

UNRAVELLING THE STRANDS OF THE SOUTH CHINA SEA CONUNDRUM: A CRITICAL ANALYSIS OF CHINA'S ACTIONS AND STATEMENTS

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1 Introduction

The South China Sea remained more or less calm until the 1960s when significant amounts of oil and natural gas reserves were discovered underneath the seafloor. Subsequently, the surrounding States, including the People's Republic of China (hereinafter, China), began to lay competing claims to geographical features and maritime zones in the South China Sea in an unprecedented manner and the South China Sea Dispute was born. In addition to the energy resources, the claims are also driven by the lucrative fisheries of the South China Sea which are crucial for the food security of hundreds of millions of people in the littoral States.¹ The South China Sea is home to over 3,300 known species of marine fishes, its fisheries employs at least 3.7 million people and it has been estimated that, in 2012, about 12% of the world's total fishing catch, worth US\$21.8 billion, came from this region.² The South China Sea has also a significant strategic importance as a primary shipping route. Annually, a total of one-third of the global merchant shipping, carrying about US\$3.4 trillion in trade, transits the South China Sea.³ Importantly, about 90% of the petroleum imported by major countries like China, South Korea and Japan also passes through the same body of water.⁴

The South China Sea, therefore, is the epicentre of changes in the international balance of power which also has the potential to trigger military conflict.⁵ This is mainly because China's coercive attitude in the South China Sea is a source of tension and instability in the region. China's assertions regarding its historic rights in the South China Sea are also, at best, ambiguous and contradictory. The following recent incidents illustrate the volatility of the situation in the South China Sea. In April 2020, a Chinese maritime surveillance vessel chased, rammed and sank a Vietnamese fishing vessel which was fishing in waters around the contested Parcel Islands and this prompted Vietnam to lodge an official protest against China.⁶ A few weeks later in the same month, China gave Chinese names to 80 geographical features in the South China Sea⁷ in order to strengthen its sovereignty claim over those features. Along the same policy lines, for several days in April a Chinese government ship tailed a Malaysian government vessel which was carrying out exploratory drilling in the South China Sea.⁸ The US accused China of taking advantage of the distraction of the COVID-19 pandemic to advance its presence in the South China Sea⁹ and subsequently sent its warships to the area.¹⁰ According to a former Australian defense official who is currently the executive director of the Australian Strategic Policy Institute, the Chinese move was 'a quite deliberate Chinese strategy to try to maximize what they perceive as being a moment of distraction and the reduced capability of the United States to pressure neighbors'.¹¹ An Australian warship was subsequently sent to the area in order to join and conduct naval exercises with the US Navy.¹² In early July, the US deployed not

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¹ Clive Schofield, Rashid Sumaila and William Cheung, 'Fishing, not Oil, is at the Heart of the South China Sea Dispute', *The Conversation* (15 August 2016) <<https://theconversation.com/fishing-not-oil-is-at-the-heart-of-the-south-china-sea-dispute-63580>> accessed 24 July 2020.

² *Ibid.*

³ 'The Strategic Importance of the South China Sea', *World Geostategic Insights* (25 June 2020) <<https://wgi.world/the-strategic-importance-of-the-south-china-sea/>> accessed 24 July 2020.

⁴ *Ibid.*

⁵ CJ Jenner (ed) and Tran Truong Thuy (ed), *The South China Sea: A Crucible of Regional Cooperation or Conflict-Making Sovereignty Claims?* (CUP 2016) 1.

⁶ 'Vietnam Lodges Protest Against Beijing After Fishing Boat Sunk in South China Sea', *NBC News* (04 April 2020) <<https://www.nbcnews.com/news/world/vietnam-lodges-protest-against-beijing-after-fishing-boat-sunk-south-n1176631>> accessed 24 July 2020.

⁷ 'Outrage as Beijing Names Islands in Disputed South China Sea', *New Straits Times* (21 April 2020) <<https://www.nst.com.my/world/world/2020/04/586359/outrage-beijing-names-islands-disputed-south-china-sea>> accessed 24 July 2020.

⁸ A Ananthalakshmi and Rozanna Latiff, 'Chinese and Malaysian ships in South China Sea Standoff: Sources', *Reuters* (17 April 2020) <<https://www.reuters.com/article/us-malaysia-china-southchinasea/chinese-and-malaysian-ships-in-south-china-sea-standoff-sources-idUSKBN21Z1TN>> accessed 24 July 2020.

⁹ *Ibid.*

¹⁰ Peter Suci, 'Are America and China Headed Towards a South China Sea Showdown?', *The National Interest* (23 April 2020) <<https://nationalinterest.org/blog/buzz/are-america-and-china-headed-towards-south-china-sea-showdown-147296>> accessed 24 July 2020.

¹¹ *Ibid.*

¹² 'Australia Joins US Warship in South China Sea as Tensions Grow', *The Telegraph* (22 April 2020) <<https://www.telegraph.co.uk/news/2020/04/22/australia-joins-us-warship-south-china-sea-tensions-grow/>> accessed 24 July 2020.

one but two aircraft carrier strike groups in the South China Sea¹³ and a few weeks later, Australian warships were reportedly confronted by the Chinese Navy near the disputed Spratly Islands.¹⁴ Subsequently, Australia's Foreign Minister and Defence Minister strongly criticised China's actions in the South China Sea as 'coercive conduct' that continues to 'destabilise the region'.¹⁵ In a declaration to the United Nations,¹⁶ the Australian Government then firmly rejected China's maritime claims in the South China Sea as having 'no legal basis' which, according to analysts, marks a dramatic shift in Australia's position.¹⁷ Thus, as tension with China is escalating, the South China Sea currently seems to be the world's most important body of water which requires a meticulous analysis of the engendered legal and regulatory issues.

Given that unlike American warships, the Australian warships did not even come within 12 nautical miles of the contested Spratly Islands,¹⁸ the question (once again) arises as to whether China has or can assert *sovereignty* over waters beyond its legitimate territorial sea generated by its mainland coast. In fact, through its baffling Nine-Dash Line map (hereinafter, the NDL) and various ambiguous statements, China seems to have laid distinctive *sovereignty* claim to the *entire* South China Sea. Its premeditated physical actions such as enlargement of some of the insular features in the South China Sea and militarisation of the area, have compounded the Dispute and have raised several legal issues. From an international law of the sea perspective, the most significant issue in the Dispute is China's *sovereignty* claim to the *entirety* of the *waters* in the South China Sea. Although sovereignty over the land features in the South China Sea is also one of the most fundamental issues, it will be put to one side for it is outside the scope of the international law of the sea. This paper, therefore, attempts to answer the following questions:

- a) *Which actions and/or statements of China in the South China Sea Dispute are incompatible with the international law of the sea and/or general international law?*
- b) *Since China has never officially clarified the nature of its NDL claim, what are, if any, valid interpretations of the NDL map?*
- c) *Is any of the insular features of the Spratly Archipelago an 'island' within the meaning of modern international law of the sea?*
- d) *What is the best way forward for the States involved in the South China Sea Dispute?*

In regard to the first question, the paper demonstrates that China is violating several rules of international law and that, part of this violation is a consequence of the ambiguities in certain provisions of the *United Nations Convention on the Law of the Sea, 1982* (hereinafter, *UNCLOS III* or simply *UNCLOS*). The paper argues that the Qiongzhou Strait in the South China Sea is an international strait where *all* vessels and aircraft are entitled to enjoy an unimpeded transit passage and that China's strict regulations that are applied to merchant vessels who intend to transit the strait, are incompatible with Article 38 of *UNCLOS*. The paper also examines the straight baselines that China has established along its mainland coast and around the Paracel Islands, and concludes that some of those baselines do not conform with the relevant *UNCLOS* provisions *e.g.* Articles 7 and 47. It is also argued that the enlargement of the submerged geographical features of the Spratly Islands by China is a breach of international law. As another incompatibility, China's use of force policy in the South China Sea is argued to be a threat to the international maritime security and in direct contradiction to *UNCLOS* and the Charter of the United Nations (UN). Lastly, China's refusal to respect the ruling of the Arbitral Tribunal in the *South China Sea Arbitration* is argued to be against the norms of international law and leading to international disorder.

¹³ 'South China Sea: What's China's plan for its 'Great Wall of Sand'?', *BBC News* (14 July 2020) <<https://www.bbc.com/news/world-asia-53344449>> accessed 24 July 2020.

¹⁴ Frank Chung, 'South China Sea: Australian Warships reportedly 'Confronted' by Chinese Navy' (23 July 2020) <<https://www.news.com.au/technology/innovation/military/south-china-sea-australian-warships-reportedly-confronted-by-chinese-navy/news-story/912d1b7e27b6ed48a7dd69a68ca5faae>> accessed 24 July 2020.

¹⁵ Brett Lackey, 'Australia Slams Beijing over its 'Coercive Conduct' in the South China Sea as Tensions Between the Two Nations Threaten to Boil Over', *Daily Mail* (24 July 2020) <<https://www.dailymail.co.uk/news/article-8556947/Australia-slams-Beijing-coercive-conduct-South-China-Sea.html>> accessed 25 July 2020.

¹⁶ UN Document No. 20/026 – Available at <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_07_23_AUS_NV_UN_001_OLA-2020-00373.pdf> accessed 26 July 2020.

¹⁷ 'South China Sea Dispute: Australia Says Beijing's Claims Have No Legal Basis', *BBC News* (25 July 2020) <<https://www.bbc.com/news/world-australia-53536173>> accessed 26 July 2020.

¹⁸ Andrew Greene, 'Australian Warships Encounter Chinese Navy in Contested South China Sea', *ABC News* (23 July 2020) <<https://www.abc.net.au/news/2020-07-23/australian-warships-encounter-chinese-navy-south-china-sea/12481514>> accessed 26 July 2020.

In answering the second question, the paper adopts a novel and holistic approach and scrutinises all possible interpretations of the NDL map upon which China's sweeping claim to the entire South China Sea seems to have been based. It concludes that the only valid interpretation of the NDL map is 'island attribution'. If the NDL map can, in principle, signify 'island attribution' and if China succeeds in establishing sovereignty over the insular features of Spratly Islands, the question then arises as to whether those features can generate maritime zones in which China can enjoy sovereignty or sovereign rights. This is subject matter of the third question that the paper attempts to shed some light on.

The third question has been discussed under the heading 'Island or Rock?'. Although the relevant *UNCLOS* provisions are, to some extent ambiguous, the paper deduces that none of the features of the Spratly Archipelago is actually an 'island' within the meaning of *UNCLOS* and none of them is capable of generating an Exclusive Economic Zone (hereinafter, EEZ). It is argued that almost all waters around the Spratly Islands remain the high seas and since no State has sovereignty over any part of the high seas, all commercial and military vessels are entitled to exercise the freedom of navigation in those waters. The paper concludes that Part XV of *UNCLOS* and co-operation between States are fundamental to resolving the issues in the South China Sea. Unless expressly provided otherwise, the term 'Article' throughout this paper refers to a specific Article of *UNCLOS*.

