly Contested Region?’ *The Conversation* (July 28, 2020). <<https://theconversation.com/explainer-why-is-the-south-china-sea-such-a-hotly-contested-region-143435>> accessed 2 November 2023.

<sup>9</sup> Central Intelligence Agency (CIA), ‘Paracel Islands’ [2021] *The World Factbook* <<https://www.cia.gov/the-world-factbook/countries/paracel-islands/>> accessed 2 November 2023.

<sup>10</sup> Alec Caruana, ICAS - Maritime Affairs Program (MAP) Handbill Spotlight – Nine-dash line. The Institute for China-America Studies’ <https://chinaus-icas.org> accessed 8 November 2023.

<sup>11</sup> R Dossani and H Scott Warren, ‘Introduction and Summary of the Proceedings’ in R Dossani and S Warren Harold, eds., *Maritime Issues in the East and South China Seas: Summary of a Conference Held January 12–13, 2016*, RAND Corporation, CF-358-CAPP. 6. <[https://www.rand.org/pubs/conf\\_proceedings/CF358.html](https://www.rand.org/pubs/conf_proceedings/CF358.html)> accessed 2 November 2023.

<sup>12</sup> M Leifer, ‘Taiwan and South-East Asia: The Limits to Pragmatic Diplomacy.’ [2001] 165 *China Quarterly*. 173–185. <[https://www.researchgate.net/publication/231940649\\_Taiwan\\_and\\_South\\_East\\_Asia\\_The\\_Limits\\_to\\_Pragmatic\\_D](https://www.researchgate.net/publication/231940649_Taiwan_and_South_East_Asia_The_Limits_to_Pragmatic_D)> accessed 2 November 2023.

<sup>13</sup> J C Trajano, ‘*Resource Sharing and Joint Development in the South China Sea: Exploring Avenues of Cooperation*’ [2019] Singapore: Nanyang Technological University, S. Rajaratnam School of International Studies, NTS Insight No. IN19-01. <<https://www.rsis.edu.sg/rsis-publication/nts/resource-sharing-and-joint-development-in-the-south-china-sea-explori>> accessed 2 November 2023.

<sup>14</sup> X Huang and Others, ‘First Documentation of Seismic Stratigraphy and Depositional Signatures of Zhongsha Atoll (Macclesfield Bank), South China Sea.’ [2020] 177 *Marine and Petroleum Geography* 1–12. <<https://www.sciencedirect.com/science/article/pii/S026481722030132X>> accessed 2 November 2023.

there were discovered petroleum reserves dramatically increased the South China Sea value. The Spratly and Paracel Islands' potential oil reserves are estimated to be up to 105 billion barrels and throughout the South China Sea as much as 213 billion barrels.<sup>10</sup> Even though the evidence of these oil reserves' existence is not yet strong, the estimated potential for these oil reserves can certainly be a factor in China's interest and countries in the region towards this region. Hydrocarbon resources are also a special attraction.

According to estimates by the United States Geological Survey (USGS), 60-70% of hydrocarbons in the region are natural gas. Meanwhile, the use of natural gas resources is projected to increase by 5% per year for the next two decades. The amount is estimated at 20 trillion cubic feet (Tcf) per year, faster than other fuels,<sup>15</sup>

## **ii. Fisheries**

The South China Sea is situated in the tropical and sub-tropical zones. It has a vast water area and contains a variety of aquatic species, yet fishing grounds are rather scattered. The main target species are conger eel, Chinese herring, Japanese pilchard, Pacific herring, groupers, seabreams, round scad, white croaker, mi-iuy croaker, large yellow croaker, large head hairtail, tilefish, threadfin breams, soiuy mullet, Pacific mackerel, pomfret, filefish, akiami paste shrimp, fleshy prawn, swimming crab, squid, cuttlefish, octopus and seaweeds, among others.

The South China Sea is a vital source of protein and export revenue, and fishing is a big business here. The industry not only earns billions of dollars in 2012, their value on the open market was just less than \$22 billion but also employs millions across the region.<sup>16</sup>

The Sea has some of the world's richest reef systems and over 3,000 indigenous and migratory fish species, comprising some 12 percent of global fish catch.

China's dominating presence in this sector becomes highlighted when we see that there were about 4.7 million fishing vessels in the world in 2012, according to data from the Food and Agricultural Organization. Of these, 68% were in Asia and nearly 700,000 were Chinese, a tally that was much larger than those of any other nation.<sup>17</sup>

## **b. Trade**

The United Nations Conference on Trade and Development (UNCTAD) estimates that roughly 80 percent of global trade by volume and 70 percent by value is transported by sea, and of that volume, 60 percent of maritime trade passes through Asia, with the South China Sea carrying an estimated one-third of global shipping. Its waters are particularly critical for China, Taiwan, Japan, and South Korea, all of which rely on the Strait of Malacca, which connects the South China Sea and, by extension, the Pacific Ocean with the Indian Ocean. As the second-largest economy in the world with over 60 percent of its trade-in value travelling by sea, China's economic security is closely tied to the South China Sea. It is also believed that a disruption of South China Sea trade would precipitate a global economic crisis<sup>18</sup>

## **c. Environment**

Most of the region, extending east to the island of Borneo, lies on the Asian continental shelf and is physically stable. The coastal area includes low-lying areas composed of sandy beaches and dune systems, mud flats, swamps and marshes, seagrass beds and mangroves and lake systems, to gravel/rocky coasts. Fringing coral reefs are developed in areas away from major rivers or areas of terrestrial run-off. Inland the coast, large coastal plains have developed, particularly around the major river systems, with the hinterland being predominantly mountainous. Much of the land area was originally covered by tropical forest, however, substantial deforestation has taken place during recent centuries and continuing logging is further reducing the original forest cover. Fertile lowlands and hill areas have been extensively developed for rice production, as paddy fields and upland terraces. Lowland areas and river floodplains also support mixed agriculture.<sup>19</sup>

---

<sup>15</sup> S V Muhammad, "Kepentingan China Dan Posisi Asean Dalam Sengketa Laut China Selatan". [2012] 4(8) *Info Singkat Hubungan Internasional* 5-8, 6.

<[https://www.academia.edu/73350267/South\\_China\\_Sea\\_Conflict\\_Challenge\\_and\\_Solution](https://www.academia.edu/73350267/South_China_Sea_Conflict_Challenge_and_Solution)> accessed 2 November 2023.

<sup>16</sup> Z Guo, 'REVIEW OF FISHERY INFORMATION AND DATA COLLECTION SYSTEMS IN CHINA'. [2008] FAO Fisheries Circular No. 1029 FIED/C1029 (En). 5. <<https://www.fao.org/3/i0111e/i0111e00.pdf>> accessed 2 November 2023.

<sup>17</sup> S Funge-Smith and Others, 'Asia-Pacific Fishery Commission (APFIC) Regional overview of fisheries and aquaculture in Asia and the Pacific.' [2012] 26 RAP Publication. 2 <<https://www.fao.org/3/i3185e/i3185e00.pdf>> accessed 2 November 2023.

<sup>18</sup> Center for Strategic and International Studies, 'How much trade transits through the South China Sea?' [2019] China Power Project. 1 <<https://chinapower.csis.org/much-trade-transits-south-china-sea/>> accessed 5 November 2023.

<sup>19</sup> Global International Waters Assessment (GIWA), 'Regional assessment 54 South China Sea': GIWA report production: UllaLi Zweifel eds,( University of Kalmar UNEP, 2005) 15.< <https://www.unep.org/resources/report/global-international-waters-assessment-south-china-sea-giwa-regional-asse>> accessed 5 November 2023.



**g. Straits of South China Sea**

The South China Sea (SCS) is a region with a highly complex geometry of continental shelf, slope and deep-sea basin, and is connected with its adjacent oceans through several narrow straits and passages. In the northeast, it connects the Pacific Ocean via the wide and deep Luzon Strait, and the East China Sea through the Taiwan Strait. In the south, it connects Java Sea and Andaman Sea through the Sunda Shelf, and Sulu Sea through the Mindoro and Balabac Straits. Therefore, it is important for water exchange through these straits. In addition, both seasonally reversing monsoon winds and intrusion of the Kuroshio current via the Luzon Strait play important roles in determining ocean circulation in the SCS.<sup>20</sup> (Shaw and Chao, 1994; Su, 2005).

**h. The Shipping Lanes and Freedom of Navigation**

The South China Sea serves as a corridor for much of the world's shipping, thus, it is essential to China, southeastern Asia, and the world for this territorial dispute to be resolved in order to ensure free navigation. The reason this area is of paramount importance is that, of the top ten shipping ports in the world, more than half are located there, and nearly fifty percent of all oil tankers pass through this region. There are roughly one and a half billion people who live within 100 miles of the South China Sea, and the volume of shipping through the South China Sea has greatly increased due to the developing industrial economies of the countries within the region. China's coast, bordering the South China Sea, has become significantly more urban, thus giving rise to even more traffic. Assuming these countries will continue to grow economically, the shipping lanes have the potential to become an escalating part of the issue threatening the economic stability of the region.

