



DISPUTES IN THE SOUTH CHINA SEA



OFFICE OF THE HONOURABLE SENATOR THANH HAI NGO

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Note on Nomenclature

Given the long history of occupation and use of the South China Sea by its littoral states, and owing to the contested territorial sovereignty of the maritime features in the region, each geographic feature is often referred to by several different names. In this paper they will generally be referred to by their most common international or English name. These are listed below along with their most prevalent alternatives. The terms used throughout the paper appear in italics.

- The *South China Sea*, or portions thereof, is referred to as the South Sea in China, the East Sea in Vietnam, the West Philippine Sea in the Philippines, and the Natuna Sea in Indonesia;
- The *Paracel Islands* (or *Paracels*) are referred to as the Xisha in China and the Hoàng Sa in Vietnam;
- The *Spratly Islands* (or *Spratlys*) are referred to as the Nánshā in China, the Trường Sa in Vietnam, and the Kalayaan Island Group in the Philippines;
- The *Scarborough Shoal* is referred to as the Huangyan Dao in China and the Panatag Shoal in the Philippines;
- *Itu Aba Island* is also referred to as Taiping Island, particularly in China and Taiwan;
- *Woody Island* is referred to as Yǒngxīng in China and Phú Lâm in Vietnam.

The names listed here and those used throughout the paper do not constitute an endorsement of any state's claim to the feature in question. In addition, it should be noted that unless otherwise specified the term “island” is here used in a colloquial sense, without making a declarative statement as to the maritime feature's status as an island, rock, or low-tide elevation as defined by the United Nations Convention on the Law of the Sea. The islands, islets, cays, sandbanks, shoals, and reefs of the South China Sea are generally referred to here as “maritime features”.



Message from the Senator

The South China Sea has emerged as one of the world's diplomatic hotspots in recent years. Ringed by the growing economies of Southeast Asia, the region is home to some of the world's most important trade routes. Over half of the world's merchant fleet tonnage travels through the Malacca, Sunda, and Lombok straits each year. In addition, the region contains significant reserves of oil and natural gas. As such, the Sea's islands and seabed have assumed a high level of strategic importance. Brunei, China, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam have all laid claim to portions of the South China Sea. Many of these states have occupied islands and reefs in the region in an effort to bolster their claims. China in particular has acted aggressively in this regard, and has intensified its efforts to construct artificial islands and to militarize its presence in the South China Sea over the past few years. The growing risk of armed clashes in the South China Sea is a matter of grave concern that jeopardizes the security and stability of the region.

Developments in the South China Sea will help shape the course of the 21st century. However, most audiences outside Asia have been slow to grasp its significance. In order to advance its national interests, the Government of Canada must shift its focus to the South China Sea and the Asia-Pacific and encourage Canadians to pay closer attention to the region. This position paper aims to provide relevant background information on the disputes, the nations involved, and their impact on the international community. It is my hope that this paper will help familiarize Canadians with this critical matter and will be a valuable source for those seeking a deeper understanding of these disputes. Recent escalating events in the region prompted me to put forward a Senate motion urging the Government of Canada to take a clearer and stronger position on the disputes. It was encouraging to see support for the motion from members of both parties in the Senate and from the Government of Canada. This paper is the product of the research performed while preparing that motion.

As a Canadian of Vietnamese descent I view the South China Sea disputes with great interest. It is my firm belief that Vietnam holds a valid and rightful sovereignty claim to the Spratly and Paracel Islands, a claim supported by ample historical evidence. However, having recognized this predisposition, I have done my best to provide impartial information and to present a balanced overview of the disputes and the positions taken by each claimant. I strongly encourage Vietnam and the other claimant states to contest China's expansive and tenuous claims to the utmost extent through every diplomatic means, including through recourse to international arbitration. In successfully challenging China's maritime claims through arbitration under the UN Convention on the Law of the Sea, the Philippines set a precedent that Vietnam should emulate. Ensuring that the claims put forward by each state are in accordance with international law is crucial if a lasting peace in the region is to be achieved.

Sincerely,

The Honourable Senator Thanh Hai Ngo



Executive Summary

Situated at the confluence of history, geopolitics, trade, state sovereignty, and military, energy, and food security, the South China Sea disputes are among the most important conflicts facing the Asia-Pacific and the world today. After simmering for decades, the struggle to assert control over the sea has intensified in recent years, with China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei competing for control of the resource-rich region. Significant potential economic benefits are in play, and the prestige and political capital that each state has invested in its claims has raised the stakes even higher. With a diplomatic solution still out of reach, the claimants have turned to other means of asserting their claims by constructing artificial islands, militarizing their outposts, and increasing their naval presence in disputed areas.

As this conflict evolves, this position paper aims to provide information on the disputes and the claims that have been advanced. Section A summarizes the 1982 United Nations Convention on the Law of the Sea (hereafter referred to as UNCLOS or “the Convention”), the main mechanism in international law to resolve maritime boundary disputes like the South China Sea. On paper, this Convention outlines the limits of state sovereignty over the seas and provides a dispute resolution process available to state parties. In practice, the issue is not so clear-cut. The maritime boundaries provided for in the Convention cannot be applied until the question of sovereignty over the South China Sea’s maritime features is established, and that is beyond the Convention’s purview. A lack of enforcement mechanisms also hinders the effectiveness of the Convention’s dispute resolution process, as a study of the recently-concluded arbitration process between the Philippines and China makes clear. Lastly, Section A covers efforts made by the United States Navy to promote the freedom of navigation enshrined in the Convention, and China’s response to said efforts.

Section B provides an overview of each South China Sea nation’s claims and their position on the disputes. Here a distinction must be drawn between the territorial and maritime claims of each party. Malaysia and Brunei claim a maritime boundary in accordance with the UN Convention that extends into the South China Sea from the mainland. Vietnam and the Philippines claim sovereignty over disputed islands, but have established their maritime boundaries in accordance with UNCLOS. China and Taiwan also claim sovereignty and historic title over the islands that lie within the infamous “nine-dash line”, but have also been deliberately vague about whether the line doubles as a maritime boundary. After presenting the claims, an overview of activity undertaken to bolster their claims is provided, including land reclamation, and militarization. As non-claimant South China Sea states, the Indonesian and Singaporean positions are also included.

Section C covers the international community’s position on the disputes. The perspectives of several prominent Asia-Pacific states such as Australia, India, Japan, Russia, South Korea, and the United States are included, as are the positions of other Western actors such as the European Union and its member states. Overall, it was found that those members of the international community that have issued statements on the South China Sea support the freedom of navigation enshrined in the UN Convention and agree with the principle of arbitration under the auspices of the Convention to resolve maritime disputes. Efforts made by the Association of Southeast Asian Nations (ASEAN) to mediate the disputes, find common ground between the claimants, and implement a binding code of conduct in the South China Sea make up a large portion of this section of the paper.