2 Transit Passage

In 1964, China issued regulations excluding foreign military ships and allowing foreign commercial vessels to pass through the Qiongzhou Strait subject to very strict regulations only.¹⁹ Since it is uncertain whether the right of transit passage has passed into customary international law,²⁰ the issue can be analysed in the light of *UNCLOS* to which China is a State party. Based on Articles 37 and 38(1), a right of transit passage exists where a strait is used for 'international navigation' between one part of the high seas or an EEZ and another part of the high seas or an EEZ. The Qiongzhou Strait clearly meets this criterion as it is used for 'international navigation', for example, between Vietnam's EEZ and China's EEZ. Further, Article 38(1) makes it clear that in such straits, 'all' ships and aircraft enjoy the right of transit passage which 'shall not be impeded' except that:

[I]f the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

Thus, in order for the *UNCLOS* regime of transit passage to apply to the Qiongzhou Strait, the alternative route seaward (in this case, southward) of Hainan Island must be of 'similar convenience' satisfying *two* criteria: hydrographical *and* navigational. Using the Messina Strait as a yardstick, and explaining that going round Sicily rather than through the Messina Strait means 60 miles longer distance, Professor Alexander listed 22 straits, including the Qiongzhou Strait, that fit the Article 38(1) exception.²¹ It is submitted that considering distance as the sole criterion for 'navigational' characteristics, is to ignore importance of other aspects of navigation. The Messina Strait is an insignificant and far narrower strait which makes navigation less convenient for large ships, particularly in heavy maritime traffic. Furthermore, due to the *cost* and potential *delays* associated with the 'compulsory pilotage'²² in the Messina Strait, commercial ships would still find it more convenient to go round Sicily even if there existed a right of transit passage. *Cost* and *time*, therefore, are two significant characteristics of 'navigation'. Germany's Declaration on *UNCLOS* also emphasised that the navigational criteria include the *economic* aspect of shipping.²³

As an example, assuming that a large laden container ship is planned to sail from Hai Phong (Vietnam) to Busan (South Korea), given that the average *daily* operating cost in 2018 was over US\$5,000 for a Panamax,²⁴ having to sail round the Hainan Island rather than directly through the Qiongzhou Strait, would incur unnecessary delays and costs and therefore would not be 'of similar convenience' with respect to 'navigational' characteristics. The uncertain shipping environment created by China in the Qiongzhou Strait is particularly damaging to the

¹⁹ Myron H Nordquist, (ed), Tommy Koh (ed) and John Norton Moore (ed), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Brill 2009) 279.

²⁰ Malcolm Shaw, *International Law* (8th ed, CUP 2017) 428.

²¹ Aldo Chircop (ed), Theodore McDorman (ed) and Susan Rolston (ed), *The Future of Ocean Regime-building: Essays in Tribute to Douglas M. Johnston Dyke* (Brill 2009) 195.

²² Shipping Guides Ltd, *Guide to Port Entry* (21st ed, Shipping Guides Ltd 2011) 1511.

²³ 'Chapter XXI: Law of the Sea', *United Nations Treaty Collection*

<https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 02 April 2020.

²⁴ 'Ship Operating Costs Decline for Seventh Year in Succession', *Dry Cargo International* (17 September 2019)

<<https://www.drycargomag.com/ship-operating-costs-decline-for-seventh-year-in-succession>> accessed 2 April 2020.

international container shipping and trade where *time* and *speed* are decisive factors. The bottom line, therefore, is that the Qiongzhou Strait remains an international strait where the right of transit passage applies to *all*, including *military*, vessels and aircraft and this right ‘shall not be impeded’ in any way, shape or form.

3 Straight Baselines

In 1996, China established two sets of straight baselines along its mainland coast as well as around the Parcel Islands. The following issues are bound to arise. First, by drawing straight baselines, connecting points 31 to 33 on the chart provided by the US Department of State,²⁵ and cutting off the eastern entrance to the Qiongzhou Strait, China has claimed the Strait and large areas of water as its *internal* waters. Since the relevant coastline is not deeply indented, since there is no fringe of islands along the coast, since the straight baselines appreciably depart from the general direction of the coast and because the enclosed sea areas are not closely linked to the land domain, such straight baselines remain widely out of conformity with Article 7. Second, although *UNCLOS* does not specify a maximum length for a straight baseline, reasonable arguments demonstrate that it cannot be greater than 48 nautical miles.²⁶ Hence, those straight baselines in the South China Sea which are greater than 48 nautical miles,²⁷ enclosing large areas of water as internal waters, are contrary to international law and unfair to the international community. Third, Article 47 only permits ‘archipelagic States’²⁸ to draw ‘straight archipelagic baselines’ and not a continental State like China. At any rate, the Parcel Islands would not qualify for straight archipelagic baselines because the ratio of the area of the water to the area of the land exceeds²⁹ the maximum permitted ratio which, pursuant to Article 47(1), is 9 to 1. China may argue that these baselines are ‘territorial sea baselines’ rather than ‘straight archipelagic baselines’ in which case they would still remain inconsistent with *UNCLOS* for using dispersed and contested low-tide elevations as basepoints, without lighthouses or similar installations on them, permanently above sea level.³⁰ Moreover, there is no *UNCLOS* provision for straight territorial sea baselines around such *mid-oceanic* geographical features. Be that as it may, this does not worry China as it has a magic map that grabs *everything* in the South China Sea: The Nine-Dash Line.

4 The Nine-Dash Line

This is China’s most (in)famous claim. The official publication of the NDL map which took place in 1947,³¹ has baffled many scholars ever since. In 2009, China submitted a Note Verbale along with the NDL map to the Secretary-General of the United Nations and requested that they be circulated to all UN Members. The Note reads:

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).³²

The legal conundrum is that China has never officially clarified the *nature* of the claims associated with the NDL, let alone the basis for such claims. Notwithstanding, since China explicitly claims *sovereignty* over the *islands*, its position regarding land is clear. Its position regarding *water*, however, is completely vague. Is it claiming sovereignty or sovereign rights over the waters within the NDL? In either case, over which body of waters exactly? What is the basis for such claims? Possible interpretations of the NDL and issues arising out of each interpretation will be analysed below.

²⁵ United States Department of State, ‘Limits in the Seas, No.117: Straight Baseline Claim: China’ (PDF, 9 July 1996) [page 17] <<https://www.state.gov/wp-content/uploads/2020/01/LIS-117.pdf>> accessed 2 April 2020.

²⁶ United States Department of State, ‘Limits in the Seas, No.106: Developing Standard Guidelines for Evaluating Straight Baseline’ (PDF, 31 August 1987) [page 13-14] <<https://2009-2017.state.gov/documents/organization/59584.pdf>> accessed 3 April 2020.

²⁷ United States Department of State, above n 25, 4-5.

²⁸ Article 46(a) defines an ‘archipelagic State’ as ‘a State constituted wholly by one or more archipelagos and may include other islands’.

²⁹ Sam Bateman and Clive Schofield, ‘State Practice regarding Straight Baselines in East Asia: Legal, Technical and Political Issues in A Changing Environment’ 1, 10 – The Paper was presented at the international conference on ‘Difficulties in Implementing the Provisions of UNCLOS’ (October 2008), available at <https://legacy.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf5/Papers/Session7-Paper1-Bateman.pdf> accessed 3 April 2020.

³⁰ Article 7(4).

³¹ Donald Rothwell (ed), Alex G Oude Elferink (ed), Karen N Scott (ed) and Tim Stephens (ed), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 634.

³² Available at <http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf> accessed 3 April 2020.

4.1 Maritime Boundary

In China, the NDL has been called ‘Chinese traditional maritime boundary line’.³³ Additionally, China has recently published maps on which the symbology and the text in the legend suggest a ‘maritime boundary’ interpretation of the NDL.³⁴ First, boundary delimitations shall be effected by *agreement* on the basis of international law in order to achieve an equitable solution.³⁵ Hence, China cannot draw such lines unilaterally. Second, the position of maritime boundary lines must be ‘ascertainable’ either by showing them on charts of an ‘adequate scale’ or by publishing lists of geographical ‘coordinates’ and a copy of such charts or lists must be deposited with the Secretary-General of the United Nations.³⁶ To date, no coordinates for the NDL have been published or deposited with the Secretary-General of the UN. Furthermore, the NDL has only been shown on very small-scale maps and thus, the relevant positions of the lines cannot be ascertained with enough accuracy. Moreover, at certain areas, the position of the boundary line cannot be fixed at all because the claimed boundary line it is a ‘dashed-line’ rather than a ‘continuous line’. Third, under State practice and international jurisprudence, such boundary would never be *equitable* as they are too close to the coasts of other States in the area. Finally, under normal circumstances, where no EEZ can extend beyond 200 nautical miles from baseline,³⁷ dashes 2, 3, and 8 are beyond 200 nautical miles from any Chinese-claimed land feature.³⁸ The NDL map, thus, cannot signify a maritime boundary line.

4.2 Island Attribution

The original NDL map which was published in the 1930s and on which subsequent similar maps were based, was titled ‘Map of the Chinese Islands in the South China Sea’.³⁹ This official title indicates that in the 1930s, China’s NDL claim is (or at least initially was) only to the *islands* which are located within the NDL. As will be observed in due course, this is the only valid interpretation of the NDL that can be in conformity with the international law of the sea. This is not to say that China enjoys sovereignty over all features within the NDL; it merely means that the NDL can, in principle, mean assertion of sovereignty over those features. Furthermore, Article 1 of China’s 1958 Declaration⁴⁰ confirmed that there are areas of ‘the high seas’ between China’s islands and the mainland. Since the high seas are, by definition, beyond sovereignty or even sovereign rights of any State, the 1958 Declaration should estop China from laying any claim to the *entirety* of the waters within the NDL. Evidently, it did not:

4.3 Historic Claim

China’s 2011 Note Verbale asserted that ‘China’s *sovereignty* and related rights and jurisdiction in the South China Sea is supported by abundant *historical* and legal evidence.’⁴¹ Shortly afterwards, China asked India to refrain from oil exploration in ‘maritime areas’ offered by Vietnam in the South China Sea, claiming that China enjoys ‘indisputable sovereignty’ there. A Chinese Foreign Ministry Spokesperson also stated that ‘China enjoys indisputable *sovereignty over the South China Sea* and the island. China’s stand is based on *historical* facts and international law.’⁴²

Given that a State’s ‘sovereignty’ cannot extend to waters beyond its ‘territorial sea’, these two statements imply that China considers its alleged ‘sovereignty’ over the ‘South China Sea’ to be based on historic rationale. This begs a series of questions: what is the *nature* of such a *historic* claim? Is it a ‘historic title’ claim or a ‘historic rights’ claim? Are these two the same? Although the confused and often interchangeable uses of the two terms

³³ Li Jinming and Li Dexia, ‘The Dotted Line on the Chinese Map of the South China Sea: A Note’ (2003) 34(3/4) *Ocean Development & International Law* 287, 294 (emphasis added).