The control by a single nation of the South China Sea will cause serious impediments to global trade and travel through the region, as the impact would be felt worldwide. This imposition would have severe economic consequences adversely affecting the essential principle of free navigation. Free navigation is paramount to ensure the most efficient outcome is reached when trading and shipping internationally. Without free navigation, the price of many necessary goods, in particular oil, would skyrocket in price due to re-routing and other inefficiencies arising from the nuisance. However, because free navigation is such a vital component of the global economy, it seems unlikely that a state would interfere with free navigation in the SCS, because it would also have an undesirable effect on the region's economy.<sup>21</sup>

The South China Sea dispute involves overlapping of territorial claims, and maritime conflicts on its uses and rights among nations like China, Vietnam, the Philippines, Malaysia, Brunei, and Taiwan. Central to this intricate issue is the interpretation and application of the United Nations Convention on the Law of the Sea (UNCLOS), an international treaty governing the rights and responsibilities of States concerning global ocean use UNCLOS regulating maritime jurisdictions, defining territorial waters, exclusive economic zones (EEZs), and continental shelf.<sup>22</sup>

**3. Disputes**

The disputes in the South China Sea (SCS) is centred on the territorial control, ownership, uses and management of the islands and natural resources of the region's exclusive economic zones (EEZ), thus Vietnam, Malaysia, Philippines China, Brunei and the Republic of China (ROC) in Taiwan, are pushing forward with their own territorial claims in the area. Each wants to secure its own national interests by asserting their rights to exclusive exploitation of the region through the utilization of international law and other mechanisms to assure those are protected and exercised.

**Territorial Claims**

The claims in the SCS are twofold:

- a. Claims and allegations are based on historical and territorial rights.
- b. Reliance on the provisions of UNCLOS III 1982.

---

<sup>20</sup> W Qingye and Others, 'Water transports through the four main straits around the South China Sea' [2009]27(2) *Chinese Journal of Oceanology and Limnology*. 229-236, 1. <[https://www.researchgate.net/publication/225590094\\_Water\\_transports\\_through\\_the\\_four\\_main\\_straits\\_around\\_the\\_South\\_China\\_Sea](https://www.researchgate.net/publication/225590094_Water_transports_through_the_four_main_straits_around_the_South_China_Sea)> accessed 3 November 2023.

<sup>21</sup> C Stock, 'Emerging Issues: The Underlying Economics of the South China Sea Conflict.' [2014] 3(1)(6) *University of Baltimore Journal of International Law*. 141 <<http://scholarworks.law.ubalt.edu/ubjil/vol3/iss1/6/>> accessed 5 November 2023.

<sup>22</sup> S Kausari, 'Sovereignty at Sea: The South China Sea Dispute and UNCLOS Implication'. [2023] 6(4) *International Journal of Law Management & Humanities*.2624. <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4556583](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4556583)> accessed 3 November 2023.

These multiple territorial claims indicate a lack of agreement among the parties, which resulted in a regional conflict that has been happening for decades as can be seen on Figure 2, with the positions of the parties as follows:

### **Vietnam**

Vietnam (also called Hanoi) claims the Spratly and Paracel Islands along with the Gulf of Thailand. However, unlike China, Vietnam has not written its extended claims over the South China Sea in official texts or maps. As far as the Spratly Islands are concerned, in the 1970s, Vietnam established them as an offshore district of the Khanh Hoa Province, occupying several islands. That same decade, China seized the archipelago in a military engagement known as the Battle of the Paracel Islands.<sup>23</sup> In a bid to solidify its claims, Vietnam employed archaeologists to provide evidence to support the country's long historic presence in the SCS. It was asserted that the state has actively dominated both the Paracels and the Spratlys since the 17th Century. Consequently, China, Brunei, Malaysia, and the Philippines oppose Vietnam's claims.

Vietnam and Malaysia jointly submitted their territorial claims in the South China Sea to the UN Commission on the Limits of the Continental Shelf in 2009. The submission was considered legitimate, and the countries had to clarify their positions on the legal status of features and limits of their claims in the region.<sup>24</sup> Vietnam also adopted a maritime law in 2012 in which it claimed jurisdiction over the Paracel and Spratly Islands, requiring that all naval ships from foreign register with the Vietnamese authorities when passing through the region.<sup>25</sup>

### **Malaysia**

Malaysia's participation in the SCS disputes started in 1979, when the Malaysian Department of Mapping and Survey unveiled an official map placing the Spratly Islands within the country's continental shelf. This map overlapped the EEZ and continental shelf of Malaysia and other states, which drew protests from neighbours including China, Indonesia, Vietnam, and the Philippines. Although Malaysia's claim was considered weak by some legal analysts, it was not inferior to China or Vietnam's claims to the entire Spratly archipelago.<sup>26</sup>

In 2009, pursuant to UNCLOS III which provided that information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf (CLCS) set up under Annex II on the basis of equitable geographical representation, and the Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf and such established limits shall be final and binding),<sup>27</sup> Malaysia and Vietnam jointly submitted to the CLCS information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured with respect to the southern part of the South China Sea (CLCS 2009). To date, the CLCS has not made any recommendations on matters related to the establishment of the outer limits of their continental shelf. Nevertheless, the actions of these two countries can be regarded as steps within international law to solidify their claims.

A decade later, in 2019, Malaysia made a partial submission to the CLCS for the remaining portion of states' the continental shelf beyond 200 nautical miles in the northern part of the SCS (Malaysia 2017). Previously, Malaysia's position on the dispute had often been characterised as subdued: practising quiet diplomacy and demonstrating a willingness to strengthen bilateral ties with China, rather than confronting Beijing publicly. Following their latest submission, Kuala Lumpur's strategy seemed to change, leaning towards compliance with UNCLOS and departing from an alignment with China's position. Additionally, Malaysia has also used diplomatic, political, and economic measures to sustain its claims by improving its ties with the United States and supporting a united front on the part of the Association of Southeast Asian Nations.<sup>28</sup>

---

<sup>23</sup> S Tonnesson, 'Vietnam's Objective in the South China Sea: National or Regional Security?' [2000] 22(1) *Contemporary Southeast Asia*. 199–220 <<https://www.proquest.com/scholarly-journals/vietnams-objective-south-china-sea-national/docview/205216346/se->> accessed 4 November 2023.

<sup>24</sup> H T Nguyen, 'Extended Continental Shelf: A Renewed South China Sea Competition.' *Maritime Issues* (April 19, 2020) <[http://www.maritimeissues.com/uploaded/Nguyen%20Hong%20Thao\\_Extended%20Continental%20ShelfA%20Renewed%20South%20China%20Sea%20Competition.pdf](http://www.maritimeissues.com/uploaded/Nguyen%20Hong%20Thao_Extended%20Continental%20ShelfA%20Renewed%20South%20China%20Sea%20Competition.pdf)> accessed 4 November 2023.

<sup>25</sup> EIA [US Energy Information Administration], 'South China Sea.' [2013] <<https://www.eia.gov/beta/international/regions-topics.cfm?RegionTopicID=SCS>> accessed 4 November 2023.

<sup>26</sup> A J Roach, 'Malaysia and Brunei: An Analysis of their Claims in South China Sea.' [2014] *CNA Occasional Paper*. 31. <[https://www.cna.org/cna\\_files/pdf/iop-2014-u-008434.pdf](https://www.cna.org/cna_files/pdf/iop-2014-u-008434.pdf)> accessed 3 November 2023.

<sup>27</sup> United Nations Convention on the Law of the Sea (UNCLOS III) 1982. art. 76(8).

<sup>28</sup> P Parameswaran, 'Beware the illusion of China-ASEAN South China Sea breakthroughs', *The Diplomat*, (17 August 2016) <<http://thediplomat.com/2016/08/bewarethe-illusion-of-china-asean-south-chinasea-breakthroughs/>> accessed 5 November 2023.

## **Brunei**

After it gained independence in 1984, Brunei released maps in which it declared a 200-nautical mile EEZ overlapping the Chinese nine-dash line and a continental shelf extending to a hypothetical median with Vietnam. In so doing, the Brunei government claimed part of the Spratly Islands archipelago closer to its EEZ in the north of Borneo.<sup>29</sup> Perceived for years as a silent claimant, Brunei bases its claims on UNCLOS. Brunei has often adopted a cooperative, neutral stance regarding the SCS disputes, being in favour of a collective approach to providing maritime security and resolving disagreements. At times, however, the Sultanate has sided with China's preference for bilateral agreements, due to its weaker military power and dependency on oil reserves to sustain its economy and monarchical rule.<sup>30</sup>

## **China**

The People's Republic of China bases its claim to the Spratly and Paracel Islands on historical naval expeditions dating back to the 15th century. In 1947, the Kuomintang – then, the party in control of China – drew a line around the aforementioned islands, calling it the nine-dash line map.<sup>31</sup> In doing so, China declared its sovereignty over all islands enveloped by this line.<sup>32</sup> After the Communist Party ascended to power in 1949 and established the PRC, the new government continued to use this map in official correspondence and claimed rights to the waters within it. Currently, China maintains its claim over the SCS based on this and other historical evidence.

In 2009, following the joint submission of Vietnam and Malaysia to the Commission on the Limits of the Continental Shelf (CLCS), China also submitted the nine-dash line map to the CLCS, seeking to solidify its claim and legitimize it beyond 200 nautical miles in line with the provision of UNCLOS III, wherein states have the right to declare EEZs that extend 200 nautical miles from a continental shoreline or around islands that can be habitable. In the South China Sea, the application of this provision resulted in the overlapping of EEZs of other coastal states. UNCLOS III offers a solution in this scenario by providing that the demarcation of EEZs between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law in order to achieve an equitable solution.<sup>33</sup> China's claims resulted in Malaysia, Vietnam, Brunei, and the Philippines also declaring rights over the islands and various zones in the SCS, directly contesting the Chinese claims.