Section D presents a timeline of major events in the South China Sea from the turn of the twentieth century to the present. The South China Sea states have been advancing their own claims for decades. With so many overlapping claims, military occupation of the islands has become the surest way of establishing control over the region. The scramble to occupy the disputed islands has twice erupted in armed combat between Vietnam and China in 1974 and 1988. After receding into the background for several years, the disputes intensified in 2009 after joint Malaysian and Vietnamese claims to a portion of the Sea prompted the publication of China's nine-dash line. Since then, the tempo of island construction, militarization, and naval clashes has steadily increased.

As the disputes ramp up, their impact upon the South China Sea's fragile environment has grown as well. Section E outlines these impacts, the damage caused by land reclamation and the implications of a failure to manage overfishing in particular. The economic impacts of the disputes are also considered, including their potential to disrupt regional and global trade flows.

A summary of the Canadian position is presented in Section F. A review of recent public statements concerning the South China Sea affirms that Canada is broadly in line with its Western partners in supporting the UN Convention and calling for a peaceful settlement of the disputes, in accordance with the growing importance of the Asia-Pacific region in Canada's national interest. Parallels drawn between the ongoing disputes in the South China Sea and the thawing of maritime boundary disputes in the Arctic Ocean reinforce the need for Canada to pledge further support for international law in the South China Sea.

The paper concludes by outlining the broad steps required to resolve the disputes, culminating in an agreement on territorial and maritime sovereignty over the disputed areas. As the prerequisites to such a settlement are not yet in place, it is recommended that the South China Sea claimants pursue confidence- and trust-building measures to reduce tensions and solve problems of mutual concern. A set of recommendations for Canadian policymakers is also included, encouraging Canada to re-engage with the Asia-Pacific region diplomatically, economically, and militarily through support for the UN Convention, ratification of the Trans-Pacific Partnership agreement, and an accelerated naval procurement process, respectively.

Section A: Maritime Disputes and International Law

UNCLOS and the South China Sea

The 1982 United Nations Convention on the Law of the Sea established the rights and responsibilities of states with respect to the world's oceans in international law and set out the maritime limits of state sovereignty. Since its entry into force in 1984, it has been ratified by 163 UN member states as well as the Cook Islands, Niue, the European Union, and Palestine. An additional 14 UN members have signed the Convention but have not yet ratified it. Notably, the United States has neither signed nor ratified the Convention; however, it has signed the subsequent 1994 Agreement relating to the Implementation of Part XI of the Convention.

Differentiated Levels of Sovereignty

The Convention clearly demarcates the various boundaries of state sovereignty off the coast of a given state. A coastal state exercises full sovereignty over a belt of water labelled the “territorial sea” that extends 12 nautical miles from the baseline,¹ and can enact laws and legislation that govern activity within that area. In the “contiguous zone” that extends 24 nautical miles from the baseline, coastal states may take action to enforce the customs, immigration, fiscal, and sanitary laws and regulations implemented for the protection of its territory and territorial sea.²

Ships are accorded the right of innocent passage within the territorial sea and are therefore permitted to transit “so long as it is not prejudicial to the peace, good order and security of the coastal State”.³ Such prejudicial activities include the threat or use of force, weaponry exercises, surveillance and reconnaissance, acts of propaganda aimed at undermining the defence and security of the coastal state, wilful pollution, fishing, and any other activity that does not have a direct bearing on the transit of said ship. Where innocent passage normally does not require the permission of a coastal state, any such activities performed within a state's territorial sea do require permission. Coastal states may enact and enforce legislation concerning the use of their territorial seas, particularly with regard to navigation and the protection of the marine environment, provided that such laws do not infringe upon the right of innocent passage. Indeed, Article 24(1) explicitly states that “the coastal State shall not impose requirements on foreign ships which have the practical effect of denying or impairing the rights of innocent passage”.⁴ Warships of a foreign nation may be permitted to transit the territorial sea, provided they adhere to innocent passage. Coastal states may defend themselves from foreign warships that do not act in accordance with the principles of innocent passage⁵ or that refuse to comply with requests made by the coastal state to abide by its regulations enacted for the purpose of innocent passage.⁶

¹ *Convention on the Law of the Sea*, Montego Bay, Jamaica, December 10, 1982, 1833 UNTS 3; 21 ILM 1261 (1982), available from http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm, Article 2.

² *Ibid.*, Article 33.

³ *Ibid.*, Article 19.

⁴ *Ibid.*, Article 24(1).

⁵ *Ibid.*, Article 25.

⁶ *Ibid.*, Article 30.

Beyond the contiguous zone lies the exclusive economic zone (EEZ), extending 200 nautical miles from the baseline.⁷ States are accorded the sovereign right to exploit and manage the living and non-living natural resources of the water column and the seabed within the EEZ.⁸ They cannot restrict or hinder the freedom of navigation and overflight enjoyed by all states, except in regard to laws and regulations designed to enable the management, conservation, exploration, and exploitation of the EEZ's resources. Under certain circumstances, a coastal state may also claim the right to exploit the natural non-living resources of the seabed up to 350 nautical miles from the baselines and/or 100 nautical miles from the 2,500-metre isobath.⁹ To do so, the state in question must demonstrate that the continental shelf beyond its EEZ forms a natural prolongation of its land territory. Information regarding these claims must then be submitted to the Commission on the Limits of the Continental Shelf (CLCS) for evaluation. The Commission then issues recommendations based upon the information submitted. While the recommendations themselves are not binding, they provide a framework that, when adopted, legitimizes a state's established maritime boundaries. A decision to adopt the Commission's recommendations is considered binding and final.¹⁰

It should be noted that the CLCS will issue recommendations only as regards maritime boundaries, and not as regards territorial sovereignty. Likewise, it will not consider a submission concerning a maritime dispute that was submitted by one of the parties to that dispute. This is because the CLCS is a technical body and not a higher political authority that is empowered to enforce its recommendations upon disputing states. Rather, the CLCS recognizes that states retain competence in matters of sovereignty and boundary delimitations. As such, the CLCS cannot be appealed to in order to render a ruling and settle a dispute unless every state that is party to a dispute agrees.¹¹ With China steadfastly refusing to acknowledge any international ruling or recommendation that does not support its own territorial or maritime claims in the South China Sea, the CLCS will likely not play a substantive role in adjudicating the disputes themselves, although it will be instrumental in evaluating and approving any maritime borders established as a result of a diplomatic resolution of the disputes.

Maritime Features and Artificial Islands

The above section outlines the practices used to delimit maritime borders. However, not all territorial features in the South China Sea are treated equally under UNCLOS. The Convention makes a distinction between islands, rocks, and low-tide elevations (LTEs). An *island*—"a naturally formed area of land, surrounded by water, which is above water at high tide"¹²—is entitled to a territorial sea, contiguous zone, EEZ, and continental shelf. On the other hand, *rocks*—defined as landmasses above water at high tide but which "cannot sustain human habitation or economic life of their own"¹³—are not granted an EEZ or extended continental shelf, although they do claim a territorial sea and contiguous zone. A *low-tide elevation*, as the name implies, is a formation that is normally submerged but which is above water at low tide. In

⁷ Ibid., Article 57.