³⁴ United States Department of State, ‘Limits in the Seas, No.143: China: Maritime Claims in the South China Sea’ (PDF, 05 December 2014) [page 14] <<https://www.state.gov/wp-content/uploads/2019/10/LIS-143.pdf>> accessed 3 April 2018.

³⁵ Article 74(1).

³⁶ Articles 75(1) and (2).

³⁷ Article 57.

³⁸ United States Department of State, above n 34, 15.

³⁹ *Ibid* 12 (emphasis added).

⁴⁰ ‘Appendix 18 – PRC’s Declaration on the Territorial Sea (1958)’

<https://www.eapasi.com/uploads/5/5/8/6/55860615/appendix_18_-_prcs_declaration_on_the_territorial_sea__1958__.pdf> accessed 4 April 2020.

⁴¹ Available at <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf> accessed 4 April 2020.

⁴² ‘South China Sea: Govt Says ONGC Videsh’s Vietnamese Project is as per International Law in Response to China’s Objection about Oil Exploration’, *The Economic Times* (16 September 2011)

<<https://economictimes.indiatimes.com/news/politics-and-nation/south-china-sea-govt-says-ongc-videshs-vietnamese-project-is-as-per-international-law-in-response-to-chinas-objections-about-oil-exploration/articleshow/9999879.cms>> accessed 4 April 2020 (emphasis added).

have caused a lot of arguments, as the Arbitral Tribunal in the *South China Sea Arbitration*⁴³ (hereinafter, the Tribunal) pointed out, ‘historic rights’ is a generic term that encompasses sovereignty claims as well as more limited rights falling short of sovereignty such as fishing rights. In contrast, the term ‘historic title’ is specifically used when referring to ‘sovereignty’ over maritime zones or land, and the term ‘historic waters’ is used specifically for historic title over maritime zones. This seems reasonable for the following reasons. Firstly, the term ‘title’, in the legal sense, means a person’s right of ‘ownership’⁴⁴ of property and the concept of ‘ownership’, itself, is intertwined with the notion of ‘sovereignty’. Secondly, the term ‘title’ as far as the author is aware, has never appeared in combinations like ‘historic fishing title’ save for the Verbatim Record⁴⁵ of the *Bangladesh/Myanmar* case⁴⁶ which seems to be a slip of the tongue. Thirdly, in the context of ‘territorial sea’, where States enjoy ‘sovereignty’, *UNCLOS* only uses the term historic ‘title’ and not historic ‘rights’.⁴⁷ Fourthly, claimed historic rights apply on a *quoad hunc* basis only, not *erga omnes* and they may not even have the word ‘historic’ attached to them.⁴⁸ Finally, for the reasons set out below, unlike waters that are subject to historic rights, claimed historic waters must be ‘adjacent’ to the claimant State’s coast. To sum up, historic ‘title’ claims denote ‘sovereignty’ but historic ‘rights’ claims do not. Given that a historic claim may be either a historic ‘rights’ or a historic ‘title’ claim, the next puzzling question is whether China’s historic claim refers to a historic ‘rights’ or a historic ‘title’ claim.

4.3.1 Historic Title Claim (Denoting Sovereignty)

The issue of historic title *i.e.* claiming ‘sovereignty’ over a body of water, is not a new challenge for the law of the sea. After *Mare Liberum* won the battle against *Mare Clausum* in the 17th century, and before the appearance of the *UNCLOS* maritime zones, it was uncertain whether a coastal State could claim even a narrow strip of its coastal waters as territorial sea.⁴⁹ This prompted coastal States to seek greater protection for their interests which materialised in ‘historic waters’ claims. Such claims aimed to exempt bays and coastal waters (which were essential to the coastal State’s economy and/or security) from the regime of the high seas under the concept of *Mare Liberum*.

Historic ‘bays’ and historic titles to ‘territorial seas’ found their way to the *Convention on the Territorial Sea and the Contiguous Zone, 1958 (UNCLOS I)*, Articles 7(6) and 12 respectively. However, since no regime was codified and no reference was made to historic ‘waters’ (which could include waters beyond the territorial sea), India and Panama requested the Secretary-General of the UN to study the regime of historic waters *including* historic bays.⁵⁰ Subsequently, the UN Study found that the subject-matter of ‘historic waters’ was wider in scope than that of ‘historic bays’ and concluded that since rightfulness of a claim to historic waters must be appraised by principles of ‘international law’, such assessment was not possible unless there was a scheme to ask States of their practice and the principles upon which they based their historic waters claims. Possible consequences of such a scheme, however, put the UN Secretariat in a ‘dilemma’⁵¹ because it would involve ‘the obvious danger’ that if Governments were asked to identify what waters they claimed as historic waters, they would be tempted to advance all possible, including new claims to protect their interests.⁵² Consequently, no further action was taken and codification of historic waters failed.

Nevertheless, the UN Study notably confirmed that ‘there are cases in which a State has a valid *historic title* to certain *waters adjacent to its coasts*’.⁵³ Most importantly, with respect to cases where the historic title had not been expressly reserved in *UNCLOS I*, the Study made it clear that:

[I]f the provisions of an [*UNCLOS*] article should be found to conflict with an historic title to a maritime area, and no clause is included in the article safeguarding the historic title, *the provisions of the article must prevail* as between the parties to the Convention.⁵⁴

⁴³ *The Republic of the Philippines v the People’s Republic of China, Award* [2016] PCA Case No. 2013-19, para 225, available at <<https://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>> accessed 5 April 2020 (hereinafter, *Award*).

⁴⁴ Jonathan Law (ed), *Oxford Dictionary of Law* (9th ed, OUP 2018) 681.

⁴⁵ ‘International Tribunal for the Law of the Sea (ITLOS/PV.11/14/Rev.1)’ (22 September 2011) [page 19] <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/corrected_PV_s/ITLOS_PV.11_14_Rev.1_E.pdf> accessed 5 April 2020.

⁴⁶ [2012] ITLOS Rep 4.

⁴⁷ Article 15.

⁴⁸ Clive Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (BRILL 2008) 5.

⁴⁹ Donald Rothwell and Tim Stephens, *The International Law of the Sea* (2nd ed, Hart Publishing 2016) 157.

⁵⁰ Juridical Regime of Historic Waters, Including Historic Bays [1962] 2 *YB International Law Commission* 1, UN Doc. A/CN.4/143, para 15.

⁵¹ *Ibid* para 32.

⁵² *Ibid* para 175-6.

⁵³ *Ibid* para 33 (emphasis added).

⁵⁴ *Ibid* para 75 (emphasis added).

To ensure comprehensiveness of *UNCLOS* governing all parts of the seas and to ensure its capability to resolve all, particularly jurisdictional issues, this clarification was later incorporated into *UNCLOS* Article 309 which permits no ‘reservations or exceptions’ to *UNCLOS*. Case study also provides similar understanding of historic waters. In the words of the International Court of Justice (hereinafter, the ICJ) in the *Fisheries Case*: ‘By “historic waters” are usually meant waters which are treated as *internal waters* but which would not have that character were it not for the existence of an *historic title*.’⁵⁵

In the absence of law of the sea treaties codifying the concept and scope of the doctrine of historic waters, this opaque area of the law of the sea, as the ICJ noted in the *Continental Shelf* case, continues to be governed by general international law ‘which does not provide for a single “régime” for “historic waters” or “historic bays”, but only for a particular régime for each of the concrete, recognized cases of “historic waters” or “historic bays”.’⁵⁶ In summary, although State practice and relevant court cases are scarce, they are supplemented by the UN Study and, as the ICJ stressed in the *Continental Shelf* case, each case of historic waters or historic bays must be *concrete* and *recognised*. Furthermore, despite the failure to codify the regime of historic waters due to the dilemma, three points may be inferred:

- (i) In the law of the sea, the term *historic title* is used in conjunction with *historic waters*;
- (ii) Claimed historic waters must be *adjacent* to the claimant State’s *coast*; and
- (iii) The legal status of *historic waters* is that of *internal waters* *i.e.* the relevant State enjoys *full sovereignty* over its historic waters.

With this background in mind and returning to the alleged/implied Chinese historic title claim, the following points may be made.

First, recalling the 1962 UN Study and Articles 10(6), 15 and 309, since for the purposes of *UNCLOS* the South China Sea is technically a semi-enclosed sea⁵⁷ and not a ‘bay’ in any sense, since the bulk of the waters within the NDL are not adjacent or in close proximity to any Chinese land, and because the purpose of the NDL is not ‘delimitation’ of ‘territorial seas’ between States, no reservations or exceptions can be made for a historic ‘title’ claim to the ‘entirety’ of the waters inside the NDL.

Second, if China truly regards its NDL claim as a historic ‘title’ claim *i.e.* ‘sovereignty’ over the ‘entire waters’ within the dashes, then it would not have found it necessary to establish straight baselines around the Paracel Islands in 1996, or claim a 12-mile territorial sea or make reference to existence of ‘the high seas’ between China’s islands and the mainland in 1958.

Third, some may argue that since historic title claims are matters not codified by the law of the sea and since the NDL predates *UNCLOS*, then according to the *UNCLOS* Preamble, such claims ‘continue to be governed by the rules and principles of general international law.’ However, the Preamble to *UNCLOS* explicitly states that it intends to settle ‘all issues’ relating to the law of the sea and Article 309 stresses that no reservations or exceptions may be made to *UNCLOS* ‘unless expressly permitted by other articles’ of *UNCLOS*. Moreover, even if historic title claims are to be studied in the light of ‘general international law’, Article 293 makes it clear that applicable rules must not be incompatible with *UNCLOS*.

Fourth, based on the UN Study, a valid historic *title* claim must satisfy *all* of the following requirements:⁵⁸

- (i) effective exercise of sovereignty by the claimant State over the area;
- (ii) continuity of such exercise of authority for a considerable time; and
- (iii) attitude and acquiescence of foreign States.

⁵⁵ *UK v Norway* [1951] ICJ Rep 116, 130 (emphasis added).

⁵⁶ *Tunisia/Libyan Arab Jamahiriya* [1982] ICJ Rep 18 [100].

⁵⁷ As per Article 122, a semi-enclosed sea means ‘a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States’.

⁵⁸ The UN Secretariat, above n 50, para 185.

A Chinese NDL historic 'title' claim would fail each and every one of these criteria.