The nine-dash line map has been declared by China's opponents as not being in conformity with the provisions of UNCLOS III, on the basis that the Convention stipulates guidelines on baselines, the width of territorial waters, the regime of islands which is that an island is a naturally formed area of land, surrounded by water, and above water at high tide. It further provides that the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territories. The exceptions of the latter are rocks which cannot sustain human habitation or economic life of their own, have no exclusive economic zone or continental shelf,<sup>34</sup> the low-tide elevations, the exclusive economic zone, the continental shelf, the maritime boundary delimitation, and dispute settlement, are all applicable to the South China Sea. Hence, the foundation of the Chinese claims over the islands is unsubstantiated because it fails to follow the Convention's determinations and does not provide sufficient historical evidence.

China is currently engaged in island-building, increasing the size of islands and turning islets and other features into full-fledged islands in order to produce an EEZ extending 200 nautical miles, all with the aim of reclaiming land in the South China Sea.<sup>35</sup> It is claiming its rights over and around the islands that cannot

---

<sup>29</sup> J Rüländ, 'The Nature of Southeast Asian Security Challenges' [2005]36 (4) *Security Dialogue*.545–563. <<https://journals.sagepub.com/doi/abs/10.1177/0967010605060453>> accessed 5 November 2023.

<sup>30</sup> B A Putra, 'Comprehending Brunei Darussalam's vanishing claims in the South China Sea: China's exertion of economic power and the influence of elite perception' [2020] 7(1) *Cogent Social Sciences*. 1-13 [https://www.researchgate.net/publication/347437265\\_Comprehending\\_Brunei\\_Darussalam's\\_vanishing\\_claims\\_in\\_the\\_South\\_China\\_Sea\\_China's\\_exertion\\_of\\_economic\\_power\\_and\\_the\\_influence\\_of\\_elite\\_perception](https://www.researchgate.net/publication/347437265_Comprehending_Brunei_Darussalam's_vanishing_claims_in_the_South_China_Sea_China's_exertion_of_economic_power_and_the_influence_of_elite_perception) accessed 3 November 2023.

<sup>31</sup> Alec Caruana, ICAS - Maritime Affairs Program (MAP) Handbill Spotlight – Nine-dash line. The Institute for China-America Studies' <https://chinaus-icas.org> accessed 8 November 2023

<sup>32</sup> H T Nguyen, 'Extended Continental Shelf: A Renewed South China Sea Competition.' *Maritime Issues* (April 19, 2020) <[http://www.maritimeissues.com/uploaded/Nguyen%20Hong%20Thao\\_Extended%20Continental%20ShelfA%20Renewed%20South%20China%20Sea%20Competition.pdf](http://www.maritimeissues.com/uploaded/Nguyen%20Hong%20Thao_Extended%20Continental%20ShelfA%20Renewed%20South%20China%20Sea%20Competition.pdf)> accessed 6 November 2023.

<sup>33</sup> United Nations Convention on the Law of the Sea (UNCLOS III) 1982. art. 74

<sup>34</sup> *Ibid*, note 33. art.121(3).

<sup>35</sup> Council on Foreign Relations (CFR), 'Territorial Disputes in South China Sea' [2023], Centre for Preventive Action.

naturally support habitation, as well as building new ones to expand the area that would be under its sovereignty.

China's position and operations have complicated its relationships with neighbouring states with claims in the region. These disputes have escalated tremendously, leading to situations where vessels have been sunk, and military exercises have been performed to assert sovereignty.<sup>36</sup>

### Philippines

Philippine's claims are both legal and historical over the Scarborough Shoal and the Kalayaan Island Group (KIG), which is comprised of 50 features of the Spratly Islands<sup>37</sup>. These claims clash with China's declarations of ownership. In 1956, the Philippine government began explorations in the SCS, legitimizing those by claiming that the islands and the shoal were *terra nullius*, or no man's land, and furthered it by occupying several of the Spratly Islands and naming them the Kalayaan Island Group. In addition, the Philippines declared the aforementioned islands and shoals as a special regime of islands that, in spite of being distinct from the rest of the Philippine archipelago, belong to the Philippines.

Under the provisions of UNCLOS III, Philippine sovereignty appears stronger, because an EEZ can be declared up to 200 nautical miles from the baseline.<sup>38</sup> Both groups of islands are 400 nautical miles closer to the Philippines than to China, within the Philippines' EEZ and are recognized as such under UNCLOS. In spite of being consistent with the provisions of UNCLOS, China, Malaysia, and Vietnam have objected to the Philippines' claims, which has also increased tensions in the SCS.<sup>39</sup>

## 4. Sovereignty of State and Acquisition of Territory in International Law.

International law defines sovereignty as the independence of state power from any other power, both in international relations as well as internal matters.<sup>40</sup> This means the outside independence and autonomy of the state as well as independence within the state itself. Furthermore, a sovereign state is not limited by anything more than further sovereign rights of the other states, general international law and freely accepted international commitments. Königová argues that sovereignty entails two important elements. The first is universality, the ability to subject all entities in a particular territory, regardless of their mode of grouping.<sup>41</sup> The second element is right creation which is characterized by the fact that all areas of activities are regulated by legal standards that are recognized by the state authorities. Sovereignty is characterized by three important features. The first feature is the authority, the law of the state to command, and at the same time be obeyed. We must not confuse authority with power. The authority differs from the power in a way that the power is done by someone who has the ability to influence others despite his real interests. Outside of authority and power, sovereignty also includes supremacy and territoriality. Sovereignty is an authority within the area defined by the boundaries.<sup>42</sup>

As already noted, the state is independent outside and separate inside. Sovereignty of the state has two dimensions, internal and external. Internal sovereignty is understood to mean the sovereign rights of the state in decision-making and enforcement authority in a given territory inhabited by certain populations. External sovereignty of the state means acceptance of the authority of a state by the other states. Furthermore, apart from

---

<<http://www.cfr.org/global/global-conflict-tracker/p32137#!/conflict/territorial-disputes-in-the-south-chinasea>> accessed 6 November 2023.

<sup>36</sup> EIA [US Energy Information Administration], 'South China Sea.' [2023] <<https://www.eia.gov/beta/international/regions-topics.cfm?RegionTopicID=SCS>> accessed 6 November 2023.

<sup>37</sup> M E Rosen, 'Philippine Claims in the South China Sea: A Legal Analysis.' [2014] *CNA Occasional Paper*. ii. <[https://www.cna.org/cna\\_files/pdf/iop-2014-u-008435.pdf](https://www.cna.org/cna_files/pdf/iop-2014-u-008435.pdf)> accessed 6 November 2023.

<sup>38</sup> United Nations Convention on the Law of the Sea (UNCLOS III) 1982. art. 55.

<sup>39</sup> Council on Foreign Relations (CFR), 'Territorial Disputes in South China Sea' [2023], Centre for Preventive Action. <<http://www.cfr.org/global/global-conflict-tracker/p32137#!/conflict/territorial-disputes-in-the-south-chinasea>> accessed 6 November 2023.

<sup>40</sup> V Kosco, 'Sovereignty: Analysis of its Current Issues in Certain Countries' [2016] (1) (1) *Letrik*; 27-41, 29. <[https://www.researchgate.net/publication/335134711\\_The\\_Concept\\_Of\\_Sovereignty\\_In\\_International\\_Law\\_And\\_Relations](https://www.researchgate.net/publication/335134711_The_Concept_Of_Sovereignty_In_International_Law_And_Relations)> accessed 6 November 2023.

<sup>41</sup> A K Henrikson, 'Sovereignty, Diplomacy and Democracy: The Changing Character of International Representation – From State to Self' [2014] (2) (15) *Comparative Politics*, 1. <[https://www.researchgate.net/publication/281619544\\_Sovereignty\\_diplomacy\\_and\\_democracy\\_The\\_changing\\_ch](https://www.researchgate.net/publication/281619544_Sovereignty_diplomacy_and_democracy_The_changing_ch)> accessed 6 November 2023.

<sup>42</sup> D A Lake, 'The New Sovereignty in International Relations' [2003] (5) *International Studies Review*; 303-323. <[https://www.researchgate.net/publication/335134711\\_the\\_concept\\_of\\_sovereignty\\_in\\_international\\_law\\_and\\_relations](https://www.researchgate.net/publication/335134711_the_concept_of_sovereignty_in_international_law_and_relations)> accessed 6 November 2023.



internal and external sovereignty, distinction can also be made between absolute and non-absolute sovereignty. Absolute sovereignty applies where there is no compelling reason to interfere in the internal affairs of a state.<sup>43</sup>

There are five traditional modes of acquisition of territory in international law: cession, occupation, accretion, conquest or subjugation and prescription.<sup>44</sup> These five modes are all derived from private law in general and have their roots in Roman law.<sup>45</sup> It has been said that in most cases the different modes of acquisition cannot be isolated and separated from one another and that most titles are composite.