⁸ Ibid., Article 56.

⁹ Ibid., Article 76(5).

¹⁰ Ibid., Article 76(8).

¹¹ Commission on the Limits of the Continental Shelf, "Rules of Procedure of the Commission on the Limits of the Continental Shelf," April 17, 2008, CLCS/40/Rev.1, Annex 1.

¹² *Convention on the Law of the Sea*, Article 121(1).

¹³ Ibid., Article 121(3).

accordance with the Convention, LTEs are not entitled to a territorial sea, contiguous zone, or EEZ.¹⁴ Maritime features such as rocks or seamounts that are permanently submerged are not granted any territoriality in and of themselves. The Convention draws another distinction between natural and artificial formations. While coastal states are entitled to construct artificial islands in their EEZ¹⁵ and extended continental shelf,¹⁶ Article 60(8) of the Convention explicitly states that “Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf”. Coupled with the fact that rocks and LTEs have no EEZ or extended continental shelf of their own, expanding one such feature into an artificial island does not automatically grant a coastal state an EEZ over the surrounding waters.

Dispute Resolution Mechanisms

There are measures in place within the Convention to resolve maritime sovereignty disputes. In the case of overlap between the territorial seas of multiple states that cannot reach a settlement, Article 15 denies states the right to extend their territorial sea beyond a median line equidistant from the baselines of each state. In the case of EEZs and extended continental shelves, the Convention mandates that agreement be reached in a peaceful manner on the basis of international law.¹⁷ If the parties are unable to resolve a dispute and all available “local remedies” have been exhausted,¹⁸ then the matter is referred to the International Tribunal for the Law of the Sea, the International Court of Justice, or an arbitral tribunal constituted under Annex VII of the Convention¹⁹ for arbitration, and a binding ruling is then issued. The Philippines recently brought arbitration proceedings against China in 2013, and the Arbitral Tribunal—with the Permanent Court of Arbitration in The Hague acting as a registry—issued an Award in the case on July 12, 2016.

These dispute resolution mechanisms as set out in UNCLOS are predicated upon the conflict being bilateral in nature. Given the degree of overlap between the competing claims of each coastal state in the South China Sea, resolving each dispute bilaterally will be difficult. However, Part IX of UNCLOS, which addresses “enclosed or semi-enclosed seas”, may offer an alternative approach to the South China Sea disputes. Article 122 of the Convention states that a sea may be considered “enclosed” when it is “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.” Even without ruling on the sovereignty of the contested territorial features of the South China Sea, the exclusive economic zones that extend from the baselines of each littoral state already cover the majority of the sea. That coverage would surely increase should control of the islands be resolved. Some²⁰ have suggested that this fact forms a suitable basis upon which to consider the South China Sea as a “semi-enclosed sea”.

¹⁴ Ibid., Article 13.

¹⁵ Ibid., Article 60.

¹⁶ Ibid., Article 80.

¹⁷ Ibid., Articles 74 and 83.

¹⁸ Ibid., Article 295.

¹⁹ Ibid., Article 287.

²⁰ Christopher Linebaugh, “Joint Development in a Semi-Enclosed Sea: China’s Duty to Cooperate in Developing the Resources of the South China Sea”, *Columbia Journal of Transnational Law* 52, no. 542 (2014), p. 549.

Should that be the case, Article 123 of the Convention would then apply, which mandates that “states bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights” in resource management, environmental protection, and joint scientific research programs. The claimant states have demonstrated the ability to cooperate in the past, as indicated by the joint seismic mapping program performed by Vietnam, the Philippines, and China in 2005. However, UNCLOS by itself does not provide any mechanisms to enforce this cooperation, and the South China Sea has not yet been recognized internationally as an enclosed or semi-enclosed sea. So long as the claimant states remain fixated on the zero-sum game of establishing sovereignty and enforcing their territorial claims, it is unlikely that further cooperation between all the states that border the South China Sea of the sort provided for under Part IX of the Convention will occur on a regular basis.

United States Navy Freedom of Navigation Operations

On October 27, 2015, the United States Navy guided-missile destroyer USS *Lassen* (DDG-82) conducted a freedom of navigation operation (FONOP) in the South China Sea, its seventh in the area since 2011.²¹ These operations are routinely conducted by the United States Navy as a means of showing the flag, patrolling the high seas, and demonstrating the American commitment to upholding the right of all ships to navigate freely in accordance with international law. The FONOP conducted by the USS *Lassen* illustrates the complexity of the maritime disputes in the South China Sea. During this operation, the *Lassen* passed within 12 nautical miles of five maritime features of the Spratly Islands—Subi Reef, Northeast Cay, Southwest Cay, South Reef, and Sandy Cay. These features are claimed by China, Taiwan, Vietnam, and the Philippines. Despite this, the FONOP was not designed to contest the sovereignty claims of any state. Rather, the operation was intended to challenge “attempts by claimants to restrict navigation rights and freedoms around features they claim, including policies by some claimants requiring prior permission or notification of transits within territorial seas”.²² As such, none of the claimant governments were expressly notified in advance and permission for the *Lassen*’s transit through the area was not sought.

The location of the USS *Lassen*’s FONOP was no doubt chosen in part because Subi Reef has been built up into an artificial island by China. Prior to Chinese land reclamation activity, Subi Reef itself was a low-tide elevation. As previously discussed, LTEs are not entitled to territorial seas according to UNCLOS, and therefore the practice of innocent passage within 12 nautical miles should not ordinarily apply. As the *Lassen* passed within 12 nautical miles of Subi Reef, the revelation that the *Lassen*’s transit was indeed conducted under the rules of innocent passage initially raised concerns internationally that the United States Navy had implicitly recognized Subi Reef as possessing a territorial sea, potentially setting a precedent and validating China’s construction of artificial islands in the South China Sea to bolster its territorial claims. However, the reasoning behind the move is more complex. Should an LTE be located in whole or in part within the territorial sea of another island or island, the baselines that determine the maritime jurisdiction of said rock or island can be extended to encompass the LTE. This is the case with Subi Reef, as it lies within the territorial sea of the nearby rock of Sandy Cay. The

²¹ USNI News, “Document: SECDEF Carter Letter to McCain on South China Sea Freedom of Navigation Operation”, January 5, 2016, <http://news.usni.org/2016/01/05/document-secdef-carter-letter-to-mccain-on-south-china-sea-freedom-of-navigation-operation>, para. 6.

²² *Ibid.*, para. 7.

Lassen's FONOP was therefore conducted under innocent passage in accordance with the principles of customary international law as enshrined in UNCLOS, irrespective of which states claim Sandy Cay or Subi Reef.

A similar point was made in January 2016 with another FONOP. On January 30, the USS *Curtis Wilbur* (DDG-54) sailed within 12 nautical miles of Triton Island in the Paracels under innocent passage, without notifying Chinese authorities in advance.²³ While the FONOP was designed to contest China's policy of requiring notification before warships enter its claimed areas,²⁴ the operation also challenged the inclusion of Triton Island within the baselines surrounding the Paracels. The current baselines as established by China are not in line with the Convention.