Fifth, the ICJ decision in the *Fisheries Case*⁵⁹ is also sometimes invoked to justify a Chinese historic 'title' claim. It is true that based on historic title rationale, the ICJ approved Norway's claim of sovereignty over waters which were beyond the then 3-mile territorial sea limit. However, the decision was based on three important determinants. First, the existence of about 120,000 insular formations and complex configuration of the deeply indented Norwegian coastline, proved a 'close dependence of the territorial sea upon the land domain'⁶⁰ permitting Norway to establish 'straight' baselines along its craggy coastline for 'practical needs'. China obviously does not meet any of these conditions regarding craggy coastline and innumerable insular formations. Second, sea areas enclosed by such baselines were found to be 'sufficiently closely linked to the land domain to be subject to the regime of internal waters.'⁶¹ Waters enclosed by the NDL are way too far from China's mainland to be subject to even a regime of EEZ, let alone a regime of territorial sea or internal waters. Third, the ICJ also found certain economic interests 'peculiar' to Norway and 'evidenced by a long usage'.⁶² In fact, the inhabitants in some barren regions had been dependent on fishing for a long time and Norway had a record of 'exclusive' use of the fisheries from 1618 until 1906 when British fishing vessels re-appeared in the region.⁶³ Economic interests in the South China Sea, are not 'peculiar' to China nor have the resources within the NDL been used 'exclusively' by China as there are concrete historical evidence by other ASEAN (Association of Southeast Asian Nations) countries proving that they have contacted the islands for fishing and trading. In short, the *Fisheries Case* does not lend support to a Chinese historic 'title' claim.

Last but not least, it has been suggested that China's practice may have established a new rule in international law.⁶⁴ It is submitted, however, that giving weight and currency to such a view is unconstructive to say the least. Setting a precedent in the international law of the sea to recognise a coastal State's historic 'title' (*i.e.* full sovereignty) claim to waters and to all living and non-living resources in the water and underneath the seabed hundreds of miles beyond the State's territorial sea will have, at least in the present case, serious consequences. If the international community recognises a Chinese historic 'title' claim to the entire South China Sea, then China will have every right to shut the door on all foreign-flagged commercial, military and fishing vessels with a grave impact on the world's economy, peace and security. A Chinese historic 'title' claim to the entirety of the South China Sea is not only invalid but also impossible. How about a Chinese historic 'rights' claim?

4.3.2 Historic Rights Claim (Short of Sovereignty)

Setting aside the historic 'title' claim, opens the space for the littoral States surrounding the South China Sea to have their legitimate EEZ, and for certain areas of water to enjoy being the high seas within the NDL. Here comes the trouble though: In 2010, the President of the National Institute for South China Sea Studies stated that the NDL is based on the theory of 'sovereignty + UNCLOS + *historic rights*'.⁶⁵ Article 14 of China's *Exclusive Economic Zone and Continental shelf Act, 1998*, also provides: 'The provisions of this Act shall not affect the *historical rights* of the People's Republic of China.'⁶⁶ The question then arises as to whether China (or any other State for that matter) may have any historic 'rights' in the EEZ of other States.

In the light of case study, there are two distinct types of historic 'rights':

- (i) '*Non-exclusive historic rights*' which mainly include fishing rights in various maritime zones; and

⁵⁹ *UK v Norway* [1951] ICJ Rep 116.

⁶⁰ *Ibid* 133.

⁶¹ *Ibid*.

⁶² *Ibid*.

⁶³ *Ibid* 124.

⁶⁴ Keyuan Zou, 'China's Approach to UNCLOS and its Application to Disputed Issues in the South China Sea' in Jill Barrett (ed) and Richard Barnes (ed), *The Law of the Sea: UNCLOS as a Living Treaty* (BIICL 2016) 362, 368. (Admitting that China's claim is not limited to the fisheries on the high seas but is in fact broader in scope, the author seems to have consciously used the generic term 'historic rights' to mean exclusive historic rights 'with full sovereignty' *i.e.* historic 'title'. This is apparent from the previous page where the author clearly distinguishes between the two).

⁶⁵ *Ibid* 367 (emphasis added).

⁶⁶ 'Exclusive Economic Zone and Continental Shelf'

<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf> accessed 6 April 2020 (emphasis added).

- (ii) *'Exclusive historic rights'* which include sovereign rights over resources and/or the superjacent waters and which are regarded to have a 'quasi-territorial or zonal impact beyond the territorial sea'.⁶⁷

Since China has not clarified the 'type' of its historic 'rights' claim to the NDL, it will be analysed, in the next sections, whether China's historic 'rights' claim may validly fall into either of these two categories of historic 'rights'.

4.3.2.1 Non-Exclusive Historic Rights Claim

The Tribunal did not expressly distinguish between 'non-exclusive' and 'exclusive' historic rights and ruled out the possibility of both types of rights in the EEZ of other States. For example, in relation to historic fishing rights, the Tribunal stated that the notion of a coastal State 'having *sovereign* rights over living and non-living resources is generally incompatible with another State having *historic rights* to the same resources, *in particular if such historic rights are considered exclusive*'.⁶⁸ Reference to 'historic rights' and 'if such historic rights are considered exclusive' indicates that, the Tribunal did recognise (albeit obliquely) the difference between 'non-exclusive' and 'exclusive' historic rights but, nevertheless, treated both types in the same way. In effect, therefore, the Tribunal concluded that under *UNCLOS*, even 'non-exclusive' historic rights have not been preserved in the EEZ of other States. However, regardless of the decision on the merits, the *reasoning* of the Tribunal is, with respect, arguable for the following reasons.

Firstly, the Tribunal's conclusion is not in line with previous arbitral decisions that have recognised the existence of non-exclusive rights, *e.g.* traditional fishing rights, 'beyond the territorial waters'⁶⁹ including the EEZ of other States. Secondly, the Tribunal reasoned that *UNCLOS* does not expressly require coastal States to recognise historic fishing rights within their EEZ and that pursuant to Article 62, a coastal State is obliged to permit fishing by foreign nationals in its EEZ only if the coastal State lacks the capacity to harvest the entire allowable catch. It further argued that '[e]ven then, *historic fishing* in the area is only one of the criteria to be applied in allocating access'.⁷⁰ The Tribunal, accordingly, argued that the inclusion of this provision 'would be entirely unnecessary if traditional fishing rights were preserved in the exclusive economic zone'⁷¹ and that 'any historic rights China may have had in the waters of the South China Sea beyond its territorial sea were extinguished by the adoption in the Convention [i.e. *UNCLOS*] and in customary law of the concept of the exclusive economic zone'.⁷² However, it is to be noted that Article 62(3) does not use the term 'historic fishing'. Rather, it speaks of foreign States whose nationals have 'habitually' fished in the EEZ. The Tribunal's interpretation, therefore, holds true only if 'habitual fishing' of a foreign State's 'nationals' can be equated with 'historic fishing rights' of the 'State' itself. This seems rather far-fetched. Even if so, why did the drafters refrain from using more wide-spread and well-established standard terms such as 'historic fishing rights' and instead used general phrases to speak about individuals who have 'habitually' fished in the EEZ? Furthermore, Article 58(2) provides that apart from Article 62(3), 'other pertinent rules of international law' also apply to the EEZ. There is nothing to suggest that rules relating to 'historic fishing rights' cannot be amongst 'other pertinent rules of international law' that apply to the EEZ. It is, therefore, submitted that the purpose of Article 62(3) is ensuring optimum utilisation of living resources in the EEZ for the benefit of humankind rather than excluding historic fishing rights of other States in an extremely complicated and vague manner.

Rather strangely, despite ruling out historic rights of foreign States in the 'EEZ' of a coastal State, the Tribunal concluded that such rights can exist in the 'territorial seas' of the coastal State. In doing so, the Tribunal argued that there is nothing to suggest that *UNCLOS* intended to alter acquired rights in the territorial sea and thus, established traditional fishing rights of foreign States in the territorial waters of a coastal State remain protected by international law.⁷³ Article 2(3) provides that '[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law'. The Tribunal construed this Article together with the absence of any *UNCLOS* provision regarding historic fishing rights in the territorial sea, as the legitimacy of any traditional fishing rights in the territorial sea which were established prior to adoption of *UNCLOS*. As alluded to earlier, in reaching its conclusion regarding the legal status of historic rights claims in the EEZ of other States,

⁶⁷ Sophia Kopela, 'Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration' (2017) 48(2) *Ocean Development & International Law* 181, 188.

⁶⁸ Award, para 243 (the second and third emphases are added).

⁶⁹ *E.g. Eritrea/Yemen Arbitration* (Phase Two: Maritime Delimitation) [2001] 40 ILM 983 [109].

⁷⁰ Award, para 242 (emphasis added).

⁷¹ *Ibid* para 804(b).

⁷² *Ibid* para 800.

⁷³ *Ibid* para 804(c).

one of the arguments that the Tribunal made was that the notion of the coastal State having *sovereign rights* over the resources in its EEZ is generally incompatible with another State having historic rights to the same resources.⁷⁴ With respect, it is submitted that this argument may not resolve the legal status of historic rights claims in *all* maritime zones because if the same argument is applied to the ‘territorial sea’, it will produce undesirable and contradictory results: since a coastal State’s *sovereignty* over its territorial sea is much stronger than its sovereign rights in its EEZ, the notion of the coastal State having *sovereignty* over its territorial sea and its resources, is far more irreconcilable with another State having historic rights to the same resources. Moreover, according to Article 19(2)(i), a foreign vessel is not allowed to engage in ‘any fishing activities’ in the territorial sea of the coastal State; not even during a passage. Thus, if the Tribunal’s approach is adopted, then foreign States cannot have *any* fishing rights in the territorial sea of the coastal State and this would contradict the Tribunal’s own conclusion that foreign States can have fishing rights in the territorial sea of a coastal State.

To avoid such contradictions, it should be noted that States may reach an *agreement* to recognise any valid historic rights that they may have in each other’s maritime zones regardless of what *UNCLOS* provisions may provide about such rights in such maritime zones. In other words, even if *UNCLOS* had expressly precluded historic rights of a foreign State in the EEZ or in the territorial sea of a coastal State, nothing would still prevent the two States to recognise such rights in those maritime zones through an agreement. In fact, at *UNCLOS II*, a compromise was attempted to be achieved between the pre-*UNCLOS* non-exclusive historic fishing rights of third States and the post-*UNCLOS* exclusive fishing rights of the coastal State in its maritime zones. However, following the failure of *UNCLOS II*, the issue regarding ‘territorial sea’ was subsequently settled through ‘bilateral fishing agreements’.⁷⁵ Similar agreements can be reached for non-exclusive historic rights in the ‘EEZ’ too. The upshot is that, in fairness to China (or any other State for that matter), a States *can* have *non-exclusive* historic rights in the territorial sea or EEZ of another State. To put it another way, China may claim non-exclusive historic rights over resources in the maritime zones of another State in order to have a *shared* access to those resources *with* that State; hence the term *non-exclusive*. It must be emphasised that this conclusion does not mean that China has any legitimate non-exclusive historic rights within the NDL. It simply means that, *in theory*, a State *may* have non-exclusive historic rights over specified living and/or non-living resources in a specified part of another State’s EEZ or territorial sea, and China is no exception.

However, since the NDL map does not make any reference to *specified* areas or resources that its dashes surround, a non-exclusive historic right claim implied by the map necessarily has to be to the *entire* area within the dashes and to the *entire* living and non-living resources therein. Such a claim would simply be invalid for the following reasons. With regard to non-living resources, there are enormous amounts of oil and natural gas in various locations in the South China Sea that have not yet been extracted or even discovered by any State.⁷⁶ How can then China (or any other State for that matter) have any *historic* right over something outside its EEZ that has not been discovered yet? A historic right in a foreign State’s maritime zones is gained through continuous and undisputed exercise of jurisdiction over the resources in question for a sufficiently long period of time. In respect to living resources, there is no concrete evidence to establish that China has historic fishing rights in every single geographical location within the huge body of water demarcated by its capacious NDL map.

