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A Strategic Proposal for Malaysia With Respect to the South China Sea Arbitration

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Abstract

China has claimed sovereignty over the islands and archipelagos within the South China Sea dating back to 1947 when the ‘eleven-dash line’ was first published by the Nationalist government of the Republic of China. Malaysia is one country that is particularly impacted by China’s claim, which includes the Spratly Islands, a major pathway for global trade and home to marine life, and oil and gas reserves. This submission discusses the ruling of the Arbitral Tribunal established under Annex VII to the 1982 United Nations Convention on Law of the Sea (UNCLOS) in *The Republic of the Philippines versus The People’s Republic of China (Philippines v China)* – also commonly referred to as ‘The South China Sea Arbitration’ – and proposes a strategy for Malaysia.

Keywords: South China Sea, Nine-Dash Line, UNCLOS, Spratly Islands, proposal

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1. Introduction

China has claimed sovereignty over the islands and archipelagos within the South China Sea dating back to 1947 when the ‘eleven-dash line’ was first published by the Nationalist government of the Republic of China.¹ Malaysia is one country that is particularly impacted by China’s claim, which includes the Spratly Islands, a major pathway for global trade and home to marine life, and oil and gas reserves.² This submission discusses the ruling of the Arbitral Tribunal established under Annex VII to the 1982 United Nations Convention on Law of the Sea³ (UNCLOS) in *The Republic of the Philippines versus The People’s Republic of China (Philippines v China)* – also commonly referred to as ‘The South China Sea Arbitration’ – and proposes a strategy for Malaysia.

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1 Usuki, Eiichi, ‘China’s Three Distinctive Assertions under the ‘Nine-Dash-Line’ Claims and the Annex VII Arbitral Tribunal’s Interpretation of Article 121 Regarding an Island and Rocks under the 1982 UN Convention on the Law of the Sea’ (2015) 21 *Asian Yearbook of International Law* 143-144.

2 ‘The World Factbook: Spratly Islands’ (*Central Intelligence Agency*) <www.cia.gov/library/publications/the-world-factbook/geos/pg.htm> accessed 7 April 2020.

3 United Nations Convention on the Law of the Sea (adopted 12 October 1982, entered into force on 16 November 1994) 1833 UNTS 3 (UNCLOS).



2. History of the South China Sea

Sovereignty over the Spratly Islands has long been contested, dating back to before the Second World War, at which time Taiwan was a Japanese colony. On 23 December 1939, Japan expanded its claims within the South China Sea to include southern maritime features, in particular, the Spratly Islands.⁴ Save for the Pratas Islands, which Japan recognised in 1909 through the Japan-Ch'ing Agreement for Handing Over Pratas Island as being under the control of Imperial China,⁵ the sovereignty over other maritime features in the South China Sea (including the Spratly Islands) remained contested during the period from 1938-1951. The 1951 Treaty of Peace with Japan mandated Japan relinquish all claims to territories, once again allowing other countries an opportunity to lay claim to them.⁶

2.1 China's Claims in the South China Sea

At the date of the People's Republic of China (PRC) establishment in 1949, several countries surrounding the South China Sea had already laid claim to its various maritime features. The PRC invoked historical claims to both the waters and insular features made by the former government, the Republic of China, to include: a three nautical mile territorial sea declared in the 1930s; the creation of a U-shaped line in the South China Sea in 1933; and most importantly, the 'eleven-dash line' map, which was published in 1947.⁷ The PRC eliminated two dashes, and in 1953, the nine-dash line was officially asserted.⁸ In 1958, the PRC declared a twelve nautical mile territorial sea, and in 1992, the PRC clarified that China's territorial sea included the Spratly, Paracel, and Pratas Islands in the South China Sea.⁹ In 1996, the PRC ratified UNCLOS¹⁰ and issued a Declaration on Exclusive Economic Zone (EEZ),¹¹ which made no mention of any historic maritime rights enjoyed by the PRC. It was not until 1998 in Article 14 of the EEZ law¹² that the PRC mentioned 'the preservation of a historic right'.¹³

China did not officially declare a statement to the international community detailing the extent and application of the nine-dash line until 2009. In that same year, Malaysia and Vietnam submitted an application to extend the limits of their claimed continental shelf beyond 200 nautical miles, to which China submitted the following response to the UN Secretary-General: 'China has indisputable sovereignty over

4 Usuki (n 1) 141-143.

5 *ibid* 141-143.

6 Usuki (n 1) 141-143.

7 *ibid* 143-144.