On May 10, 2016, the USS *William P. Lawrence* (DDG-110) completed a FONOP during which it traveled within 12 nautical miles of Fiery Cross Reef.²⁵ Chinese land reclamation efforts on the reef have expanded it into an artificial island, which by itself does not grant the reef a territorial sea. However, the Arbitral Tribunal has ruled that Fiery Cross Reef is considered to be a rock as defined by UNCLOS. As such it is entitled to a territorial sea and a contiguous zone, and the right of innocent passage applies. In this case, the USS *William P. Lawrence* would have been obliged to transit the area under innocent passage, which it did.²⁶

A fourth FONOP occurred in October 2016. On October 21, the USS *Decatur* (DDG-73) sailed near Triton and Woody Islands in the Paracels in an operation similar to the FONOP carried out by the USS *Curtis Wilbur* in January. Unlike the previous patrol, the *Decatur* remained at a distance greater than 12 nautical miles from the islands. As before, the operation near the Paracels contested China's policy of prior notification and the claimed boundaries of China's territorial sea around the Paracels. As the USS *Decatur* remained in what the United States considered to be international waters, the destroyer was not required to operate under innocent passage. The patrol, which the Pentagon claimed was conducted "in a routine, lawful manner without ship escorts and without incident",²⁷ was labelled "'illegal' and 'provocative'"²⁸ by the Chinese Ministry of National Defence. The Ministry also blamed the patrol on the American desire to "see the world in chaos".²⁹

²³ Sam LaGrone, "U.S. Destroyer Challenges More Chinese South China Sea Claims in New Freedom of Navigation Operation", *USNI News*, January 30, 2016, <https://news.usni.org/2016/01/30/u-s-destroyer-challenges-more-chinese-south-china-sea-claims-in-new-freedom-of-navigation-operation>.

²⁴ It should be noted that warships transiting territorial seas are not required to provide advance notice or to request permission, provided that they transit the territorial sea under innocent passage.

²⁵ Michael Martina, Greg Torode and Ben Blanchard, "China Scrambles Fighters as U.S. Sails Warship Near Chinese-Claimed Reef", *Reuters*, May 11, 2016, <http://www.reuters.com/article/us-southchinasea-usa-china-idUSKCN0Y10DM>, para. 2.

²⁶ Sam LaGrone, "U.S. Destroyer Passes Near Chinese Artificial Island in South China Sea Freedom of Navigation Operation", *USNI News*, May 10, 2016, <https://news.usni.org/2016/05/10/u-s-destroyer-passes-near-chinese-artificial-island-in-south-china-sea-freedom-of-navigation-operation>.

²⁷ Idrees Ali and Matt Spetalnick, "U.S. Warship Challenges China's Claims in South China Sea", *Reuters*, October 21, 2016, <http://www.reuters.com/article/us-southchinasea-usa-exclusive-idUSKCN12L1O9>, para. 6.

²⁸ *Reuters*, "China Protests 'Illegal', 'Provocative' U.S. South China Sea Patrols", October 21, 2016, <http://www.reuters.com/article/us-southchinasea-usa-china-idUSKCN12L270?il=0>, para. 1.

²⁹ *Ibid.*, para. 7.

The Arbitration Case between China and the Philippines

On January 22, 2013, the Government of the Philippines initiated arbitration proceedings against China over the sovereignty disputes between the two states in the South China Sea / West Philippine Sea. In the submitted Notification and Statement of Claim, the Philippine government stated that China was and remains in contravention of the UN Convention: its nine-dash line cuts through and across the Philippines' EEZ, Chinese land reclamation activity is taking place upon maritime features that are located upon the Philippines' continental shelf, and China has claimed sovereignty over the maritime zones surrounding its occupied islands and rocks greater than 12 nautical miles. In its Statement of Claim, the Philippines announced that it

seeks an Award that: (1) declares that the Parties' respective rights and obligations in regard to the waters, seabed and maritime features of the South China Sea are governed by UNCLOS, and that China's claims based on its "nine dash line" are inconsistent with the Convention and therefore invalid; (2) determines whether, under Article 121 of UNCLOS, certain of the maritime features claimed by both China and the Philippines are islands, low tide elevations or submerged banks, and whether they are capable of generating entitlement to maritime zones greater than 12 M [nautical miles]; and (3) enables the Philippines to exercise and enjoy the rights within and beyond its exclusive economic zone and continental shelf that are established in the Convention.³⁰

In sending the dispute to arbitration the Philippines did not intend to determine which state could exercise sovereignty over the disputed maritime features, as establishing sovereignty over land territory is beyond the Convention's purview. Nor did it seek to establish a maritime boundary.³¹ By avoiding these issues, the case can serve as a precedent to be applied by others in their disputes with China and is more likely to receive support from other claimants in the region. To that end, Vietnam filed a submission on December 11, 2014 stating that it supported the Philippine position, rejected China's nine-dash line, and reaffirmed its own claims to the region. However, Taiwan has announced that it will not recognize the ruling as it had not been invited to take part in the hearings.³² In addition, on May 10, 2016, the Court accepted a submission from the Chinese (Taiwan) Society of International Law pressing Taiwan's claim to Itu Aba Island and reaffirming its status as an island as defined in the Convention.³³

The Chinese government responded to the Philippines' submission on February 19, 2013, stating that the Philippine Notification and Statement of Claim contained several factual errors and that the dispute between the two countries was due to the Philippines' illegal occupation of part of the Spratly Islands, Chinese sovereignty over which is "indisputable".³⁴ The Chinese government then rejected the Philippine Notification, contested the Arbitral Tribunal's

³⁰ Ministry of Foreign Affairs of the Republic of the Philippines, "Note Verbale No. 13-2011 – Notification and Statement of Claim", January 22, 2013, <https://assets.documentcloud.org/documents/2165477/phl-prc-notification-and-statement-of-claim-on.pdf>, pp. 2–3.

³¹ *Ibid.*, 3.

³² This result is not unexpected, as Taiwan has not ratified UNCLOS, shares China's nine-dash line as the basis for its own territorial claims, occupies disputed territory (Itu Aba Island), and is not officially recognized as a sovereign state by either the United Nations, China, or the Philippines.

³³ Greg Torode and J. R. Wu, "Taiwan Enters South China Sea Legal Fray, as Group Seeks to Sway International Court", *Reuters*, May 9, 2016, <http://www.reuters.com/article/us-southchinasea-taiwan-idUSKCN0Y02LD>.