It follows that due to the lack of specificity as to what areas or resources are covered, the NDL map cannot, *per se*, denote a Chinese non-exclusive historic rights claim. If China believes that it has any legitimate non-exclusive historic rights in another coastal State’s maritime zones in the South China Sea, it should formally and unambiguously *specify* the resources and the associated area(s) and then, pursuant to Articles 279 and 280, conduct negotiations with the relevant coastal State(s) to settle the potential disputes through peaceful means. But China has never specified the resources or the areas associated with its historic rights claim nor has it ever entered into any negotiations with the concerned State(s). This is probably because China’s vague historic rights claim is not a non-exclusive one; it appears to be an *exclusive* one⁷⁷ and this is inferred from ‘the complete prevention by China of fishing by Filipinos at Scarborough Shoal over significant periods of time after May 2012’.⁷⁸ Since Scarborough Shoal lies within *UNCLOS* 200-nautical mile EEZ of the Philippines, China’s *complete* prevention of fishing by Filipinos at the Shoal, suggests that China implicitly asserts *exclusive* historic fishing rights within the NDL. It should, therefore, be analysed how valid a Chinese ‘exclusive’ historic rights claim might be.

⁷⁴ Ibid para 243.

⁷⁵ Sophia Kopela, above n 67, 195.

⁷⁶ ‘South China Sea’, *U.S. Energy Information Administration* (15 October 2019)

<https://www.eia.gov/international/analysis/regions-of-interest/South_China_Sea> accessed 26 July 2020.

⁷⁷ *Award*, para 243.

⁷⁸ Ibid para 812.

4.3.2.2 Exclusive Historic Rights Claim

A State having ‘exclusive’ historic rights over certain resources in the EEZ of a coastal State means that even the coastal State itself is not entitled to have access to the resources. In a maritime delimitation context in *Tunisia/Libya*⁷⁹ and in relation to Tunisia’s alleged historic fishing rights, the ICJ stated that: ‘Historic titles must enjoy respect and be preserved as they have always been by long usage.’ The Court, however, while noting that ‘Tunisia’s historic rights *may be relevant* for the decision...*in a number of ways*’,⁸⁰ did not find it necessary to take the issue into account for the final delimitation. Nonetheless, Judge Aréchaga said, in his Separate Opinion, that besides the historic factor, there are ‘other special circumstances equally relevant’ and that based on the *travaux préparatoires* of the 1958 Convention [UNCLoS I], the historic factor is included in the wider formula of “special circumstances”.⁸¹

Thus, in *Qatar/Bahrain*⁸² where Bahrain claimed ‘exclusive’ historic rights over pearling banks in an area of disputed seabed, the ICJ while taking note of the facts that the pearling activity had also been carried out by other nationals and the activity had ceased to exist a long time ago, held that even if pearling had been carried out by fishermen from one State only, this never ‘led to the recognition of an *exclusive quasi-territorial* right to the fishing grounds themselves or to the superjacent waters.’⁸³ The Court, therefore, held that the alleged historic rights did not amount to a ‘special circumstance’ for adjusting the provisional equidistance line in order to achieve an equitable result. Perusing the judgment, one is driven to the conclusion that for an exclusive quasi-territorial right, there must have existed an *exclusive* and *continuous* exercise of *sovereignty* over the claimed subject matter, or at least the activity must have been exercised with an *animus domini i.e.* with an *intention* to assert *sovereignty*.

Returning to the issue in question, China has never exercised *exclusive* sovereignty or jurisdiction over living resources in waters within the NDL either before or after the official publication of the map and foreign vessels have always been and still are fishing in these waters.⁸⁴ Similarly, China has not exercised *exclusive* jurisdiction over non-living resources as Malaysia, the Philippines, Brunei, Indonesia, and Vietnam have all undertaken hydrocarbon exploration activities in the South China Sea.⁸⁵ Since China has not exercised *exclusive* and *continuous* jurisdiction over living or non-living resources in the South China Sea, the NDL map cannot signify a Chinese ‘exclusive’ historic right over living or non-living resources within the dashes.

4.4 Summary of the NDL Interpretations

China’s claims and statements regarding its NDL map remain vague, inconsistent and contradictory. For instance, while the NDL map submitted to the UN in 2009 included nine dashes, China’s new national NDL map published in 2013 includes a tenth dash to the east of Taiwan.⁸⁶ Although the added dash itself is not new, it is indicative of China’s ambiguous intentions and changing claims. In fact, the formation and development of China’s NDL claims have been affected by historical events over the course past decades. It is believed that China’s NDL claims are, at least partially, based on the U-Shaped Line which was compiled by Hu Jinjie, a Chinese cartographer.⁸⁷ The U-Shaped Line only included the Dongsha (Pratas) Islands and Xisha (Paracel) Islands and was later published in 1920s and 1930s.⁸⁸ In 1933, the U-Shaped Line was stretched south to 7-9° N latitude to demonstrate China’s sovereignty over small features of the Nansha Islands in reaction to the occupation of those features by France, the then protector of Vietnam.⁸⁹ This modification suggests that the U-Shaped Line was originally used as an ‘island attribution’. Two years later the U-Shaped Line was extended further south to 4° N latitude to include the James Shoal for the first time; in 1947 the U-Shaped Line was replaced by 11 dashes; and in 1953 two of the 11 dashes were eliminated without any official explanations.⁹⁰ It has been argued that the ideas about China’s

⁷⁹ [1982] ICJ Rep 18 [100].

⁸⁰ Ibid [102] (emphasis added).

⁸¹ ‘Separate Opinion of Judge Jiménez De Aréchaga’ (PDF) [page 80] <<http://www.icj-cij.org/files/case-related/63/063-19820224-JUD-01-03-EN.pdf>> accessed 8 April 2020.

⁸² [2001] ICJ Rep 40.

⁸³ Ibid [236] (emphasis added).

⁸⁴ Leonardo Bernard, ‘The Right to Fish and International Law in the South China Sea’ (2016) 4(1) Journal of Political Risk 1, 14.

⁸⁵ United States Department of State, ‘Limits in the Seas, No.143: China: Maritime Claims in the South China Sea’ (PDF, 05 December 2014) [page 21] <<https://www.state.gov/wp-content/uploads/2019/10/LIS-143.pdf>> accessed 26 July 2020.

⁸⁶ Euan Graham, ‘China’s New Map: Just Another Dash?’, *The Strategist* (17 September 2013) <<https://www.aspistrategist.org.au/chinas-new-map-just-another-dash/>> accessed 25 July 2020.

⁸⁷ Zou Keyuan and Liu Xinchang, ‘The Legal Status of the U-shaped Line in the South China Sea and Its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction’ (2015) 14(1) Chinese Journal of International Law 57, 62.

⁸⁸ Wu Shicun, *Solving Disputes for Regional Cooperation and Development in the South China Sea: A Chinese Perspective* (Chandos Publishing 2013) 79.

⁸⁹ Ibid.

⁹⁰ Ibid.

NDL claims emerged in distinct episodes during the first half of the twentieth century in response to domestic political crises and that the ideas were primarily aimed at domestic audiences mainly as attempts to shore up declining nationalist legitimacy.⁹¹

After such a long period of time and several changes to the map, China still has not clarified the legal basis or even the nature or scope of its claims within the NDL map. Nevertheless, whatever the intended purpose of the NDL map might be, the foregoing analyses indicate that the only valid interpretation of the map is ‘island attribution’ *i.e.* it lays sovereignty claim to the *islands* surrounded by the dashes.⁹² The map cannot signify historic *title i.e.* China cannot have *sovereignty* over the entire waters and seabed demarcated by the NDL. Such a claim would not pass the legal test for historic *title*, it would not be consistent with State practice and would not be recognised by international law. The NDL does not satisfy the criteria to qualify as a maritime boundary either. There are two types of historic *right* over living and/or non-living resources of seawater or seabed: non-exclusive and exclusive. With respect to non-exclusive historic rights, although the Tribunal held that such rights can only exist in the territorial seas of foreign States, it is submitted that they can also exist in the EEZ of other States if there is a bilateral agreement. With regard to exclusive historic rights, courts or tribunals have neither granted nor denied such rights and the issue remains somewhat obscure under both case law and UNCLOS. It is submitted that these rights should also be generally recognised because disturbing long-standing regimes would defeat the ultimate purpose of law *i.e.* order and stability. Issues relating to both non-exclusive and exclusive historic rights may be resolved through agreements to ensure the existence and continuity of such rights. For instance, India and Sri Lanka settled their dispute through the 1976 Agreement that ensured the interests of both sides.

The NDL map can, theoretically, signify Chinese *non-exclusive* historic rights over the enclosed living and/or non-living resources provided that (in the unlikely event) China successfully establishes the legitimacy of such historic rights in specific areas within the NDL through bilateral agreements with the concerned coastal States. Although reaching even a *non-exclusive* historic right agreement with any of the concerned coastal States would be next to impossible, China appears to be claiming an *exclusive* historic right over the entire living and non-living resources within the NDL. It is worth noting that during the Third UN Conference on the Law of the Sea, China strongly opposed ‘maritime hegemony’ and supported the proposition of less developed States who wished to assert 200-nautical mile EEZs to control their offshore resources against the view of the United States and the Soviet Union who wished to restrict them to a 12-nautical mile territorial sea.⁹³ Today, however, while *UNCLOS* promises the coastal States in the South China Sea a 200-nautical mile EEZ and control of its resources, China encroaches upon their EEZs under the pretext that it has *exclusive* historic rights within the NDL which is why weaker claimant States increasingly look on China as the maritime hegemon it denounced during the *UNCLOS* negotiations.⁹⁴ As analysed above, the NDL map can never mean a Chinese *exclusive* historic right over living or non-living resources in the South China Sea. Proving *exclusive* and *continuous* jurisdiction over living or non-living resources in the South China Sea is simply impossible for China or any other State for that matter. Consequently, China may then assert that such resources are located within the 200-mile EEZ arc emanated from its (contested) islands in the South China Sea. There is a small problem here: China has to first distinguish between ‘island’ and ‘rock’.

5 Island or Rock?

In its relatively recent 2011 Note Verbale, China has explicitly claimed that [all] Nansha (Spratly) Islands are ‘fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ), and Continental Shelf.’ It fails to distinguish between ‘low-tide elevations’, ‘islands’ and ‘rocks’ within the meaning of *UNCLOS*. A low-tide elevation is defined in Article 13(1) as ‘a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.’ Article 13(2) also makes it absolutely clear that where a low-tide elevation ‘is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.’ Although Spratly Islands consist of over 170 insular features, majority of them are submerged banks and shoals and only about 36 tiny features are above the water.⁹⁵ Thus, despite China’s 2011 Note Verbale, only these 36 features *may* potentially be entitled to territorial sea and EEZ. Furthermore, Article 121(3) provides that ‘rocks’ which ‘cannot sustain human habitation or economic life of their own’ shall have no EEZ or

⁹¹ Bill Hayton, ‘The Modern Origins of China’s South China Sea Claims: Maps, Misunderstandings, and the Maritime Geobody’ (2019) 45(2) *Modern China* 127, 127-8.