Jennings defined occupation as ‘the appropriation by a State of a territory which is not at the time subject to the sovereignty of any State’ (terra nullius). According to him, this does not imply that – in the days of colonization when occupation was invoked the territory was uninhabited: ‘Natives living under a tribal organization were not regarded as a State for this purpose.’ He recognized that this attitude, which stemmed from the 19th century, ‘may cause some embarrassment now’. Because the whole globe is now subject to some state’s sovereignty, except for the Polar Regions, occupation has become obsolete.<sup>46</sup>

In December 1974, the UN General Assembly asked the ICJ for an Advisory Opinion on the Western Sahara. Resolution 3292 (XXIX) of 13 December 1974 submitted to the Court on the question: Whether the Western Sahara was, at the time of its colonization by Spain, a territory belonging to no one, or terra nullius? In its opinion, the Court clearly accepted that occupation had been considered a mode of acquisition of territory in international law during the 19th century. In order, however, for a territory to be open to occupation, it had to be established that ‘at the time the territory belonged to no-one, in the sense that it was then open to acquisition through the mode of “occupation”’.<sup>47</sup> The ICJ also referred to the Legal Status of Eastern Greenland (1931) where the Permanent Court of International Justice had recognized the occupation of terra nullius as ‘an original means of peaceably acquiring sovereignty’.<sup>48</sup>

In the development of international law, the limit of power, which is the boundary of a country's territory, is very closely held, violations of the territory of a country can have fatal consequences and can even lead to the relationship being broken, or war as a last resort. Territorial boundaries are demanded to maintain good regional security for each country, and border treaties that are created need to be obeyed to avoid harm to other countries' interests.

The determination of the territory's boundaries, which includes the sea, always considers the form of consequences and other considerations so that all interests are equally running. For countries whose territory borders another country's territory, the boundaries cannot be determined unilaterally, rather attention must be paid to their history and the existing agreements made. It is believed that a resort to history alone might create more conflicts.

The regulation of international maritime boundaries is regulated by the 1982 United Nations Convention on Law of The Sea, by drawing baselines with the coastal state's geographical conditions.<sup>49</sup> It also provides for the delimitation of maritime zones such as the Territorial Sea, Contiguous Zone, Exclusive Economic Zone, Continental Shelf, Archipelagic Waters and the High Sea, and a Dispute Resolution mechanism.<sup>50</sup> International law is based on free will and the consent of several or all States. This is to dominate the state's common interests or other international legal subjects that claim to be bound by it. In general, international law is a part of the law that regulates the activities of international entities. The states are sovereigns with known geographical territories and boundaries in the SCS and are signatories and members of UNCLOS III 1982. The conflicts in the SCS have the characteristics of territorial acquisition by the states through international law and by self-help.

## **5. UNCLOS III 1982, China’s Unilateral Actions and Nine –Dash Line**

The question of who owns what and where in the South China Sea started in 1945 after the end of World War II and in 1947, China’s then nationalist government published a map establishing its claims in the South China Sea, with 11-dash U-shaped line intended to delineate territorial jurisdiction. This map predates the Peoples Republic of China as it was published by the Chiang Kai-Shek’s nationalist government of the Republic

---

<sup>43</sup> R Jackson, ‘Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape’ in R Jackson (ed), *Sovereignty at the Millennium* (Massachusetts/Oxford: Blackwell Publishers 1999) 14.

<sup>44</sup> I Brownlie, *Principles of Public International Law* (4th ed., 1980), at 131; R. Jennings and A. Watts (eds.), *Oppenheim’s International Law* (9th ed., 1992), ii, 679.

<sup>45</sup> I A. Shearer (ed.), *Starke’s International Law* (11th ed., 1994), at 146.

<sup>46</sup> R Jennings, *The Acquisition of Territory in International Law* (1963), at 20.

<sup>47</sup> *Advisory Opinion on the Western Sahara* [1975] ICJ Rep 11, at 39.

<sup>48</sup> *Legal Status of Eastern Greenland* (1931) 55 PCIJ Series A/B, No. 53, 21, at 44 and 63

<sup>49</sup> United Nations Convention on the Law of the Sea (UNCLOS III) 1982. arts.5, 7, 14. 48.

<sup>50</sup> *Ibid*, note 49, part xv, ss.3 and 2, s.1. arts. 279–285.

of China (ROC or Taiwan). However, following the defeat of Chiang's government, a new People's Republic of China (PRC or China) published a similar U-shape map but this time indicating 9 -dash line dropping two lines.<sup>51</sup> Since the dropping of two dashes in 1953, the nine - dash line has been the subject of anxiety, conflict and a lightning rod of competing claims.

Again in 2013, China added a tenth dash line to the map, which raises the question of what the significance of these dash lines is. It is apparent that China's claims are two-fold, sovereignty over land which includes the islands within the dash lines and sovereignty over territorial waters.<sup>52</sup> As mentioned earlier, these Chinese claims are disputed by other States like Philippines, Vietnam, Malaysia and others who equally claim sovereignty of the SCS.

These dash lines are reported to encompass approximately two million (2,000,000) square kilometer of maritime space and 13 square kilometers of land area, excluding Taiwan and Pratas island. The land area includes the three groups of land features within the South China Sea: (1) the Paracel Islands (referred to by China as Xisha Qundao), (2) the Spratly Islands (Nansha Qundao), and (3) Scarborough Reef (Huangyan Dao). The largest of these islands is Woody Island in the Paracel Islands, with an area of 2.4 square kilometers. The dashes likewise encompass numerous submerged features such as Macclesfield Bank (Zhongsha Qundao) and James Shoal (Zengmu Ansha).<sup>53</sup>

Though China does not assign specific numbers to each dash line, these dashes are located in relatively close proximity to the mainland coasts and coastal islands of the littoral states, surrounding the SCS. For instance, Dash 1 is 50 nautical miles (nm) from the mainland coast of Vietnam and 36 nm from Vietnam's coastal island of Ly Son. Dash 3 is 75 nm from the closest Indonesian island, Pulau Sekatung. Dash 4 is 24 nm from the coast of Malaysia on the island of Borneo. Dash 5 is 35 nm from the closest point on the Philippines' southeastern island of Balabac. Dash 9 is 26 nm from Y'Ami Island, the Philippines' northernmost island in the Luzon Strait. The fact that these dash lines are not uniformly distributed and are separated from one another by 106 (dash 7 & 8) and 274 (dash 3 and 4) nm is noteworthy.<sup>54</sup> The extent of China's Claims is illustrated below with the use of maps published by the PRC.

The distances between the dashes and the islands are generally farther than the aforementioned distances to the surrounding coasts. At their closest points, the dashes are 84 nm from the nearest island within the Paracel Islands (dash 1 to Triton Island), more than 46 nm, from the nearest island within the Spratly Islands (dash 5 to Half Moon Shoal), and nearly 75 nm from Scarborough Reef (dash 7). Some of the dashes are far from the nearest islands within the South China Sea. For instance, dash 3 is 235 nm from the nearest such island, which is Spratly Island. Dash 4 is 133 nm from Louisa Reef. Dash 8 is 179 nm from the closest island on Scarborough Reef.<sup>55</sup> Furthermore, a geographical comparison of China's dashline map distributed to the international community is very different from the 1947 maps. The 2009 maps have been described as inconsistent and complicated when compared to the 1947, 2013-2014 maps. Implying that the sizes and locations of the 2009 map, show dashes which are shorter and closer to the coast of neighbouring States. For instance, 'near the Vietnam coast, dash 2 from the 2009 map is 45 nm closer to Vietnam's coast than the nearest dash on the 1947 map.'<sup>56</sup>

China's maritime claims through its drawing of dash lines was revealed first in May 2009 and reiterated in 2011 via a Note Verbales to the UN Secretary General requesting that it be communicated to all UN member states that: "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" (see attached map). The above position is consistently held by the Chinese government, and is widely known by the international community.<sup>57</sup> Although Vietnam, Indonesia, and the Philippines subsequently objected to the

<sup>51</sup> M Raymond and D A Welch, 'What's Really Going On in the South China Sea?' [2022](41)(2) *Journal of Current Southeast Asian Affairs*.214-239< <https://journals.sagepub.com/doi/full/10.1177/18681034221086291>> accessed 5 November 2023.

<sup>52</sup> K. Baumert & B. Melchior, 'China: Maritime Claims in the South China Sea (Limits in the Seas No.143)'[2014]4-8 <(PDF) China: Maritime Claims in the South China Sea (Limits in the Seas No. 143) (researchgate.net)> accessed 6 November 2023

<sup>53</sup> *Ibid.* 5.

<sup>54</sup> Central Intelligence Agency (CIA), *World Factbook* : 'Entries for Spratly and Paracel Islands'[2023] < <https://www.cia.gov/library/publications/the-world-factbook/>> accessed 5 November 2023.

<sup>55</sup> K Baumert and B Melchior, 'China: Maritime Claims in the South China Sea (Limits in the Seas No.143)' 5. <[https://www.researchgate.net/publication/286459698\\_China\\_Maritime\\_Claims\\_in\\_the\\_South\\_China\\_Sea\\_Limits\\_in\\_the\\_Seas\\_No\\_143](https://www.researchgate.net/publication/286459698_China_Maritime_Claims_in_the_South_China_Sea_Limits_in_the_Seas_No_143)>accessed 7 November 2023.