8 *ibid* 143-144.

9 U.S. Department of State, *Limits in the Seas* (No. 43 Straight Baselines People's Republic of China, 1978).

10 'Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements' (*Ocean & Law of the Sea United Nations*, 03 September 2020) <https://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm>.

11 China: Submission in Compliance with the Deposit Obligations pursuant to UNCLOS

12 Exclusive Economic Zone and Continental Shelf Act (adopted 26 June 1998, Standing Committee of the Ninth National People's Congress).

13 Usuki (n 1) 143-144.



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 [...] The above position is consistently held by the Chinese Government, and is widely known by the international community.¹⁴

2.2 The Arbitral Tribunal's Rulings in the South China Sea case

In the ensuing years, international community awareness of issues concerning the South China Sea increased. The Philippines through a Statement of Claim of 22 January 2013¹⁵ invoked arbitration under UNCLOS.¹⁶ After much deliberation, it was decided that the Tribunal was duly constituted, as both the Philippines and China were parties to UNCLOS. China did not accept this decision, however, and continues to reject the Tribunal's award.¹⁷

The Tribunal ruled that historic rights claimed by China in the past were 'extinguished' and, therefore, 'incompatible' with UNCLOS, using two factors as the basis for their decision: UNCLOS provides certain rights to all of China's neighbouring South China Sea countries, and China's historic rights impinge upon the freedoms of these countries guaranteed by UNCLOS.¹⁸ The Tribunal had to determine which features in the South China Sea were 'high-water insular' features, which are entitled to a territorial sea, contiguous zone, EEZ, and continental shelf as specified in Article 121 of UNCLOS, or 'rocks,' which are specified in Article 121(3) as explicitly not generating an exclusive economic zone or continental shelf.¹⁹ The Tribunal concluded the Spratly Islands, in their natural condition, are not capable of sustaining human habitation or economic life of their own; that the high-tide features are not entitled to an EEZ or continental shelf; and therefore, China has no entitlement to an EEZ or continental shelf that extends into maritime features claimed by the Philippines.²⁰

Regarding Mischief Reef and Second Thomas Shoal within the Spratly Islands, the Tribunal noted that they are located in an area 'not overlapped by the entitlements generated by any maritime feature claimed by China' and thus are part of the Philippine's EEZ and continental shelf.²¹

The Arbitral Tribunal ruled that Chinese historical claims to the nine-dash line were superseded by becoming a party to UNCLOS. The Tribunal found China in violation of Articles 60, 80, 77, 56, and 94 of UNCLOS for illegal fishing in other coastal state's EEZs; engaging in reconstruction activities and artificial island building in the Spratly Islands and causing permanent damage to the surrounding coral

14 UN General Assembly, *Note verbale dated 7 May 2009 from the Permanent Mission of the People's Republic of China addressed to the Secretary-General*, 7 May 2009, CML/18/2009, available at: https://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf [accessed 24 April 2020].

15 Consulate General of the Philippines 'Submission of Notification and Statement of Claim on the West Philippine Sea Dispute' (Chicago, 30 January 2013) 02-13.

16 Case 2013/19 *The South China Sea Arbitration* [2016], para 28.

17 Schofield, Clive, 'A Landmark Decision in the South China Sea: The Scope and Implications of the Arbitral Tribunal's Award' (2016) 38/3 *Contemporary Southeast Asia* 339-340.

18 *ibid* 340-342.

19 UNCLOS (n 3).

20 Case 2013/19 (n 16) paras 478-556, 571-646.

21 Schofield (n 17) 342.



reef; and enacting a ban in order to maintain sovereign control over resources—fisheries in particular—in the South China Sea. The Chinese were found guilty of harmful fishing practices and a failure to ensure the protection and preservation of the marine environment under UNCLOS Article 192.²²

3. Impact of the Award

The Tribunal's award is of relevance for the wider region. The Spratly Islands, comprised of over one hundred small islands/reefs, are claimed mostly by China (and by extension, Taiwan) and Vietnam, although Brunei, Malaysia, and the Philippines have also claimed certain regions. The area surrounding these islands is mostly unexplored territory, but nearby oil and gas reserves suggest deposits also exist in this vicinity. The copious amount of fish in the area make it prime real estate for fisheries, which explains China's 'monopolistic behavior' in the region.²³