⁹² See also Chris PC Chung, ‘Drawing the U-Shaped Line: China’s Claim in the South China Sea, 1946–1974’ (2016) 42(1) *Modern China* 38.

⁹³ Douglas Guilfoyle, ‘The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea’ (2019) 95(5) *International Affairs* 999, 1006-7.

⁹⁴ *Ibid* 1016.

⁹⁵ Robert Smith, ‘Maritime Delimitation in the South China Sea: Potentiality and Challenges’ (2010) 41(3) *Ocean Development & International Law* 214, 222.

continental shelf. The issue, therefore, boils down to whether any of those 36 features can ‘sustain human habitation or economic life of their own’ to be then regarded as an ‘island’ which, as per Article 121(2) is capable of emanating EEZ and continental shelf. Whomersley⁹⁶ argues that ‘if a feature *can* sustain human habitation and an economic life, it does not matter *how* it does so.’ However, this seems to be an extreme view. If this was the intent of the drafters, they would not have even bothered themselves to provide Article 121(3) because based on that interpretation, every single minute islet with no drinking water and with no arable land still *can* sustain human habitation provided that all the necessaries are supplied to the islet from the outside world. This argument does not hold true simply because the feature must sustain human habitation ‘of its own’. Thus, it does matter *how* a feature sustains human habitation.

If an insular feature cannot supply daily freshwater, if it is not capable of growing vegetation, and if does not produce any material for human shelter, it is hard to see how any human may independently survive on that feature. Although apparently Itu Aba Island and Pagasa Island may be capable of supplying freshwater for daily use,⁹⁷ one should ask oneself that if any of the Spratly Islands is truly capable of sustaining human habitation, why then none of the islands has indigenous inhabitants⁹⁸ after centuries? Probably because no one could have survived on them. As the Tribunal has rightly pointed out, the current presence of the ‘governmental personnel’ on the features, does not alter their legal status from ‘rock’ to ‘island’ as the life of the personnel is heavily dependent on the ‘outside supply’.

The next point is that in order for insular features to qualify as ‘islands’, they must sustain economic life ‘of their own’. This means that the feature, itself, must be able to support an independent economic life without relying predominantly on external resources.⁹⁹ Of course, if the resources *on* the feature are not sufficient to *sustain* an independent economic life, the inhabitants may still engage in economic activities such as fishing and pearling *beyond* the coastline of the feature and in the waters *around* the feature. The question, however, is whether these economic activities beyond the coastline qualify the feature to sustain economic life of ‘its own’. What is the distance from the coastline and towards the sea within which the resources and related economic activities can be considered to be *of* the feature itself? It can be inferred from Article 13 that any naturally formed area of land which is surrounded by and above water at all times, will always have a *territorial sea* ‘of its own’. Accordingly, a feature which is permanently above water and which has lucrative fish stocks within its *territorial sea*, can have economic life ‘of its own’. This means that territorial sea is an *inherent* part of any (however small) insular feature which is permanently above water. Waters *beyond* the territorial sea, however, do not inherently belong to the feature; they have to be *generated* as EEZ by the feature. And in order for the feature to be entitled to generate such EEZ, the feature has to be an ‘island’, not an Article 121(3) ‘rock’. Thus, it is submitted that the sea resources and the related economic activities like fishing or exploration and exploitation of non-living resource beyond the territorial sea of insular features do not satisfy the requirement because features must sustain economic life ‘of their own’ to be then considered as an ‘island’ and be entitled to generate maritime zones. The converse would be an absurdity. The *land* dominates the sea. The *land* generates the EEZ and the continental shelf which can then be exploited by the inhabitants of the land.

There is also a confusion about the function of the conjunction ‘or’ in the phrase ‘sustain human habitation or economic life of their own’. Put differently, is it necessary for a feature to sustain *both* human habitation *and* economic life of its own to be then considered as an ‘island’? Answering the question in the negative, the Tribunal stated that ‘an island that is able to sustain *either* human habitation *or* an economic life of its own is entitled to *both* an exclusive economic zone *and* a continental shelf’.¹⁰⁰ The Tribunal, nonetheless, observed that, in practical terms, the two concepts are linked because ‘economic activity is carried out by humans and that humans will rarely inhabit areas where no economic activity or livelihood is possible’.¹⁰¹ Assume, for the sake of argument, that an insular feature that cannot sustain human habitation due to, for example, its volcanic activities, has very rich fisheries within its inherent territorial sea. In one sense, it might be thought that the feature can have its own economic life because those resources inherently belong to the feature and can be exploited by humans as an economic activity to support life. However, such resources without life *i.e.* without settled inhabitants *on* the feature, do not enable the feature to generate an EEZ or continental shelf, otherwise, even a minute barren atoll

⁹⁶ Chris Whomersley, ‘The Award on the Merits in the Case Brought by the Philippines against China Relating to the South China Sea: A Critique’ (2017) 16(3) *Chinese Journal of International Law* 387, para 39 (the first emphasis is added).

⁹⁷ Clive Schofield (ed), ‘Maritime energy resources in Asia: Legal Regimes and Cooperation’ (2012) 37 *National Bureau of Asian Research* 76.

⁹⁸ ‘China’s Assertiveness in the Paracel and Spratly Islands: A Sign of Weakness, Not Strength’, *Defence Viewpoints* (02 April 2018) <<https://www.defenceviewpoints.co.uk/articles-and-analysis/chinas-assertiveness-in-the-paracel-and-spratly-islands-a-sign-of-weakness-not-strength>> accessed 27 July 2020.

⁹⁹ *Award*, para 500.

¹⁰⁰ *Ibid* para 496.

¹⁰¹ *Ibid* para 497.

with no inhabitant could generate a huge area of EEZ which is absurd and inequitable. A settled human population on the feature is, therefore, essential. Conversely, assume that a minuscule insular feature can accommodate a few humans but it is completely made of hard stone, it has no natural food or freshwater resources and is located in the middle of the ocean where no living resources can be found within its territorial sea and everything, from building materials to food, has to come from the outside world. One may think that, in a sense, the feature can sustain human habitation. However, as pointed out by the Tribunal, the notion of ‘habitation’ includes a ‘qualitative element’ that is particularly related to permanent settlement and residence.¹⁰² Thus, the mere presence of a few governmental personnel who may, later on, be replaced by other personnel does not constitute ‘habitation’. The mere presence of a few temporary or even permanent personnel who have to live under unfavourable circumstances on a small islet and who absolutely depend on external resources, seems to be more of a ‘survival’ than ‘habitation’. Thus, having sufficient space and resources to sustain a normal life is another essential element for an insular feature. It is, therefore, submitted that an insular feature should be entitled to an EEZ and continental shelf only if it is able to sustain *both* human habitation *and* an economic life of its own.

Some may argue that the features in the Spratly Islands may be able to sustain human habitation in the *future*. That is true. In the future, population explosion will probably change not only the way people presently live, but also the relevant laws and regulations. Currently and under the present laws and regulations, however, the foregoing arguments suggest that none of the features in the Spratly Islands qualify as an ‘island’ capable of generating an EEZ or a continental shelf.¹⁰³ The issue is worth analysing in a wider scope. There are countless small, uninhabited and scattered insular features across the oceans that were *res nullius* for almost all human history, and even after their recent acquisition they were totally ignored until the emergence of *UNCLOS*. Thus, granting a huge amount of ocean resources to the distant absentee landlords based on their minute, mid-oceanic, uninhabited and previously disregarded features, would be a serious disregard of the *UNCLOS* spirit which aims to promote ‘equitable utilization’¹⁰⁴ of the ocean resources. Such resource allocations in the absence of any genuine inhabitants on the feature to use those resources in the surrounding waters, would be an absurdity. In fact, as Smith remarks,¹⁰⁵ the purpose of Article 121(3) is (or at least was!) to prevent States from claiming a huge area of ocean space and seafloor based on a mid-oceanic tiny feature. Undoubtedly, Article 121(3) despite representing the result of about 10 years of negotiations,¹⁰⁶ is drafted very poorly. Apart from its general vagueness, it does not define ‘rock’ and thus, States can construe it as it best suits their interests. For example, States may argue that for a feature to be deprived of the status of ‘island’, it must *geologically* be a rock.¹⁰⁷ Regrettably, because many States have uninhabited small islands, most of them kept quiet about the vague language of Article 121(3) throughout the *UNCLOS* negotiations.¹⁰⁸

Reverting to the South China Sea Dispute, it is submitted that the island-or-rock arguments are misleading because, undeniably, such arguments are all rivalries for opportunistically grabbing the resources in the potential EEZ and continental shelf around those features. This is clearly reflected in the Chinese 2011 Note Verbale. For this reason, and because of the vagueness of Article 121(3) and because whether or not Article 121(3) has become a rule of customary international law is open to serious doubt,¹⁰⁹ it is suggested that attention should be focused on the stake itself: the ‘delimitation’. Since any 200-mile EEZ generated by Spratly Islands would overlap with the 200-mile EEZs emanated from the coastlines of Vietnam, the Philippines and the northeast part of Malaysia, rules of maritime delimitation should apply. Looking at the island/rock issue from this perspective, even if China has full sovereignty over Spratly features and even if the features are ‘islands’ and do generate an EEZ, the ICJ has decided not to give very small islands their full potential entitlement to maritime zones or even ‘not to take account’ of them at all, should such an approach have a ‘disproportionate effect’ on the delimitation line.¹¹⁰ Thus, in terms of maritime delimitation, despite China’s claim in its 2011 Note Verbale, State practice and international jurisprudence would not grant the minuscule, isolated and sparse Spratly Islands considerable weight or full maritime zones, especially when pitted against the opposing massive, long and continuous coastlines of the other littoral States in the area. What if China resorts to doping in the competition and swells those tiny atolls and low-tide elevations in order to turn them into big real ‘islands’?

¹⁰² Ibid para 489.

¹⁰³ Cf American Society of International Law, ‘The Regime of Islands in the Aftermath of the South China Sea Arbitration’ (2018) 112 Proceedings of the ASIL Annual Meeting 3, 3-14.

¹⁰⁴ *UNCLOS*, the Preamble.

¹⁰⁵ Robert Smith, above n 95, 220.

¹⁰⁶ David Attard (ed), Malgosia Fitzmaurice (ed) and Norman A Martinez Gutierrez (ed), *The IMLI Manual on International Maritime Law: Volume I: The Law of the Sea* (OUP 2014) para 4.2.3.

¹⁰⁷ The Tribunal rightly ruled out this interpretation in paragraphs 479-82 of the *Award*.