³⁴ Embassy of the People's Republic of China in the Republic of the Philippines, "Note Verbale No. (13) PG-039", February 19, 2016, <https://assets.documentcloud.org/documents/2165478/phl-prc-china-note-verbale.pdf>, pp. 1–2.

jurisdiction in the case, and announced that it would not participate. On March 30, 2014, the Philippine government submitted its Memorial (nearly 4,000 pages in 10 volumes) to the Arbitral Tribunal, providing the Philippines' legal arguments and evidence for its position. On December 17, the time allotted for a Chinese Counter-Memorial having expired, the Tribunal announced that no Chinese submission had been received and requested supplementary information related to the Tribunal's jurisdiction in the proceedings from the Philippine government. This was provided on March 15, 2015.³⁵ Throughout the process, the Chinese government refused to attend the hearing or submit evidence of its own. However, on December 7, 2014, the Chinese Ministry of Foreign Affairs released a position paper outlining its stance on the Tribunal's jurisdiction in the case,³⁶ which the court has since accepted as a formal submission.³⁷

China has also referred to its 2006 Declaration under Article 298 of the Convention, which states that China does not accept the dispute resolution mechanisms provided in the Convention on disputes concerning the delimitation of maritime borders and on disputes concerning military activities.³⁸ The Tribunal addressed that argument by stating that it had not been tasked with settling a maritime boundary dispute or making any judgements about state sovereignty over certain maritime features.³⁹ Instead, it had been asked to rule on the status of the maritime features in question and determine whether states could derive any maritime entitlements (i.e. territorial seas and Exclusive Economic Zones) from controlling said features. Accordingly, since the Tribunal was not asked to adjudicate a border delimitation dispute, China's 2006 Declaration under Article 298 did not apply.

On October 29, 2015, the Permanent Court of Arbitration ruled that it had jurisdiction over the case⁴⁰ and was preparing to issue a ruling on 7 of the 15 claims put forward by the Philippines, most of which concerned the status of certain maritime features and whether they generate exclusive economic zones under the UN Convention. The remainder of the claims alleged that several disputed maritime features are part of the Philippines' EEZ, that China's nine-dash line is invalid under the UN Convention, and that Chinese activity in the Spratlys infringes on the Philippines' rights in its EEZ and threatened the maritime environment. At the time, the Tribunal declared that it had not yet decided on its jurisdiction regarding these claims and had scheduled additional hearings before deciding to rule on them. The Tribunal eventually ruled that it had jurisdiction to evaluate each of the Philippine's 15 submissions.

³⁵ Asia Maritime Transparency Initiative, "Arbitration on the South China Sea: Rulings from The Hague", n.d., last accessed March 3, 2016, <http://amti.csis.org/ArbitrationTL/index.html>.

³⁶ Ministry of Foreign Affairs of the People's Republic of China, "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines", December 7, 2014, http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

³⁷ Ankit Panda, "Philippines v. China: Court Rules Favorably on Jurisdiction, Case Will Proceed", *The Diplomat*, October 30, 2015, <http://thediplomat.com/2015/10/philippines-v-china-court-rules-favorably-on-jurisdiction-case-will-proceed/>, para. 9.

³⁸ United Nations Division for Ocean Affairs and the Law of the Sea, "Declarations and Statements—China, Declaration Made After Ratification (25 August 2006)", last updated October 29, 2013, http://www.un.org/depts/los/convention_agreements/convention_declarations.htm.

³⁹ Permanent Court of Arbitration, "Award on Jurisdiction and Admissibility", October 29, 2015, <https://www.pcacases.com/web/sendAttach/1506>, pp. 140–147.

⁴⁰ *Ibid.*, p. 149.

Details of the Award

The Arbitral Tribunal in Hague issued its Award in the case on July 12, 2016, weighted heavily in favour of the Philippines. In addition, the Tribunal rejected several of China's arguments against the legitimacy of the process, including the assertions that unilaterally initiating the arbitration process constituted an abuse of the UN Convention, that other political agreements such as the 2002 Declaration on Conduct prevented the Philippines from bringing the case forward, and that China had exempted itself from the dispute resolution process through its 2006 declaration. Lastly, the Tribunal did not agree that the dispute between the two states was a question of territorial sovereignty that would not fall under the purview of the UN Convention. Indeed, the Tribunal considered that addressing the Philippines' complaints would not require a decision on state sovereignty over the maritime features in the region, and that making such a decision "would not advance the sovereignty claims of either Party to islands in the South China Sea"⁴¹ in any case.

With minor adjustments, the Tribunal broadly agreed with the majority of the Philippines' 15 submissions. It disagreed with the 15th submission, which called for a declaration that China shall henceforth respect the Philippines' rights and freedoms as established under the UN Convention. In this case, the Tribunal ruled that it did not presume that China was deliberately acting in bad faith but was merely operating within what it believed to be its rights under the Convention. Given that the Award already stipulates that both parties must comply with the ruling, the Tribunal felt that no additional declaration was necessary.

The Tribunal ruled that China, through its destructive land reclamation practices, was in violation of its obligation under the UN Convention to protect the marine environment. The Tribunal also found that Chinese activity performed after the start of the arbitration proceedings had aggravated and prolonged the disputes. The Tribunal further ruled that China had failed to prevent its citizens from exploiting the resources of the Philippines' EEZ and that its law enforcement vessels near the Scarborough Shoal had operated in a dangerous manner and prevented Philippine fishermen from pursuing their livelihoods near the Shoal. However, while the Chinese had unlawfully prevented Philippine fishing vessels from operating in the Philippines' historic fishing grounds in the vicinity of Scarborough Shoal, the Tribunal also pointed out that states retain their traditional fishing rights in another state's territorial waters. Chinese fishermen therefore have the right to fish in the area as well and the Philippines may not prevent them from doing so.

Of the maritime features in question, Scarborough Shoal, Gaven Reef, McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef could be considered "high-tide features" while Subi Reef, Hughes Reef, Mischief Reef, and Second Thomas Shoal were ruled to be low-tide elevations. However, the Tribunal went further, and determined that all of the high-tide features in the Spratly Islands were considered rocks under UNCLOS and thus did not generate an economic exclusive zone or an extended continental shelf, either individually or collectively. The Tribunal based its decision on a review of the historical evidence, which revealed that although the maritime features of the Spratlys had been used temporarily in the past, no

⁴¹ Permanent Court of Arbitration, "Eleventh Press Release 12072016", July 12, 2016, <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>, p. 6.

permanent human habitation or economic activity had occurred. Instead, the current military, governmental, and civilian personnel stationed in the Spratlys are

heavily dependent on outside supply, and it is difficult to see how their presence on any of the South China Sea features can fairly be said to be sustained by the feature itself, rather than by a continuous lifeline of supply and communication from the mainland. ...the Tribunal considers that their presence there is motivated by official considerations and would not have occurred, but for the disputed claims to sovereignty over these features.⁴²

The Tribunal was also tasked with ruling on the legality of China's artificial island on Mischief Reef. The Tribunal ruled that the Philippines is the only coastal state that could claim an EEZ over Mischief Reef's location, and that the reef therefore was included in the Philippines' EEZ. As such, the Tribunal ruled that only the Philippines could authorize the construction of structures or artificial islands within its EEZ, and that China had breached the Convention.⁴³ Given that the other Spratly Islands were ruled to be rocks and therefore incapable of generating an EEZ, it is likely that the judgement regarding Mischief Reef will set a precedent whereby the other Chinese facilities in the Spratlys could be found to have been constructed illegally as well.