<sup>56</sup> *Ibid.*, note 53

<sup>57</sup> Permanent Mission of the People's Republic of China, Notes Verbales CML/17/2009 and CML/18/2009, May 7, 2009, UN Division for Ocean Affairs and the Law of the Sea (DOALOS);

contents of China's 2009 Notes, insisting that China's claims reflected in the dashed-line map are without basis under the international law of the sea, China maintains its position stating that "China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence."<sup>58</sup>

The claim of sovereignty by China over Paracel Islands is disputed and equally claimed by Vietnam and Taiwan, yet China went ahead to plant its flag on the contested islands and its waterways.<sup>59</sup> Similarly, Scarborough Reef is also claimed by the Philippines and Taiwan; and some or all of the Spratly Islands are also claimed by Vietnam, the Philippines, Malaysia, Brunei, and Taiwan. Because China's land claims are disputed, its maritime claims described above that are based on those land claims are likewise disputed. With respect to Scarborough Reef and certain features in the Spratly Islands, these issues are the subject of arbitration proceedings between the Philippines and China under Annex VII of the LOS Convention.

UNCLOS III specifically provides for maritime rights that are attached to territorial features of various kinds. For example, An Island is defined as a naturally formed area of land, surrounded by water, which is above water at high tide such an island is entitled to an EEZ but a rock however, that cannot sustain human habitation or economic life of its own is not entitled to an EEZ.<sup>60</sup> Again, the low water line of a low-tide elevation (LTE) - a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide cannot be used to fix a baseline for territorial sea, neither can an artificial island or a fully submerged shoal.<sup>61</sup>

Consequently, maritime entitlements in the SCS depend entirely on two main points, firstly, which country enjoys territorial sovereignty over which features and secondly, whether those features are islands, rocks or LTEs. China controls only seven (7) features in the SCS namely; Jonson South Reef, Fiery Cross Reef, Cuarteron Reef, Subi Reef, Gaven reef, Hughes Reef and Mischief Reef.<sup>62</sup> By Beijing ratifying the United Nations Convention on the law of the sea in 1996, its expanding claims ought rightly to be within the boundaries of international law.

China has continued to engage in Unilateral acts that are not consistent with international law. For instance, since 2013, China has built a number of artificial islands and turned them into military bases. The previous year in 2012, China in a calculative move seized Scarborough shoal from the Philippines, after what seemed like an agreement between the two nations to withdraw patrol crafts in view of the approaching typhoon season. China thereafter stationed Coast Guard vessels to prevent Philippine fishing boats.<sup>63</sup> There have also been reported skirmishes between the Chinese navy and the military and private persons of other states carrying on legitimate enterprises in the area. This proposed legitimization of China's claims through the annexation of the Islands in the region is a source of continuing conflict.

Beijing has combined its historical assertions in the region with attempts to bring its domestic legislations such as the Law on the Territorial Sea and the Contiguous Zone of 25 February 1992 and the Exclusive Economic Zone and Continental Shelf Act 1998 of China, and international policies in line with UNCLOS principles. Unfortunately, the Chinese government continues this strategy without participation in any form of adjudication or arbitration, and the tense military clashes that have been an unfortunate by-product of these efforts will inevitably continue to escalate with no solution in sight.<sup>64</sup>

China's claims are the most extensive of all the sea's bordering States and are contested in the form of multiple overlapping claims by the states. China, Vietnam and the Philippines have also reclaimed land and built military facilities of varying degrees of sophistication on some of the occupied islands and reefs. While China did not expressly rule out international arbitration when ratifying UNCLOS, in practice it has resisted attempts to have its conflicting claims in the South China Sea adjudicated by international tribunals. This contrasts with

---

<[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)> accessed 7 November 2023.

<sup>58</sup> Permanent Mission of the People's Republic of China, Note Verbales CML/8/2011, April 14, 2011, DOALOS <[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)> > accessed 7 November 2023.

<sup>59</sup> Al Jazeera English, 'What's Behind the South China Sea Disputes?' *Al Jazeera Online* (22 November 2020) <What's behind the South China Sea dispute? | Start Here -> accessed 7 November 2023

<sup>60</sup> United Nations Convention on Law of the Sea (UNCLOS III) 1982. art.121

<sup>61</sup> Ibid, note 60, art. 80 (8).

<sup>62</sup> A L Vuving, 'South China Sea: Who Occupies what in the Spratlys?' *The Diplomat* (May 2016) <South China Sea: Who Occupies What in the Spratlys? – The Diplomat> accessed 7 November 2023.

<sup>63</sup> K. Bradsher, 'Philippine Leader Sounds Alarm on China' *The New York Times* (February 2014) <Philippine Leader Sounds Alarm on China - The New York Times (nytimes.com)> accessed 3 November 2023.

<sup>64</sup> K Leddy, 'Competing Claims: The Developing Role of International Law and Unilateral Challenges to Maritime Claims in the South China Sea.' [2021] 54 *Vanderbilt Law Review* 785. <<https://scholarship.law.vanderbilt.edu/vjtl/vol54/iss3/6>> accessed 4 November 2023.

the approach taken by Malaysia and Indonesia, and Malaysia and Singapore, which brought UNCLOS cases before the International Court of Justice in 2002 and 2008 respectively, ultimately complying with the ICJ rulings.<sup>65</sup>

## **6 Judicial Pronouncements on the South China Sea (Philippines v China)**

The South China Sea Arbitration<sup>66</sup> was conducted between the Republic of the Philippines and the People's Republic of China by the Permanent Court of Arbitration (PCA), under the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The arbitration is related to disputes between the Parties regarding the legal basis of maritime rights and entitlements, the status of certain geographic features, and the lawfulness of certain actions taken by China in the South China Sea; in particular, the following four issues, as raised by Philippines:

1. To resolve a dispute between the parties regarding the source of maritime rights and entitlements in the South China Sea;
2. To resolve a dispute between the parties concerning the entitlements to maritime zones that would be generated under the Convention by Scarborough Shoal and certain maritime features in the Spratly Islands that are claimed by both the parties;
3. To resolve a series of disputes concerning the lawfulness of China's actions in the South China Sea, vis-à-vis interfering with Philippine's rights, failing to protect and preserve the marine environment, and inflicting harm on the marine environment (through land reclamation and construction of artificial islands);
4. To find that China has aggravated and extended the disputes between the Parties by restricting access to a detachment of Philippines Marines stationed at Second Thomas Shoal.

While China and Philippines are both parties to the UNCLOS, China specifically made a declaration in 2006 to exclude maritime boundary delimitation from its acceptance of compulsory dispute settlement. In addition, China has shown disagreement with Philippines' decision to take the matter to arbitration and has decided neither to agree with the decision of the Tribunal nor to participate in the proceedings.

The Tribunal, on its end, has taken cognizance of these factors and has purported to not deal with delimiting maritime boundaries. Furthermore, the Tribunal did not bar the proceedings, on the basis of Article 9 of Annex VII of UNCLOS III. In addition, the Tribunal also noted that despite China's absence from the proceedings, since it is a party to the UNCLOS, the decision of the Tribunal would, in fact, be binding upon it, pursuant to Article 296 (1) and Article 11 of Annex VII UNCLOS III.

China's Foreign Ministry, further, stated its position with regard to the proceedings by publishing a Position Paper in 2014.<sup>67</sup> It claimed that the Tribunal lacks jurisdiction over the matter because:

1. The essence of the subject-matter of the arbitration is the territorial sovereignty over the relevant maritime features in the South China Sea;
2. China and the Philippines have agreed, through bilateral instruments and the Declaration on the Conduct of Parties in the South China Sea, to settle their relevant disputes through negotiations;
3. Philippines' disputes would constitute an integral part of maritime delimitation between the two countries.

The Tribunal considered China's Position Paper as a plea on jurisdiction and conducted a separate hearing on the issue of jurisdiction and admissibility. Additionally, the Tribunal also declared that it would honour China's declaration of 2006 and the UNCLOS and would neither delve into issues of maritime boundary delimitation or questions of sovereignty.<sup>68</sup> The Philippines also stated that it, "does not seek in this arbitration a determination of which Party enjoys sovereignty over the islands claimed by both of them. Nor does it request a delimitation of any maritime boundaries." Pursuant to this, the Tribunal issued its Award on Jurisdiction<sup>69</sup> in October 2015, in which it concluded that it did indeed have jurisdiction in the case, as per Philippines' Final Submissions, and that China's lack of participation would not prove to be a bar to its proceedings.<sup>70</sup>

---

<sup>65</sup> European Parliament, 'China's compliance with selected fields of international law.' [2021] 9.

<[https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_BRI\(2021\)696207](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)696207)> accessed 4 November 2023.

<sup>66</sup> *South China Sea Arbitration* (PCA Case Number 2013–19)

<sup>67</sup> Ministry of Foreign Affairs of the Peoples Republic of China, <https://www.mfa.gov.cn/eng/> accessed 8<sup>th</sup> November 2023

<sup>68</sup> *Ibid*, note 67

<sup>69</sup> *Ibid*, para 164.

<sup>70</sup> Permanent Court of Arbitration's Award on the South China Sea Arbitration. para. 11 – 12.