In spite of the finality of the Tribunal's rulings in *Philippines v China*, China continues to exercise its 'rights' within its perceived EEZ. China has repeatedly acted to preserve its claims, including heightening military presence around maritime features to deter other coastal states from exercising control.²⁴ China's actions to curb Freedom of Navigation Operations (FONOPs)²⁵ transcend verbal warnings to leave its territorial sea; China's actions—such as encroaching within 45 yards of USS DECATUR while the vessel was performing a FONOP—increase the risk of collision, as they are contrary to rules developed to promote safe navigation.²⁶

22 Case 2013/19 (n 16) paras 478-553, 571-646, 698-716, 1015-1038, 1082-1109.

23 The World Factbook (n 2).

24 Beijing threatened to take military action in July of 2017 and again in May of 2018 if Vietnam did not cease oil and gas drilling in Vietnam's exclusive economic zone. In another incident, China blocked three Philippine civilian vessels from resupplying the BRP Sierra Madre, which was purposely grounded on Second Thomas Shoal in 1999 by the Philippines to prevent Chinese occupation.

25 FONOPS are conducted by the U.S. Navy in an effort to reinforce the international laws of the sea cited in UNCLOS and deter other countries from making excessive maritime claims. The Department of Defense's Annual Freedom of Navigation Reports can be found on the following website under Secretary of Defense for Policy <<https://policy.defense.gov/OUSDP-Offices/FON/>>.

26 Lynn Kuok, 'How China's Actions in the South China Sea Undermine the Rule of Law' (*Brookings*, 2019) <www.brookings.edu/research/how-chinas-actions-in-the-south-china-sea-undermine-the-rule-of-law/> accessed 7 April 2020, 4-5.



Figure 1

Source: Wikimedia

3.1 Potential Courses of Action for Malaysia

By putting its own interests above those of the international community, China is weakening the sustainability and credibility of international law. As seen in Figure 1, Malaysia's, Brunei's, Vietnam's, and the Philippines' EEZs all overlap parts of the Spratly Islands, and there currently exists no system that enables each of these coastal states to coexist peacefully while reaping the benefits of the maritime space. Because the Spratly Islands are mostly contained within Malaysia and the Philippines' claimed EEZs, Malaysia should set the example and be more proactive in asserting its rights within the limits of its own EEZ. The fact that China has consistently maintained Coast Guard presence around Loconia



Shoals, a low-tide elevation in Malaysia's exclusive economic zone, and that Malaysian Foreign Minister Saifuddin Abdullah denied seeing an increase in Chinese vessels despite several reports confirming the opposite speak to Malaysia's subservience to China's actions in the region.²⁷ When deciding on the appropriate course of action, Malaysia should take into account methods of decision-making from previous international conventions, such as the Montreux Convention,²⁸ the Proliferation Security Initiative,²⁹ and effective stances taken by other nations in regard to appropriate maritime conduct, specifically within the South China Sea.

Malaysia and China entered into a bilateral consultation mechanism on maritime affairs in 2019—an accord that serves only as a prolongation of peace and has no real implications that curb China's tendency to overstep boundaries.³⁰ Yet, it is argued that it would be prudent for each of the coastal states involved in the Spratly Islands dispute (including China, in order to eliminate a sense of secrecy and promulgate the intention of the other coastal states to freely exercise their rights) to gather in a forum and formally voice any complaints and, using the Montreux Convention as a guide,³¹ create and become party to a resolution in which the coastal states agree upon their respective EEZs. The goal of the Montreux Convention, concluded in 1936, was to reach a conclusive decision regarding Turkey's ability to regulate maritime traffic through the Turkish Straits.³² Such resolution between coastal states in the South China Sea need not match the degree of formality in the Montreux Convention; rather, it seems sufficient to use an approach similar to the Proliferation Security Initiative (PSI), in which a broad goal is voiced and each coastal state agrees to contribute to achieving that goal. One challenge in adopting methods used to promulgate the PSI and Montreux Convention is that the concepts governing these two agreements are quite unrelated to matters in the South China Sea. Furthermore, the Montreux Convention pertains to a vastly different operating space than the South China Sea, and Malaysia may find it difficult to reconcile these differences with their current situation.

The expectation is that, under this new resolution, the coastal states are obliged to only take what is theirs. And while Malaysia and Vietnam have defined the boundaries of each country's respective continental shelf,³³ no other country involved in the disputes has taken action to clearly delimit overlapping boundaries.³⁴ Thus, the first item on the agenda should be for the remaining countries—particularly the Philippines and

27 Kuok (n 26) 7.

28 Traduction - Translation: Convention Regarding the Regime of the Straits Signed at Montreux (adopted 24 July 1923, entered into force 20 July 1936).