Lastly, the Tribunal issued a ruling on the validity of China's nine-dash line. The Tribunal determined that the Convention was specifically formulated to "comprehensively allocate the rights of States to maritime areas",⁴⁴ and that a state's historic rights to resources in the waters beyond the territorial sea were extinguished when that state ratified UNCLOS. Furthermore, after analyzing the historical evidence, the Tribunal found that although Chinese fishermen had used the islands in the South China Sea, prior to the Convention any waters beyond the territorial sea were considered international waters. Accordingly, "there was no evidence that China had historically exercised exclusive control over the waters of the South China Sea or prevented other States from exploiting their resources".⁴⁵ Therefore, while the nine-dash line may still be used as a general indication of China's claim to the rocks and islands of the South China Sea, there exists no legal basis for China to claim a historic right to the resources in and under the waters enclosed by the nine-dash line.

China had boycotted the arbitration process and had announced prior to the ruling that it would not recognize it. On the day of the ruling, the Chinese Ministry of Foreign Affairs published a statement⁴⁶ reiterating its arguments against the arbitration process, many of which had been refuted by the Tribunal in its Award. The Chinese government also repeated that it would not accept any settlement that was imposed upon it by a third party. The Award was welcomed by the Philippines and by the United States, which urged all claimants "to avoid provocative statements or actions".⁴⁷ Canada issued its own statement on July 21, expressing

⁴² Permanent Court of Arbitration, "Award in the Matter of the South China Sea Arbitration", July 12, 2016, <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>, p. 252–253.

⁴³ Ibid., p. 415.

⁴⁴ Permanent Court of Arbitration, "Eleventh Press Release 12072016", p. 8.

⁴⁵ Ibid., p. 9.

⁴⁶ *Xinhua*, "Full Text of Statement of China's Foreign Ministry on Award of South China Sea Arbitration Initiated by Philippines", July 12, 2016, http://news.xinhuanet.com/english/2016-07/12/c_135507744.htm.

⁴⁷ John Kirby, "Decision in the Philippines-China Arbitration", U.S. Department of State, <http://www.state.gov/r/pa/prs/ps/2016/07/259587.htm>, para. 5.

concern at the escalating tensions and calling for all parties to comply with the Tribunal's decision.⁴⁸ Taiwan, which shares China's claims, was less pleased. Itu Aba Island is the only maritime feature in the Spratlys occupied by Taiwan, and the Taiwanese government has long advocated that it be considered an island under the UN Convention. Instead, the Arbitral Tribunal classified it as a rock and greatly weakened the validity of the nine-dash line, which Taiwan also uses as the basis for its claims in the region. In response to the ruling, Taiwanese foreign minister David Tawei Lee declared the decision to be "the worst scenario"⁴⁹ and promised action. The foreign ministry released a statement calling the Award "completely unacceptable"⁵⁰ and criticizing the Tribunal for expanding the purview of its ruling to include Itu Aba Island and all islands in the Spratlys, not just the ones that the Philippines had explicitly asked the Tribunal to evaluate.

The Arbitral Tribunal's Award is final and binding. However, it is not enforceable, and it is unlikely that China will abide by the ruling voluntarily. Even so, the decision in favour of the Philippines carries great weight internationally. Successfully challenging the nine-dash line is significant. In addition, clarifying the status of several disputed maritime features will help establish a common frame of reference for the claimants. Ruling that none of the features in the Spratlys are entitled to an EEZ will in all likelihood reduce the desire by the competing states to claim them. For these reasons, the ruling is an important step toward the peaceful resolution of the disputes. At the same time, it is possible that China, having been deprived of a legal instrument to justify its claims in the South China Sea, will increase its island-building and militarization activity as a means of creating a *fait accompli* on the ground. In the wake of the ruling, analysts were quick to predict that "China will respond with fury, certainly in terms of rhetoric and possibly through more aggressive actions at sea".⁵¹ It is entirely possible that the situation will escalate further before a *détente* is reached.

Section B: Positions of the South China Sea Nations⁵²

People's Republic of China

China's claims in the South China Sea are based on the assertion that "China was the first to discover, name, develop, conduct economic activities on and exercise jurisdiction of the

⁴⁸ Global Affairs Canada, "Canadian Statement on South China Sea Arbitration", *News Release*, July 21, 2016, <http://news.gc.ca/web/article-en.do?nid=1102379>, paras. 4–5.

⁴⁹ Anthony Deutsch and Ben Blanchard, "Tribunal Overwhelmingly Rejects Beijing's South China Sea Claims", *Reuters*, July 12, 2016, <http://www.reuters.com/article/us-southchinasea-ruling-stakes-idUSKCN0ZS02U>, para. 24.

⁵⁰ Ministry of Foreign Affairs of the Republic of China (Taiwan), "ROC Position on the South China Sea Arbitration", July 12, 2016,

http://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&s=5B5A9134709EB875, para. 1.

⁵¹ Thomas Escritt and Ben Blanchard, "Tribunal Says China Has No Historic Title over South China Sea", *Reuters*, July 12, 2016, <http://www.reuters.com/article/southchinasea-ruling-idUSL8N19Y02S>, para. 6.

⁵² Section B differs from Section C in that the South China Sea nations are not presented in alphabetical order. Instead, the order reflects the approximate extent of the South China Sea claims of each country. As such, with the nine-dash line, China and Taiwan are presented first, followed by Vietnam, the Philippines, Malaysia, and Brunei. As non-claimant states, Indonesia and Singapore are presented last. This format has the added benefit of introducing the nine-dash line first, which provides context for the other claimants' positions. It should be noted that this does not constitute an endorsement of a given nation's claim. Maps of the maritime boundaries claimed by each state and of the occupied maritime features in the Spratly Islands are provided in Appendix A.

Nansha Islands”⁵³ and the other disputed islands, and that Chinese activity in the region has occurred “since ancient times”,⁵⁴ allegedly dating back 2,000 years. For centuries, Chinese power in the region rested on a series of regional political actors that were controlled to varying degrees by authorities in Beijing. The extent to which the southern coast of what is today China was controlled by a unified Chinese state varied over time, as did Chinese influence and control over the other political actors of the South China Sea. A similar situation existed on China’s western periphery, where the borders were determined by Chinese influence and the ability to project force, which varied over time. Thus, while there was certainly a Chinese presence in the South China Sea before the republican period of the early twentieth century, equating this presence with state sovereignty and proving that this presence was continuous and that sovereignty was exercised over the past 2000 years in the name of what is today the Chinese state is problematic.