It, further, concluded that the treaties China was relying on were either political in nature and not legally binding<sup>71</sup> or that they did, and were legally binding but did not bar either Party from alternative means of dispute resolution. In accordance with the provisions of UNCLOS that parties may exchange views regarding [the dispute's] settlement by negotiation or other peaceful means<sup>72</sup>, the Tribunal found that this requirement was met in the diplomatic communications between the Parties and that the Philippines' initiation of proceedings under the UNCLOS did not constitute an abuse of process as claimed by China.

The Tribunal, proceeding with the first two submissions made by the Philippines, considered the validity of China's claim to historic rights in the maritime region of the South China Sea and the 'Nine-Dash Line'. Through a lengthy analysis of the text and context of the Convention, in line with the principles set out in the Vienna Convention on the Law of Treaties, the Tribunal established that the Convention supersedes any treaties in force before its coming into force. It questioned China's claim to historical rights in the region and established that China's state practice does not show that China had been enjoying any historical rights in the South China Sea; rather, it was enjoying the freedom of the high seas and since it did not create bar to other states' usage of the same, it could not be understood as being a historical right. Furthermore, since China's publishing of the same in its Notes Verbales in 2009, many states have objected to its claim as well. "The Tribunal concludes that the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein."<sup>73</sup> However, the Tribunal also concluded that its jurisdiction was limited to the claims of historic rights on the maritime region and not to the land masses in the South China Sea, i.e. if it can claim historic rights on any of the islands, then it may also be able to claim maritime zones (as per the Convention) on the basis of these islands.

Next, the Tribunal looked at Philippines' submissions 3 to 7, concerning the nature of the features in the South China Sea. It differentiates between low-tide elevations, high-tide features, and rocks. In its Award on Jurisdiction, the Tribunal clarified that: this is not a dispute concerning sovereignty over the features, notwithstanding any possible question concerning whether low-tide elevations may be subjected to a claim of territorial sovereignty. Nor is this a dispute concerning sea boundary delimitation: the status of a feature as a "low-tide elevation", "island", or a "rock" relates to the entitlement to maritime zones generated by that feature, not to the delimitation of such entitlements in the event that they overlap.<sup>74</sup>

The Philippines put forward three categories for classifying low-tide elevations: where a low-tide elevation is located within 12 miles of a high-tide feature, where the low-tide elevation is beyond 12 miles but within the state's exclusive economic zone or continental shelf, and where the low-tide elevation is located beyond the areas of natural jurisdiction. For the purpose of identifying the nature of the features in the South China Sea, the Tribunal relied upon satellite imagery that had been conducted on the area and direct surveys that had been carried out, by navies or otherwise, in the area, and relied upon maps that were sufficiently detailed. They chose a certain tidal height to maintain uniformity across the features, and decided to rely, in cases where there had been significant man-made changes, alterations or construction on the features, upon maps/imagery/surveys that depicted the features as they had been in their original form.

Again the Tribunal relied upon statements previously made by China to obtain their stance on the nature of the features, since China had neither submitted any document to the Tribunal nor had it discussed these in its Position Paper. The Tribunal concluded that Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef and Gaven Reef (North) were all found to be high-tide features. The Tribunal further noted that for the purposes of Article 121(3) UNCLOS III, the high-tide features at Scarborough Shoal and the reefs were rocks that cannot sustain human habitation or economic life of their own and so have no exclusive economic zone or continental shelf. The Tribunal found the same to be true of the Spratly Islands and so concluded that China, therefore, has no entitlement to any maritime zone in the area of Mischief Reef or Second Thomas Shoal; they do, however, form part of the exclusive economic zone and continental shelf of the Philippines as they lie within 200 nautical miles of the Philippines' coast and there are no overlapping entitlements in the area with respect to China.

On the contrary, Hughes Reef, Gaven Reef (South), Subi Reef, Mischief Reef and Second Thomas Shoal were all found to be low-tide elevations, of which Hughes Reef lay within 12 miles of McKennan Reef and Sin Cowe Island, Gaven Reef (South) lay within 12 miles of Gaven Reef (North) and Namyit Island, and Subi Reef lay within 12 miles of the high-tide feature of Sandy Cay on the reefs to the west of Thitu.

In the issue of Chinese interference with the living and non-living resources (primarily concerned with fishing practices in the South China Sea and oil and gas exploration and exploitation) of the Philippines, the Tribunal considered diplomatic statements from China to the Philippines and regulations related to the matter

---

<sup>71</sup> The China-ASEAN Declaration on the Conduct of the Parties in the South China Sea 2002

<sup>72</sup> United Nations Convention on Law of the Sea (UNCLOS III) 1982. art. 283

<sup>73</sup> *Ibid*, note 70, para. 278.

<sup>74</sup> *Ibid*.

that China had passed domestically. The Philippines put forward four contentions related to living resources: China's prevention of fishing by Philippine vessels at Mischief Reef since 1995, and at Second Thomas Shoal since 1995, China's revision of the Hainan Regulation and China's moratorium on fishing in the South China Sea in 2012. The Tribunal finds that China had breached Articles 77 and 56 of the Convention through the operation of its marine surveillance vessels (which interfered with Philippines' oil and gas exploration) and through its moratorium on fishing which interfered with the exclusive economic zone of the Philippines, respectively.

The Tribunal also found China in breach of Article 58 (3) of the Convention, due to its failure to prevent fishing by Chinese-flagged ships in the exclusive economic zone of the Philippines, failing to respect the sovereign rights of the Philippines over its fisheries in its exclusive economic zone.

Submission 10 of the Philippines related to China's interference with Philippines' fishing vessels and practices in the Scarborough Shoal. While both the states had conflicting views on the situation (China believed that it was Philippines who was causing the interference) and both claimed historic rights (Philippines distinguished this by clarifying that it only referred to historic fishing rights) to the region, the Tribunal opined that China was, in fact, in contravention of the Convention by interfering with the traditional fishing practice of the Philippines in its exclusive economic zone through the deployment of its official ships in the region. The Tribunal also noted that this decision does not depend on the question of sovereignty, and that the Tribunal once again refrained from commenting on the matter.

Philippines' successive contention related to China's activities on the reefs in the South China Sea, with regards to the practices it had adopted for the purpose of large-scale construction and reclamation at seven locations in the Spratly Islands, and its practices with regards to fishing in the South China Sea. Philippines claimed that China had been harming and causing damage to the marine environment of the South China Sea through these practices and despite objections from the surrounding states, China had not ceased its actions. It was also noted that while some of the fishing ships were not state-appointed ships and were being manned by non-state actors, the Chinese government had neither condemned their actions nor made any efforts to stop them from proceeding. The Tribunal, assisted by three independent experts on coral reef biology, expert briefs and satellite imagery, found that China was in breach of the Convention for failing to stop the fishing vessels from engaging in harmful harvesting practices<sup>75</sup> and also for its island-building activities.<sup>76</sup> The Tribunal further opined that China's construction on Mischief Reef, without authorization from Philippines was in violation of Philippines' sovereign rights in its exclusive economic zone and continental shelf and a breach of the Convention.<sup>77</sup>

The next consideration before the Tribunal was the demeanour of China's law enforcement vessels at Scarborough Shoal, and the lawfulness of these actions. The Philippines also raised the issue under the relevant provisions of the Convention on the International Regulations for Preventing of Collisions at Sea, 1972 (COLREGS). The Tribunal found that China, through the actions of its law enforcement vessels, endangered Philippine vessels and personnel and created a serious risk of collision and found China in breach of Article 94 of the Convention.

The Tribunal, in response to Submission 14 of the Philippines, opined that China had, in the course of the proceedings of this arbitration, aggravated and extended its disputes with Philippines, through its actions of dredging, artificial island-building and construction activities.<sup>78</sup>

Lastly, the Tribunal did not find it necessary to make any further declaration, owing to the fact that both the parties are already parties to the Convention and are already obliged to comply with it.<sup>79</sup> After the award was released, China continued to oppose the ruling and did not recognize the award, on the basis that since the Tribunal proceeded with the arbitration despite China's refusal to participate, this voided and nullified the award, and that its territorial sovereignty and maritime rights in the region remained unaffected by the ruling.

In the Philippines, meanwhile, there was a reversal of policy. Following the election of Rodrigo Duterte as president in 2016 on an anti-American, pro-China platform, Manila declared that it wanted to 'set the award aside' and renegotiate the dispute settlement directly with China. This capitulation to Beijing was an indication of Duterte's ambition to boost Sino-Filipino ties in a bid to attract Chinese investment. However, in 2019, Duterte began to show signs of standing up to Chinese forays into the Philippine territory, especially after

---

<sup>75</sup> United Nations Convention on Law of the Sea (UNCLOS III) 1982. arts. 192 and 194(5).

<sup>76</sup> *Ibid.* arts. 192, 194(1), 194(5), 197, 123 and 206.

<sup>77</sup> *Ibid.* arts. 60 and 80.

<sup>78</sup> The Permanent Court of Arbitration's Award on the South China Sea Arbitration. para. 1181

<sup>79</sup> A Mustafa, 'Case Brief on the South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China by the Permanent Court of Arbitration.' [2017] Research Society of International <Law<https://rsilpak.org/2017/case-brief-on-the-south-china-sea-arbitration/>> accessed 7 November 2023.

tensions rose due to People's Liberation Army Navy incursions and the gathering of Chinese fishing vessels near the Philippines' Pag-asa Island – the administrative centre of the Kalayaan group and located 932 kilometres southwest of Manila. Duterte declared tensions could escalate to armed conflict to protect the island if necessary.