29 'Proliferation Security Initiative' (*Nuclear Threat Initiative*, 31 May 2020) <<https://www.nti.org/learn/treaties-and-regimes/proliferation-security-initiative-psi/>>.

30 Kuok (n 26) 7.

31 The Montreux Convention contains several provisions regarding Turkey's rights in various scenarios for allowing vessels to pass through its straits, along with vessels' rights when operating in the Black Sea. Some of the provisions include: the requirement of vessels of war transiting through the Straits to provide advance notification to the Turkish government (save for war vessels that solely carry fuel); all merchant vessels—except those transiting from the Black or Aegean Sea, who must first stop at a sanitary station—shall enjoy freedom of transit and navigation at all times. The Montreux Convention ultimately gave Turkey control over the Turkish Straits.

32 Traduction - Translation: Convention Regarding the Regime of the Straits Signed at Montreux (adopted 24 July 1923, entered into force 20 July 1936).

33 Joint Submission to the Commission on the limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect of the southern part of the South China Sea (adopted 06 May 2009, entered into force for Malaysia 13 November 1996 and for Vietnam 16 November 1994).

34 Table of claims to maritime jurisdiction (15 July 2011) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf>.



Brunei—to follow the precedent set by Malaysia and Vitenam. Once boundaries have been established, coastal states may fish and drill for oil within their respective boundaries, but they also must uphold environmental protection policies to preserve the environment. Malaysia should acknowledge that many of the coastal states have overlapping claims; for those boundaries that overlap, the respective coastal states to whom that applies will sign a joint agreement to share the resources within that area. Being particularly invested due to the Spratly Islands dispute with China, Malaysia should support the creation of a resource and reporting agency similar to the European Maritime Safety Agency (EMSA), which requires European countries to respect and take measures to protect the environment. The Common Information Sharing Environment (CISE) is voluntary and enhances information sharing among all European and EU/EEA Member States in order to conduct surveillance and operational tasks and provide a means for regulating, *inter alia*, fisheries, marine pollution, general law enforcement, and border control.³⁵ Incorporating this framework designed by EMSA into the South China Sea would provide the affected coastal states with a means for logging resources by area and country, enforcing the boundaries of each coastal state's EEZ, regulating fisheries, and so much more.

Additionally, Malaysia should encourage the other coastal states involved in the forum to emulate Europe's position and adopt a 'principled neutrality' strategy.³⁶ This mindset involves reiterating guiding principles (i.e. principles identified from UNCLOS and other international law) and the impact that clarifying these principles can have. The neutrality aspect concerns territorial sovereignty.

Whilst it is naïve to expect the countries surrounding the South China Sea to adopt the neutrality aspect, Malaysia should emphasise the importance of respecting and acknowledging customary international law, which in turn could create a stable operating space for all vessels transiting the South China Sea.

3.2 Potential Adversities Expected from Suggested Strategy

Malaysia should expect significant challenges to accompany this proposed strategy. One such challenge regarding the enforcement of utilising resources only within one's EEZ is that China will most likely continue to assert its dominance within any coastal state's national waters that fall within China's nine-dash line. Furthermore, because China has rejected the arbitral award, it is very likely that China will build on Scarborough Shoal and complete its 'three-pronged security triangle.'³⁷ In order to counteract that, Malaysia should organise, with the help of the United States, its allies, and the other coastal states whose EEZs are being encroached upon, a non-escalatory show of force by posting ships from each nation's navy within their EEZs and actively practising their rights.

Pursuance of the proposed strategy will by no means be an easy feat for Malaysia. It will take a significant amount of time and cooperation among regional actors in the South China Sea and their allies to overcome the various challenges to this proposal, posed mostly by China. At the end of the day, however, Malaysia's goal should be to create a safer, more secure operating environment in which neighbouring coastal states cooperate and recognise one another's rights: a *mare liberum*.

35 EMSA, 'Common Information Sharing Environment (CISE)' (*European Maritime Safety Agency*, 2020) <www.emsa.europa.eu/operations/vessel-reporting-services.html> accessed 7 April 2020.

36 Mathieu Duchâtel, 'The European Union's 'Principled Neutrality'—Can It Achieve Anything?' in Eva Pejsova (ed), *Sense and Sensibility: Addressing the South China Sea Dispute* (EUISS 2016) 53-56.

37 Kuok (n 26) 8.