Establishing a Chinese state-sponsored historical presence in the South China Sea is complicated by the fact that tangible proof of Chinese sovereignty in the Paracels and Spratlys prior to the twentieth century is lacking. An expedition led by Chinese astronomer Guo Shoujing in 1279 to the South China Sea is touted as concrete evidence of state-sanctioned activity establishing a formal Chinese presence in the region. This expedition was sent on behalf of Kublai Khan to conduct astronomical observations and update the Song Dynasty’s calendar system. A press release issued by the Chinese embassy in the Philippines states that Scarborough Shoal was the location chosen to perform the astronomical observations.⁵⁵ However, earlier official statements published in 1980 state that Guo Shoujing conducted his observations in the Paracel Islands, not Scarborough Shoal,⁵⁶ casting doubt on the event’s validity as proof of Chinese sovereignty. Furthermore, this single expedition is hardly indicative of a continuous official presence in the region. Instead, apart from a few personal accounts of sailors and merchants, there is little historical evidence that China exercised sovereignty in the South China Sea prior to the twentieth century.

China’s formal claim to the Paracels dates to 1909 when the governor of Guangdong sent an expedition to claim the islands. Previously, most maps showed Hainan as the southernmost point of Chinese territory; afterwards, most maps included the Paracels.⁵⁷ This position was maintained until January 1935, when China’s Review Committee for Land and Water Maps published a list of 132 maritime features located in the South China Sea, including Scarborough Shoal, the Paracel Islands and the Spratly Islands, and claimed them as part of China’s national

⁵³ Ministry of Foreign Affairs of the People’s Republic of China, “Historical Evidence to Support China’s Sovereignty over Nansha Islands”, November 17, 2000, http://www.fmprc.gov.cn/mfa_eng/topics_665678/3754_666060/t19231.shtml.

⁵⁴ *Xinhua*, “Backgrounder: China Has Indisputable Sovereignty over South China Sea Islands”, April 29, 2016, http://news.xinhuanet.com/english/2016-04/29/c_135322815.htm, para. 3.

⁵⁵ Embassy of the People’s Republic of China in the Republic of the Philippines, “Some Basic Facts on China’s Sovereignty over Huangyan Island”, April 13, 2012, <http://ph.china-embassy.org/eng/sgdt/t922594.htm>, para. 1.

⁵⁶ Ministry of Foreign Affairs of the People’s Republic of China, “China’s Sovereignty Over Xisha and Zhongsa Islands Is Indisputable”, *Beijing Review* Issue no. 7, February 18, 1980, quoted in Antonio T. Carpio, “What’s at Stake in Our Case vs. China”, *Rappler*, March 9, 2014, <http://www.rappler.com/thought-leaders/52540-philippines-case-china-carpio>, paras. 39–43.

⁵⁷ Bill Hayton, *The South China Sea: The Struggle for Power in Asia* (New Haven, CT: Yale University Press, 2014), p. 52.

territory.⁵⁸ Rather than include a list of traditional Chinese names, the list contained transliterated versions of the existing English names found on Western maps.⁵⁹

The decision to include the Spratly Islands in new maps of Chinese territory stems from the French annexation of several islets in the Spratly Islands in July 1933. This action generated confusion in Beijing with officials initially failing to distinguish between the Spratlys and Paracels and believing that French claims included the latter. Upon learning that the Paracels were not affected, the Chinese government declined to formally protest the French claim.⁶⁰ A then-secret report issued by the Republic of China's Military Council on September 1, 1933, makes clear that Chinese claims at the time did not include the Spratlys, but that officials were eager to provide evidence for such a claim at a later date:

All our professional geographers say that Triton Island [in the Paracels] is the southernmost island of our territory. But we could, maybe, find some evidence that the nine islands [annexed by France] were part of our territory in the past. ... It seems confirmed by the 1923 book of the British Admiralty, *China Sea Pilot*, which mentions the presence of fishermen from Hainan on Tizard Bank [in the northern portion of the Spratly archipelago]. Unfortunately, this book does not say to whom these islands belong and does not give any evidence of any Chinese administration, the presence of an official representative of China, or Chinese equipment and infrastructure. In conclusion, we have only one piece of evidence, our fishermen from Hainan, and we have never done anything on these islands. We need to cool down the game with the French, but let our fishermen continue their activities to protect our fishing rights. Our Navy is weak and these nine islands are not useful for us now.⁶¹

The Nine-Dash Line

Today, China's claims rests upon an updated version of the "eleven-dash line" first put forward by the Republic of China in 1947 which encompasses the vast majority of the South China Sea. In response to a joint submission made by Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf, China deposited two Notes Verbales with the UN Secretary General in May 2009. These Notes stated that

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map)... the Joint Submission by Malaysia and the Socialist Republic of Viet Nam has seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea.⁶²

⁵⁸ Embassy of the People's Republic of China in the Republic of the Philippines, "Some Basic Facts", p. 2.

⁵⁹ Bill Hayton, *The South China Sea*, p. 55.

⁶⁰ François-Xavier Bonnet, "Geopolitics of Scarborough Shoal", IRASEC's Discussion Papers no. 14 (November 2012), p. 17.

⁶¹ *Wai jiao bu nan hai zhu dao dang an hui bian* [Compilation by the Department of Foreign Affairs of all the records concerning the islands in the South Sea] (Taipei, 1995), vol. 1, 47–49, quoted in François-Xavier Bonnet, "Geopolitics of Scarborough Shoal", p. 17 (translated in Bonnet).

⁶² Permanent Mission of the People's Republic of China, Notes Verbales CML/17/2009, May 7, 2009, available from the UN Division for Ocean Affairs and the Law of the Sea (DOALOS) at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf. A map of the nine dashes can be seen here.

With some minor changes, the attached map was a near-identical copy of the map published in 1947 by the Republic of China. The 2009 map does not include two dashes in the Gulf of Tonkin, presumably because China and Vietnam reached agreement on their maritime boundary there in 2000.⁶³ Subsequent maps show a supplementary dash to the east of Taiwan in the East China Sea. China also claims the Senkaku/Diaoyu Islands in the East China Sea.

The Chinese government has been unambiguous about the extent of its territorial claims, asserting that all islands within the nine-dash line fall under Chinese sovereignty and enacting legislation, such as the 1992 *Law on the Territorial Sea and Contiguous Zone*, to that effect. It has also advanced claims based on historic title and is in the process of exercising sovereignty through the military occupation and artificial enlargement of several maritime features in the South China Sea. However, the extent of its maritime claims is less clear, in part because the Chinese government has remained deliberately vague as to its intentions. China has ratified UNCLOS, and the nine-dash line is in violation of the Convention as a maritime boundary. It is possible that the nine-dash line represents a historic claim to the South China Sea. UNCLOS does contain provisions related to historic claims, but these only affect maritime boundaries between overlapping territorial seas, not EEZs or extended continental shelves. Furthermore, a historic claim can only be established following the open, notorious, effective, and continuous exercise of authority in the given area, with a clear acquiescence to China's historic claim by other states in the region. According to analysis performed for the United States State Department, the nine-dash line as a historical claim to the South China Sea fails to meet each of these criteria.⁶⁴ Furthermore, in its Award in the arbitration case between the Philippines and China, the Arbitral Tribunal ruled that any historic rights to the South China Sea beyond China's territorial waters were extinguished when China ratified the UN Convention.⁶⁵ China has previously threatened to withdraw from the Convention if the nine-dash line is declared invalid.⁶⁶

Chinese Activity in the South China Sea

Chinese military forces currently occupy the Paracel Islands, the Scarborough Shoal and seven maritime features in the Spratly archipelago.⁶⁷ In the Paracels, Chinese communist forces took over control of Woody Island from the Kuomintang in 1956. After the Battle of the Paracels on January 19, 1974, People's Republic of China (PRC) forces wrested control of the rest of the archipelago from the Republic of Vietnam. In March 1988, tensions between Vietnam and China

⁶³ Keyuan Zou, "The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin", *Ocean Law and Development* 36, no. 1 (2005), p. 14.