In 2020, Duterte delivered a speech to the 75th UN General Assembly in which he expressed support for the Hague's ruling, stating that the award is 'part of international law, beyond compromise and beyond the reach of passing governments to dilute, diminish, or abandon'. Additionally, Duterte asserted that any attempts by China to undermine the award would be rejected and fought off. To support this position, the United States stated that in the event of an armed attack, it would come to the Philippines' aid, notwithstanding the current shaken state of their relationship. These developments, and the maintenance of claims by both China and the Philippines, further complicate the chances for a peaceful resolution of the dispute.<sup>80</sup>

## **7. Regional Involvement by ASEAN**

In 2002, ASEAN sought to reach an agreement with China to establish a "binding Code of Conduct" for the South China Sea—an idea first mooted in 1996. In November 2002, the parties signed a non-binding "Declaration on the Conduct of Parties in the South China Sea". This declaration committed the parties to the principles of UNCLOS III, affirmed their desire to resolve outstanding disputes "by peaceful means," "reaffirm[ed] their respect for and commitment to the freedom of navigation in and overflight above the South China Sea," committed them to "refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features," and committed them to "notifying, on a voluntary basis, other Parties concerned of any impending joint/combined military exercise".<sup>81</sup> However, China (along with other signatories) violated this commitment, for example by forcibly expelling the Philippines from the Scarborough Shoal.<sup>82</sup>

The declaration was intended to form the basis of negotiations for a code of conduct. However, ASEAN and China did not reach an agreement on how to begin negotiating the declaration's guidelines into a formal code of conduct until 2012. China briefly paused negotiations following the Philippine government's submission of its case to the PCA, but it agreed in 2013 to resume negotiating.<sup>83</sup>

On the 6<sup>th</sup> of September 2023, at the ASEAN Summit in Jakarta, the agenda was the concern about China's increasingly assertive activity in the South China Sea, an important trade corridor in which several ASEAN members have claims that conflict with China. The Chinese Premier Li Qiang said at the Summit that it is important to avoid a "new Cold War" when dealing with conflicts between countries and that countries needed to "appropriately handle differences and disputes"<sup>84</sup>.

## **8. The Involvement of the United States of America and the Western Allies**

The United States is a country that does not have a direct interest in the South China Sea because it has no interest in the sovereignty of countries in the territory. The United States stated that its intervention in the South China Sea conflict was only to maintain peace between China and its disputing neighbors to create regional stability. Therefore, the US advocated that conflict in the South China Sea be resolved safely, peacefully, and following international law<sup>85</sup>

In the increasing intensity of the conflict the United States continues to play an important role in Asia and reject new territories dominated by China in Asia (Carter, 2019). To prove this point, the United States urged China to

---

<sup>80</sup> G Miranda and V Maljak, 'The Role of United Nations Convention on the Laws of the Sea in the South China Sea Disputes.' [2022] *E-International Relations*. 7.  
<<https://www.e-ir.info/2022/06/23/the-role-of-united-nations-convention-on-the-laws-of-the-sea-in-the-south-china-sea-disputes/>> accessed 8 November 2023.

<sup>81</sup> Association of Southeast Asian Nations, "Declaration on the Conduct of Parties in the South China Sea," May 14, 2012.  
<<https://asean.org/declaration-on-the-conduct-of-parties-in-the-southchina-sea-2/>> accessed 7 November 2023.

<sup>82</sup> European Parliament, 'China's compliance with selected fields of international law.' [2021] 9.  
<[https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_BRI\(2021\)696207](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)696207)> accessed 7 November 2023.

<sup>83</sup> C Thayer, 'ASEAN, China and the Code of Conduct in the South China Sea,' [2013] 33(2) *SAIS Review of International Affairs*. 75–84.  
<<https://www.scribd.com/document/478235026/Carlyle-A-Thayer-Publications-Update-1966-Sept-2020>> accessed 8 November 2023.

<sup>84</sup> REUTERS, 'China warns against 'new Cold War' at ASEAN summit'. *Reuters* (September 6, 2023).  
<<https://www.reuters.com/world/asean-welcomes-world-leaders-china-us-rivalry-overshadows-region-2023-09-06/>> accessed 8 November 2023.

<sup>85</sup> T Moulton, 'Preventing War in the South China Sea.' [2022] *Journal of Indo-Pacific Affairs*, 204–209.  
< [https://media.defense.gov/2022/Jul/31/2003046333/-1/-1/1/10%20MOULTON\\_COMMENTARY.PDF](https://media.defense.gov/2022/Jul/31/2003046333/-1/-1/1/10%20MOULTON_COMMENTARY.PDF)> accessed 8 November 2023.

stop its construction in the Spratly Islands and asked China to negotiate with the warring countries. The United States has acknowledged that it wants to maintain maritime and fishing lanes. The US hopes to resolve disputes in the area peacefully following international law. Responding to the Chinese activities, the United States sent the U.S. Navy Destroyer to patrol the artificial islands built by China. This US military operation provoked Beijing's anger even more, even though America considered it an effort to fight China which was trying to limit freedom of navigation in international strategic waters.<sup>86</sup>

The United States willingness to fight for the freedom of the South China Sea, is due to the fact that the region is vital in the flow of energy. The United States also stated that all countries should be able to freely exploit resources under the seabed in international waters. However, the United States was unable to take decisive action, not only because it gave rise to a bigger conflict, but also because China has equal strength with the United States, especially in economic and military power. China in the Southeast Asia Region is the most powerful country. The United States' perspective considers the South China Sea a free water like any other water. The United States also mobilized its armed forces and carried out freedom of navigation operations. Since 1983 it has determined to continue to exercise and assert the rights and independence of sea navigation and overflight rights throughout the world in a manner consistent with the balance of interests reflected in the law of the sea conventions. It does not approve of the unilateral actions of another nation that are designed to limit the rights and freedoms of the international community and sea navigation, overflight, and other uses of the sea. This is due to the importance of the South China Sea Region for the United States, namely international trade routes.<sup>87</sup>

The United Kingdom also supports the United State of America's policy position and posits that as provided for in UNCLOS, the Arbitral Tribunal's decision is final and legally binding on both parties and calls on the Philippines and China to abide by its terms. Also, that the UK will not take a position on competing sovereignty claims, but strongly opposes any claims that are not consistent with UNCLOS. Concluding that adherence to international law, including UNCLOS, is fundamental to ensuring there continues to be a safe, prosperous and stable South China Sea., and that the UK will continue to encourage the resolution of disputes peacefully and in accordance with international law.<sup>88</sup>

### **9. Nigeria: Lessons on Protection of the Exclusive Economic Zone (EEZ)**

Nigeria is a coastal state. It has maritime boundaries with Cameroon, Benin, Equatorial Guinea, Sao Tome and Principe and Ghana within the larger Gulf of Guinea. The Gulf of Guinea is part of the Eastern tropical Atlantic Ocean off the West African coast covering approx. 6000 km. of coastlines and encompasses 17 countries. Although rich in oil, minerals and living natural resources, the area remains significantly under-developed as a result of land and maritime boundary disputes and insecurity. The Gulf of Guinea Commission (GGC) was set up by treaty in 2001. The founding Parties includes Nigeria, Angola, Gabon, Congo and Sao Tome and Principe which actually signed the treaty, and later Equatorial Guinea, Cameroun and the Democratic Republic of Congo. There has been a memorandum of understanding with the African Union (AU) in July 2021, in the face of significant security threats in the region.

Nigeria is seen as a major hegemony in the region, because of its dominance in the energy trade. The UN Convention on the Law of the Sea (UNCLOS) adopted in 1982 covers the international maritime legal framework. Nigeria signed UNCLOS on 10 December 1982 and ratified the treaty on 14 August 1986. The Convention entered into force on 16 November 1994. Nigeria first passed legislation to recognise the Territorial Sea in 1967, this has been subsequently amended twice (1971, 1998). The current legislation is therefore the Territorial Waters (Amendment) Decree 1998 (now Act), which reduced the claimed territorial sea from 30 nautical miles to 12 nautical miles, as permitted by UNCLOS. Nigeria also legislated for an Exclusive Economic Zone in 1978, following emerging customary international law at the time. The result was

---

<sup>86</sup> I Ali, and B Blanchard, 'Exclusive: U.S. warship sails near disputed South China Sea island, officials say'. *Reuters*. (March 23, 2018). <<https://www.reuters.com/article/us-usa-china-southchinasea-idUSKBN1GZ0VY>> accessed 8 November 2023.

<sup>87</sup> M Budiana and Y Djuyandi, 'International Security Based On The United States Response Post To The South China Sea Claim By The People's Republic Of China' [2023] 8(1) *Jurnal Wacana Politik* 89 – 96. <[https://www.researchgate.net/publication/369868960\\_INTERNATIONAL\\_SECURITY\\_BASED\\_ON\\_THE\\_UNITED\\_STATES\\_RESPONSE\\_POST\\_TO\\_THE\\_SOUTH\\_CHINA\\_SEA\\_CLAIM\\_BY\\_THE\\_PEOPLE'S\\_REPUBLIC\\_OF\\_CHINA](https://www.researchgate.net/publication/369868960_INTERNATIONAL_SECURITY_BASED_ON_THE_UNITED_STATES_RESPONSE_POST_TO_THE_SOUTH_CHINA_SEA_CLAIM_BY_THE_PEOPLE'S_REPUBLIC_OF_CHINA)> accessed 8 November 2023.