¹⁰⁸ John Van Dyke, ‘Uninhabited Islands: Their Impact on the Ownership of the Oceans’ Resources (1983) 12 *Ocean Development & International Law* 265, 288.

¹⁰⁹ RR Churchill and AV Lowe, *The Law of the Sea* (3rd ed, MUP 1999) 164.

¹¹⁰ *Romania v Ukraine* [2009] ICJ 61 [185].

6 Island Enlargement

China has been carrying out extensive artificial island-building projects on seven reefs in the Spratly Islands and has expanded some features by artificial installations to the extent that distinguishing between natural and artificial parts of the features has become difficult.¹¹¹ Firstly, artificial islands and installations cannot generate *any* maritime zone, nor can they affect the delimitation of *any* maritime zone.¹¹² It follows that expanding an insular feature cannot alter its legal status and cannot turn it from a low-tide elevation or a 'rock' into an 'island'. The Chinese island-building activities is aggravating the complexity of the South China Sea Dispute, and is encroaching upon and endangering the 'Area' and its resources which are the 'common heritage of mankind'.¹¹³ Secondly, as the Tribunal pronounced,¹¹⁴ such constructions on sensitive reefs have caused and will cause more pollution and harm to the marine environment and ecosystems. This amounts to a violation of Article 192. Yet, rather than reconsidering its actions or at least developing legal arguments for its position, China has apparently decided to gain the upper hand by using its military power as a last resort.

7 Military Activities

China has built military length airstrips on the contested Spratly Islands and has deployed fighter jets, cruise missiles and radar systems on Woody Island.¹¹⁵ This is a serious violation of the UN Charter Article 2(3) and *UNCLOS* Articles 279 and 301 that oblige States to settle disputes by peaceful means and to refrain from any threat or use of force. Moreover, China's attitude in *The Impeccable* incident in 2009 does not seem to be impeccable. Surrounding, bullying and harassing an unarmed ocean surveillance vessel is hardly defensible. Firstly and interestingly, China's Foreign Ministry Spokesperson stated that the *Impeccable* was engaged in activities in 'China's exclusive economic zones' without our permission.¹¹⁶ Here, again, reference to China's 'EEZ' implicates that China's claim cannot be, and in practice is not, a historic *title* (sovereignty) claim to the *entirety* of the waters within the NDZ. Secondly, the incident raised two separate but related issues. It raised an issue regarding legality of military activities of foreign vessels in the EEZ as *UNCLOS* neither expressly authorises nor prohibits such activities in the EEZ. Further, foreign ships must not involve in activities that constitute 'threat or use of force' against the 'territorial integrity or political independence' of the coastal State or in any other manner inconsistent with the UN Charter.¹¹⁷ The incident, therefore, also raised the question of whether the surveying activities of the *Impeccable* constituted 'threat or use of force' against China's interests and whether military activity of foreign-flagged vessels in the EEZ of a coastal State is lawful. These will be scrutinised below.

The *USNS Impeccable* is an unarmed American ocean surveillance ship which is used to map the ocean floor, and the data is used by the US Navy to steer its own submarines or detect and track submarines of other States.¹¹⁸ In March 2009, several Chinese vessels surrounded and harassed the *Impeccable* on different occasions in the South China Sea, 75 miles south of Hainan Island. On one occasion, the *Impeccable* was shadowed by five Chinese ships including two naval trawlers which manoeuvred dangerously close to the *Impeccable* and ordered her to leave the area, and when the *Impeccable* was trying to leave the area, the trawlers stopped directly in front of her which forced her to do an emergency stop to avoid collision.¹¹⁹ On another occasion, a Chinese intelligence ship contacted the *Impeccable* over the radio and directed her to leave the area or 'suffer the consequences'.¹²⁰ The *Impeccable's* activities, obviously, did not constitute 'use of force'. Quite the contrary, the actions of the Chinese vessels did.

The wider question is whether or not foreign-flagged vessels are entitled to engage in military, surveying or mapping activities in the EEZ of a coastal State. Strictly speaking, the EEZ has essentially an *economic* nature which is why *UNCLOS* has clearly attributed rights and duties of the coastal States and other States in the EEZ in

¹¹¹ Robert Smith, above n 95, 223.

¹¹² Article 60(8).

¹¹³ Article 136.

¹¹⁴ *Award*, para 979-83.

¹¹⁵ David Brunnstrom, 'China Installs Weapons Systems on Artificial Islands: U.S. Think Tank', *Reuters* (14 December 2016) <<https://www.reuters.com/article/us-southchinasea-china-arms/exclusive-china-installs-weapons-systems-on-artificial-islands-u-s-think-tank-idUSKBN1431OK>> accessed 28 July 2020.

¹¹⁶ 'Foreign Ministry Spokesperson Ma Zhaoxu's Remarks on US Navy Surveillance Vessel's Activities in China's Exclusive Economic Zone', *Embassy of The People's Republic of China in the United Kingdom of Great Britain and Northern Ireland* (13 March 2009) <<http://www.chinese-embassy.org.uk/eng/zf/fyrth/t542172.htm>> accessed 12 April 2020.

¹¹⁷ Article 301.

¹¹⁸ 'China Hits Out at US on Navy Row', *BBC News* (10 March 2009) <<http://news.bbc.co.uk/1/hi/world/asia-pacific/7934138.stm>> accessed 15 April 2020.

¹¹⁹ 'USNS *Impeccable* (T-AGOS-23)', *Wikipedia* (13 March 2020) <[https://en.wikipedia.org/wiki/USNS_Impeccable_\(T-AGOS-23\)](https://en.wikipedia.org/wiki/USNS_Impeccable_(T-AGOS-23))> accessed 15 April 2020.

¹²⁰ *Ibid.*

respect of *economic* activities such as exploration and exploitation of the natural resources, construction and use of artificial islands and so on. There are, however, some other, such as military uses of the EEZ that *UNCLOS* does not explicitly address. In this regard, military activities of foreign ships in the EEZ of a coastal State is a vexed issue as it is not clear which State has jurisdiction over such activities. Article 59 provides a general solution for unspecified uses of the EEZ by stating that:

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved *on the basis of equity* and in the light of all the *relevant circumstances*, taking into account the respective importance of the interests involved to the parties as well as to the *international community as a whole*.¹²¹

The fact that Article 59 contains no presumption in favour of either the coastal State or other States, suggests that the attribution of unspecified uses of the EEZ is to be decided on a case-by-case basis.¹²² As noted by Professor Klein, while Article 59 maintains neutrality, the general reference to ‘all the relevant circumstances’ in the Article covers an overly broad spectrum of factors and the lack of specificity as to what factors might be more important than others, means that Article 59 is void of any normative content and its intended purpose cannot be attained without application of the mandatory procedures of dispute settlement in Part XV of *UNCLOS*.¹²³ However, since the US is not a State party to *UNCLOS* and because other naval powers such as Canada, France and Russia have taken advantage of Article 298(1)(b) by excluding ‘disputes concerning military activities’ from the mandatory procedure,¹²⁴ the likelihood of the issue being clarified through judicial application is rather slim.

The issue, therefore, should be looked at from a wider angle. Treaties must be interpreted in accordance with the rules laid down in the *Vienna Convention on the Law of Treaties, 1969*. Article 31(1) of this Convention states that a treaty must be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ If application of these interpretation rules still leaves the meaning ambiguous or obscure, then in accordance with Article 32 of the *Vienna Convention*, recourse may be had to ‘the preparatory work of the treaty and the circumstances of its conclusion’, in order to determine the meaning. In the light of the preparatory work of *UNCLOS*, it may be argued that *UNCLOS* generally does not grant the coastal States the power to regulate military activities of other States in its EEZ. During the *UNCLOS* negotiations, a proposal by El Salvador to insert into Article 56 an element of ‘residual competences and rights’ in favour of the coastal State was considered and rejected.¹²⁵ Similarly, proposals to require other States to have due regard to the ‘security interests’ of the coastal State were not accepted.¹²⁶ Also, Peru made a proposal to require foreign warships and military aircraft in the EEZ to ‘refrain from engaging in manoeuvres or using weapons’ which was rejected likewise.¹²⁷ Furthermore, the economic nature of the exclusive economic zone (as the name suggests) together with case law would suggest that the coastal State’s interest in the EEZ is purely *economic*. In *The M/V Saiga (No. 2)*,¹²⁸ the International Tribunal for the Law of the Sea (ITLOS) held that Guinea was entitled to apply its customs law in its EEZ only in relation to matters which are explicitly mentioned in Article 60(2) *i.e.* artificial islands, installations and structures. That is to say, Guinea was not entitled to apply its customs laws in relation to any other matter not explicitly mentioned in *UNCLOS*.¹²⁹ This decision, therefore, casts doubt on the legality of the ‘*Surveying and Mapping Law of the People’s Republic of China*’ which was enacted in 2002 and which makes all types of surveying and mapping activities ‘in the domain’ of China and in ‘other sea areas under the jurisdiction’ of China subject to the approval of the Chinese authorities.¹³⁰ This is because *UNCLOS* does not explicitly empower the coastal State to regulate surveying or mapping activities of other States in its EEZ. The aforementioned arguments, thus, go some way towards suggesting that although as a matter of fact the coastal State may indeed be more interested in what happens in its EEZ, as a matter of law, however, the security interests of the coastal State in its EEZ cannot be higher than or superior to that of the international community.

¹²¹ (emphasis added).

¹²² RR Churchill and AV Lowe, *The Law of the Sea* (3rd ed, Juris Publishing 1999) 176.

¹²³ Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP 2005) 140.

¹²⁴ ‘Chapter XXI: Law of the Sea’, *United Nations Treaty Collection*

<https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsq_no=XXI-6&chapter=21&Temp=mdsg3&clang=_en> accessed 16 April 2020.

¹²⁵ Satya N Nandan (ed) and Shabtai Rosenne, *United Nations Conventions on the Law of the Sea 1982: A Commentary*, Volume II (Martinus Nijhoff Publishers 1993) 529.

¹²⁶ *Ibid* para 58.4.

¹²⁷ *Ibid* para 58.8.

¹²⁸ [1999] ITLOS Rep 10 [127].

¹²⁹ *Ibid*.

¹³⁰ ‘Surveying and Mapping Law of the People’s Republic of China’, *Invest in China* (29 August 2002) [Articles 2 and 7] <http://www.fdi.gov.cn/1800000121_39_2073_0_7.html> accessed 17 April 2020.

Nonetheless, understandably, less developed coastal States may (and often do) object to other States' military activities in their EEZ. Since the nature of such activities is highly political, different States have developed different policies that best suit their national interests. State practice, therefore, is becoming inconsistent. Article 31(3)(b) of the *Vienna Convention* provides that in interpreting a treaty, 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' must also be taken into account. The current diverging State practice will, therefore, translate into conflicting interpretations. The tug-of-war will continue.