<sup>88</sup> GOV.UK, 'UK statement on the South China Sea' Press Release (12 July 2023) <<https://www.gov.uk/government/news/uk-statement-on-the-south-china-sea#:~:text=%E2%80%9CThe%20UK%20does%20not%20take,and%20stable%20S>> accessed 8 November 2023.



the Exclusive Economic Zone Decree No. 28 of 5 October 1978 (now Act), which claimed a distance of 200 nautical miles. The Petroleum Decree No.51 of 1969 (now Act), also provides for a continental shelf which it defines as follows : ““Continental shelf" means the sea-bed and subsoil of those submarine areas adjacent to the coast of Nigeria the surface of which lies at a depth no greater than two hundred metres (or, where its natural resources are capable of exploitation, at any depth) below the surface of the sea, excluding so much of those areas as lies below the territorial waters of Nigeria.”

In 2016, Nigeria made a submission on a Continental Shelf claim to the Commission on the Outer Limits of the Continental Shelf (CLCS). This was an amendment to a prior 2009 submission. The 2016 submission has been followed by subsequent internal Senate interest in seeking status of Nigeria’s extended continental shelf. This has culminated in a Maritime Zones Bill, which seeks to repeal and consolidate national legislation on maritime zones. The current bill is titled Nigerian Maritime Zones (Enactment) Bill 2020. It is described as "a Bill for an Act to repeal the Exclusive Economic Zones Act Cap E17 LFN 2010 and the Territorial Waters Act Cap T5 LFN 2010 and enact the Maritime Zones Act to provide for the Maritime Zones of Nigeria..." This bill (SB49) failed to gain presidential assent.<sup>89</sup> It is expected to help Nigeria to define the extent of national territory and authority exercised at sea to maximise its jurisdictional gains.<sup>90</sup>

Nigeria is a valuable political friend to China in regional and international forums. Nigeria typically votes in tandem with other African countries—and this bloc vote correlates strongly with China’s votes in international bodies. A steadfast supporter of Beijing’s One China policy, Nigeria has served on the UN Security Council more times than any other African nation. Characterizations of these interests—and indeed Chinese interests in Africa writ large— differ significantly. To Chinese policymakers and diplomats, these strategic priorities are of “mutual benefit” to both their country and African states and present opportunities for “win-win progress.” Conversely, some commentators question China’s motives and methods as self-serving and potentially exploitative.<sup>91</sup> This is also in the face of illegal fishing activities by large Chinese trawlers in Nigeria’s EEZ in disregard of international law and Nigeria’s territorial jurisdiction, in addition to the acts of piracy and dumping of harmful wastes by other criminal elements.

The United States has military presence in the Gulf of Guinea known as US ‘Africa Command’ (AFRICOM) was officially launched on October 1, 2007, and became a stand-alone command on October 1. The mission statement of AFRICOM specifies that the: United States Africa Command, in concert with interagency and international partners, builds defense capabilities, responds to crisis, and deters and defeats transnational threats in order to advance U.S. national interests and promote regional security, stability, and prosperity.<sup>92</sup>

Nigeria needs to take steps to safeguard its international waters to avoid encroachment, and monitor the utilization of its natural resources therein, including its territorial security against external threats: It is advised to act as follows:

- i. Enhance Maritime Domain Awareness: Nigeria should invest in modern technologies, such as satellite imagery, surveillance vessels, and coastal radars, to enhance its maritime domain awareness and detect illegal activities.
- ii. Legal Framework: Nigeria should review and update its maritime laws to ensure they are aligned with international conventions and provide a robust legal basis for enforcement actions.
- iii. Public Awareness Campaigns: Nigeria should conduct public awareness campaigns to educate coastal communities about their rights and responsibilities within the EEZ and encourage reporting of illegal activities.

---

<sup>89</sup> Godwin Oritse, ‘Why Buhari didn’t assent three maritime Bills’ *Maritime Reports*. *Vanguard Online* (August 3, 2023) <<https://www.vanguardngr.com/2023/08/why-buhari-didnt-assent-three-maritime-bills/>> accessed 8 November 2023.

<sup>90</sup> A Chircop and Others ‘Ocean law reform: A multi-level comparative law analysis of Nigerian maritime zone legislation’ [2016] 67 *Marine Policy*:60-75. <<https://www.sciencedirect.com/science/article/abs/pii/S0308597X16000178?via%3Dihub>>

<sup>91</sup> M T Page. ‘The Intersection of China’s Commercial Interests and Nigeria’s Conflict Landscape’ [2018] Special Report 428: United States Institute of Peace.5. <<https://www.usip.org/sites/default/files/2018-09/sr428-the-intersection-of-chinas-commercial-interests-and-nigerias->> accessed 8 November 2023.

<sup>92</sup> F V Nnamani, ‘United States’ Africa Command and Maritime Security in the Gulf of Guinea, 2007 – 2020’ [2022] 3(2) *Journal of Contemporary International Relations and Diplomacy*. 494-511. <<https://doi.org/10.53982/jcird.2022.0302.01-j>> accessed 8 November 2023.

- iv. International Partnerships: Nigeria should seek cooperation with developed maritime nations to acquire advanced maritime security equipment and training for its maritime forces.
- v. Support for Regional Initiatives: Nigeria should provide support to regional maritime security initiatives, such as the Maritime Security Coordination Centre for the Gulf of Guinea, to foster greater coordination and information sharing.

The South China Sea conflict serves as a stark reminder of the potential threats to maritime sovereignty and the importance of robust protection measures. Nigeria can learn from this conflict and take proactive steps to safeguard its EEZ, ensuring the sustainable exploitation of its maritime resources and the protection of its national security interests.

## **10. Findings /Conclusion**

- a. The South China Sea dispute is a complex dispute over the ownership, resources and rights of passage of the Sea. It is the most important water body for trading as one-third of the world's shipping trade passes through the South China Sea carrying over 3 trillion dollars' worth of trade each year. It is said to have large reserves of oil, natural gas, fisheries, sea products and other minerals in the sea bed. For decades there have been competing claims over who controls the hundreds of tiny islands and reefs present in this area. The ASEAN countries around the sea such as Japan, Taiwan, Philippines, Vietnam, Indonesia, Malaysia and Brunei have been fighting over the rights over the sea against China for years.
- b. The dispute concerns sovereignty, territorial acquisition, and control, maritime zone delimitation and rights, national and regional security, International and national trade and economic interests.
- c. The parties are all signatories to the United Nations Convention on Law of the Sea (UNCLOS III) 1982, and other international and regional treaties and instruments such as the ASEAN Declaration on Code of Conduct 2002.
- d. China's unilateral actions and claims of historical rights in drawing the Nine Dash line, and encroaching on the exclusive economic zones and continental shelves of the neighbouring states which disregards and undermines the cohesiveness and territorial integrity of the ten member states of the Association of the Southeast Asian Nations (ASEAN) as an accelerated positioning of China as the leading country in Asia. This is even more, because it considers itself a dominant regional power of the Eastern hemisphere.
- e. The UNCLOS mechanism gives states, especially weaker ones, comfort and protection in cases where one of the parties to a dispute – like China in the SCS which consistently insists on only addressing disputes through bilateral negotiations, because it enjoys significant advantages over other countries.
- f. There are issues of interpretations on the provisions of UNCLOS III on its 'Dispute Resolution Mechanisms' and jurisdiction, and also regarding the phrase "historic right" used by China in the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, is held to be different and not having same meaning with "Historical title" as exclusively used in UNCLOS Articles 15 and 298. Article 15 addresses "the delimitation of the territorial maritime boundary between neighboring or opposite countries". The territorial sea is under a country's sovereignty, indicating that "historical title" means ownership. Article 298 depicts "historical bays or titles" with "historical title," emphasizing their closeness. "Historical bays" emphasize Gulf countries' sovereignty. Hence, Article 298's "historical title" must be historical ownership.
- g. China is using its domestic laws to interpret and pursue international maritime boundaries delimitation, contrary to the provisions of UNCLOS III.
- h. ASEAN has been looked to as the possible solution to these disputes in recent years, with the promise of an ASEAN-China code of conduct. However, there is a major obstacle in the way of the creation of an ASEAN-China code of conduct: the divide between ASEAN on collectively addressing South China Sea disputes. ASEAN member states who are actively part of disputes in the region are pushing to address them as ASEAN, whereas some other member states are reluctant to ASEANize bilateral disputes and are advocating for keeping bilateral disputes out of ASEAN. This divide within ASEAN on their collective stance against China has added another twist to the resolution of the disputes and has raised the question of whether ASEAN is the best approach.

**i.** The ASEAN Declaration on Code of Conduct 2002 has no dispute resolution mechanism, as it only pleads with states to use or explore 'peaceful means' of resolving conflicts.

**j.** The growing influence of China especially its military and economic power globally and in the SCS, is a source of concern to the Western powers such as the United States and the United Kingdom, hence their vested interest in the region, while hiding under the guise of seeking protection for and compliance with international laws.