All in all, considering China's statements and physical actions, some analysts have argued that China is in fact creeping towards its ultimate goal which is turning the South China Sea into a 'Chinese lake'.¹³¹ Considering China's ambiguous and constantly changing claims, noting the failure to resolve the South China Sea issues through agreements after decades, and taking into account the potential flashpoint in the region, one is driven to the conclusion that seeking authoritative interpretation from a competent court or tribunal is inevitable to break the deadlock. Will China obey the ruling?

8 Dispute Settlement

In 2013, when the Case was filed by the Philippines, not only did not China appear to defend the Case, but soon after the filing, it resumed its island enlargement activities, particularly in areas claimed by the Philippines, in a disrespectful way and in violation of Article 300. Further, Article 296(1) states that any decision rendered by a court or tribunal having jurisdiction 'shall be final and shall be complied with by all the parties to the dispute'. After the ruling, however, China stated that 'the award is null and void and has no binding force'¹³² violating Article 296(1). China argued that the arbitration was filed unilaterally by the Philippines and that under Article 298(1)(a)(i) the Tribunal did not have jurisdiction over its historic claim as it had already activated the 'exception' in 2006.¹³³ Firstly, under Article 9 of Annex VII, if one of the parties to the dispute 'does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.' The Tribunal, therefore, was empowered to proceed without China's appearance. Secondly, according to Article 288(4), whether a court or tribunal has jurisdiction over a particular dispute, must be determined by the same court or tribunal and not by the parties to the dispute. The Tribunal found that it did have jurisdiction over the Dispute.¹³⁴ Moreover, as noted above, based on China's own statements and actions, its claim cannot, and in practice is not, a historic 'title' but a historic 'rights' claim short of sovereignty which is outside the scope of the exception in Article 298(1)(a)(i).

9 Conclusions

The COVID-19 pandemic has raised serious doubts as to China's commitment as a Member of the United Nations to respect the norms of international law, particularly in times of international crisis. China's latest moves to intimidate other States by sinking or harassing their vessels, to impose its will on the region through militarisation of the South China Sea, and to assert sovereignty over the contested Paracel and Spratly Archipelagos by giving them Chinese names, highlight how far it remains from modern international law and diplomacy. The world's minimal response to the sinking of the Vietnamese fishing vessel by China and the continuation of the Chinese island fortification in the midst of the COVID-19 pandemic is a cause for concern.

Since the official submission of the NDL map to the Secretary-General of the UN in 2009, China has offered no legal basis for its NDL claim nor has it clarified the nature or scope of the claim. Comprehensive historical and legal analyses, nonetheless, indicate that the map can only mean 'island attribution' *i.e.* claiming sovereignty over the insular features enclosed by the NDL map. This, however, does not mean that China has sovereignty over those features; the NDL sovereignty claim over the features has been disputed by Vietnam¹³⁵ and the

¹³¹ *E.g.* Do Thanh Hai, *Vietnam and the South China Sea: Politics, Security and Legality* (Routledge 2017) 84.

¹³² 'Statement of the Ministry of Foreign Affairs' (12 July 2016)

<http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1379492.shtml> accessed 16 April 2020.

¹³³ *Ibid.*

¹³⁴ It is, however, worth noting that some scholars have cast doubt on whether the Tribunal had jurisdiction over the Dispute. See, *e.g.*, Natalie Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention' (2017) 32(2) *International Journal of Marine and Coastal Law* 332, 332–63.

¹³⁵ UN Document No. 22/HC-2020 – Available at

<https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf> accessed 28 July 2020.

Philippines.¹³⁶ Apart from this ‘island attribution’ claim (which is disputed), the NDL map has no meaning and no legal basis under modern international law of the sea.

China has breached various rules of international law. None of the features of the Spratly Archipelago constitutes an ‘island’ within the meaning of Article 121 and none of them, therefore, is capable of generating an EEZ. The vast majority of the features of the Spratly Archipelago are submerged shoals or low-tide elevations that cannot have a territorial sea of their own and thus, the waters around them remain the high seas. Accordingly, irrespective of which State might have sovereignty over those features, all merchant and military vessels are entitled to enjoy the freedom of navigation in waters around the features without being confronted or challenged by any State. It follows that if the confrontation between the Chinese Navy and the Australian warships (that were not even within 12 nautical miles from any of the features of the Spratly Archipelago) was an intentional plan by the Chinese Navy to intimidate the Australian warships, it constitutes a breach of Articles 87(1)(a) and 301. China’s use of force policy *e.g.* establishing military bases and landing long-range nuclear strike-capable bombers on the *disputed* islands in the South China Sea¹³⁷ and intimidating and sinking foreign-flagged vessels in the South China Sea is a significant threat to the freedom of navigation and international maritime security. Such a policy is a serious violation of Article 2(3) of the UN Charter and Articles 279 and 301 of *UNCLOS* in regard to peaceful settlement of disputes. The dispute over the contested islands must be settled in a peaceful manner and the coastal States in the South China Sea must be able to engage in fishing and seabed activities in their legitimate EEZ without being harassed by any State. The artificial transformation of the submerged features of the Spratly Archipelago by China does not alter their legal status from submerged shoals, low-tide elevations or rocks to *UNCLOS* ‘islands’. Under Article 60(8), regardless of how large or similar to real natural ‘islands’ China may make those features in the future, they can never generate an EEZ or have a continental shelf. China’s large-scale construction of artificial islands on sensitive reefs in the Spratly Islands has caused irreparable damage to the coral reef ecosystem and is a breach of Articles 192 and 136. It is harming the marine environment, encroaching upon the ‘Area’ and endangering its resources which are the ‘common heritage of mankind’.

Undoubtedly, *UNCLOS* is a significant and admirable achievement of the international community. However, its textual ambiguities *e.g.* in Articles 59 and 121(3), can potentially open the way for abuse. Depletion of resources, thus, may tempt some States to encroach upon other States’ maritime zones or even upon the ‘Area’ through misinterpretation of ambiguous *UNCLOS* provisions. Today over one-third of the State parties to *UNCLOS* are in breach of at least one important provision of it.¹³⁸ China claiming the whole of the South China Sea and Japan claiming a full suite of maritime zones around the minute ‘rock’, Okinotorishima,¹³⁹ are the well-known examples. What is the way forward? The solution, undoubtedly, does not lie in use or show of force. The recent response of the US in the South China Sea appears to be only a short-term solution or even an extreme and counterproductive action. Where deployment of one American aircraft carrier and its strike force is often considered as a powerful deterrent, deploying two at once is a significant ‘show of force’.¹⁴⁰ Although the continuation of the freedom of navigation patrols by vessels from different States is of paramount importance, such exercises do not necessarily have to be conducted by a group of aircraft carriers and destroyers in a provocative show of force. The South China Sea situation calls for a long-term and peaceful solution.

Part XV of *UNCLOS* plays a pivotal role in the success of the international law of the sea as it provides a system for the *peaceful* settlement of disputes as well as an opportunity for authoritative interpretation of ambiguous provisions of *UNCLOS* by competent courts and tribunals. Under Part XV, State parties to an international maritime dispute must first try to settle their dispute by peaceful means of their own choice¹⁴¹ and if no settlement is reached, the dispute must then be submitted (at the request of any party to the dispute) to the court or tribunal having jurisdiction under Part XV.¹⁴² China, nonetheless, despite having evident disputes with the Philippines, sought to carry out its own understanding of its rights in the South China Sea without negotiating with the Philippines,¹⁴³ which is one of the reasons that prompted the Philippines to commence the arbitration against China under Part XV. The Tribunal was an independent third-party adjudicator that was properly constituted under

¹³⁶ UN Document No. 000192-2020 – Available at

<https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_03_06_PHL_NV_UN_002.pdf> accessed 28 July 2020.

¹³⁷ ‘China Lands Nuclear Strike-capable Bombers on Disputed South China Sea Island’, *DW News* (19 May 2018)

<<https://www.dw.com/en/china-lands-nuclear-strike-capable-bombers-on-disputed-south-china-sea-island/a-43848185>> accessed 28 July 2020.

¹³⁸ Robin Churchill, ‘The Persisting Problem of Non-compliance with the Law of the Sea Convention: Disorder in the Oceans’ (2012) 27 *International Journal of Marine and Coastal Law* 813, 815.

¹³⁹ Clive Schofield (ed), Seokwoo Lee (ed), and Moon-Sang Kwon (ed), *The Limits of Maritime Jurisdiction* (Brill 2013) 215.

¹⁴⁰ Lara Jakes, ‘With Beijing’s Military Nearby, U.S. Sends 2 Aircraft Carriers to South China Sea’, *The New York Times* (4 July 2020)

<<https://www.nytimes.com/2020/07/04/us/politics/south-china-sea-aircraft-carrier.html>> accessed 27 July 2020.

¹⁴¹ Article 280.

¹⁴² Article 286.

¹⁴³ *Award*, para 708.

UNCLOS (to which China is a State party) and unanimously rejected China's maritime claims in the South China Sea. This is a positive indication that the international law of the sea dispute resolution system will not be intimidated by any superpower. Under Article 296(1), the Tribunal's ruling is final and binding on both China and the Philippines. China's flagrant disregard for the Tribunal's decision, however, underscored a weakness in Part XV: even if States do use Part XV, there is no mechanism to *enforce* the ruling and ensure compliance. China's refusal to abide by the Tribunal's decision is disrespectful to the international court system, escalates the situation, flies in the face of Article 296(1) and is a continuation of its intimidating policy: at the ASEAN regional Forum in July 2010, the then Chinese Foreign Minister, Yang Jiechi, told his ASEAN counterparts that 'China is a big country and other countries are small countries and that is just a fact.'¹⁴⁴

If China believes that it has any legitimate maritime claims in the South China Sea, it should formally and unambiguously clarify such claims and their legal basis. Pursuant to Articles 279 and 280, China is then under an obligation to enter into peaceful negotiations with the concerned States to come to an agreement. Not clarifying the basis of a maritime claim and not entering into peaceful negotiations, constitutes a breach of Articles 279 and 280 as well as Article 300 that requires States to fulfil their obligations 'in good faith'. Bilateral negotiations with China are unlikely to bear any fruit as China will attempt to coerce each State individually. However, if the ASEAN countries work together as a union and enter into *multilateral* negotiations with China, they will have more bargaining power and will be able to pressure China to prevent it from encroaching on their EEZ and call it to account. If negotiations are unsuccessful, then the dispute must inevitably be referred to the mandatory dispute settlement mechanism in Part XV and all the involved State parties must subsequently respect the outcome. Negotiations, or Part XV dispute settlement mechanism – there is no third way. A State party to an international dispute who does not clarify the legal basis of its claims and neither attempts to settle the dispute by peaceful means nor obeys the subsequent ruling of a competent court or tribunal, must be pressurised by the UN (*e.g.* through Article 41 of the UN Charter or by other similar means) to abide by international law. Lackadaisical or self-interested attitude of States can only result in erosion of the supremacy of the international Rule of Law which is indispensable to international trade, peace, security and political stability.

¹⁴⁴ Ian Storey, *Southeast Asia and the Rise of China: The Search for Security* (Routledge 2011) 287.