⁶⁴ United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, "Limits in the Seas No. 143 – China: Maritime Claims in the South China Sea", December 5, 2014, <http://www.state.gov/documents/organization/234936.pdf>, pp. 19–22.

⁶⁵ Permanent Court of Arbitration, "Eleventh Press Release 12072016", July 12, 2016, <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>, p. 9.

⁶⁶ The *Japan Times*, "Beijing Indicates It May Exit U.N. Sea Convention if South China Sea Ruling Disappoints", June 21, 2016, <http://www.japantimes.co.jp/news/2016/06/21/national/politics-diplomacy/beijing-indicates-may-exit-u-n-sea-convention-south-china-sea-ruling-disappoints/#.V2ILBdIrKUK>.

⁶⁷ This figure is sometimes contested. In its Asia-Pacific Maritime Security Strategy for 2015, the United States Department of Defense counted eight Chinese outposts on seven different maritime features, while other sources contend that China occupies eight features in the Spratlys. Most of these other sources include Eldad Reef in the tally, although the United States Department of Defense does not. In his own assessment, Alexander Vuving reports that Eldad Reef remains unoccupied and is instead a source of quiet competition between China and Vietnam.

over the growing Chinese presence in the Spratly Islands culminated in a skirmish on Johnson South Reef that resulted in the death of 64 Vietnamese soldiers. Competing Philippine and Chinese claims to the Scarborough Shoal and fishing rights in the area intensified until 2012, when both Philippine and Chinese forces were sent to the Shoal. With typhoon season approaching, both sides agreed to withdraw their forces pending a final agreement on the use of the shoal. While the Philippines withdrew their forces in accordance with the agreement, China did not. Chinese vessels have remained in the area since then.

Chinese land reclamation and construction has taken place in the Paracels since Chinese forces occupied the islands, with a runway completed there in 1978.⁶⁸ Since December 2013, the Chinese government has also invested significant effort into reclaiming land and creating islands at many of the maritime features it controls in the Spratlys as well. These efforts are the most tangible attempts by China to change the facts on the ground to enforce its sovereignty claims in the region. A report issued by the United States Congressional Research Service in December 2015 noted that

China has reclaimed land at seven of its eight⁶⁹ Spratly outposts and, as of June 2015, had reclaimed more than 2,900 acres [nearly 12 km²] of land. By comparison, Vietnam has reclaimed a total of approximately 80 acres; Malaysia, 70 acres; the Philippines, 14 acres; and Taiwan, 8 acres. China has now reclaimed 17 times more land in 20 months than the other claimants combined over the past 40 years, accounting for approximately 95 percent of all reclaimed land in the Spratly Islands.⁷⁰

The United States Department of Defense's annual report to Congress for 2016 on military developments in China stated that Chinese land reclamation in the Spratlys had reached 3,200 acres (13 km²) by late 2015, while other parties had reclaimed roughly 50 acres of land over the same 2013–2015 time period.⁷¹

During a state visit to the United States in September 2015, President Xi pledged not to militarize the Spratly Islands.⁷² Chinese rhetoric on this topic has shifted since then. After the United States Navy's FONOP in May 2016, the Chinese Defence Ministry stated that the American patrol "proves that China's construction of defensive facilities on the relevant reefs in the Nansha Islands is completely reasonable and totally necessary".⁷³ In July, *Xinhua* reported that construction and land reclamation in the Spratlys would continue.⁷⁴ The potential military use of the islands has become increasingly evident. Radar stations and helipads have been built at several locations, surface-to-air and anti-ship missiles have been installed on Woody Island, and

⁶⁸ Leszek Buszynski, "ASEAN, the Declaration on Conduct, and the South China Sea", *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 25, no. 3 (2003), p. 347.

⁶⁹ See note 67.

⁷⁰ United States Congressional Research Service, "Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress" (R42784, December 22, 2015), by Ronald O'Rourke, p. 28.

⁷¹ Office of the Secretary of Defense, "Annual Report to Congress: Military and Security Developments Involving the People's Republic of China", April 26, 2016, p. 13.

⁷² David Brunnstrom and Michael Martina, "Xi Denies China Turning Artificial Islands into Military Bases", *Reuters*, September 25, 2015, <http://www.reuters.com/article/us-usa-china-pacific-idUSKCN0RP1ZH20150925>, para. 8.

⁷³ Michael Martina, Greg Torode and Ben Blanchard, "China Scrambles Fighters", para. 8.

⁷⁴ Michael Forsythe, "China Begins Air Patrols Over Disputed Area of the South China Sea", *The New York Times*, July 18, 2016, <http://www.nytimes.com/2016/07/19/world/asia/china-sea-air-patrols.html>, para. 9.

both civilian and military aircraft have landed on airstrips at Woody Island and Fiery Cross Reef. Recently passenger airliners have landed on the newest airstrips in the South China Sea, located on Subi Reef and Mischief Reef,⁷⁵ and satellite imagery has revealed that reinforced hangars suited for Chinese military aircraft are being constructed on Subi, Mischief, and Fiery Cross Reefs.⁷⁶ It is also possible that preparations are underway to construct an airstrip on Scarborough Shoal.

China ratified UNCLOS on June 7, 1996.

Republic of China (Taiwan)

Taiwan occupies the Pratas Islands, located roughly 350 kilometres southeast of Hong Kong, and Itu Aba Island, located in the middle of the Spratly archipelago. Taiwan shares China's territorial claims, having published the original eleven-dash line map in 1947. Both Taiwan and China argue that the Paracel and Spratly islands were illegally occupied by Japan in 1938 and vacated as a result of the 1951 Treaty of San Francisco and the 1952 Treaty of Taipei. While Taiwan claims that the islands reverted to the control of the Republic of China, the Philippines claims that the islands exist in a state of *res nullius* and can be claimed by other states.

After the Second World War, Taiwanese forces first occupied Itu Aba Island in December 1946 and have occupied the island continuously since June 1956. Itu Aba Island is the largest maritime feature in the Spratly Islands, and the only feature in the disputed region with a natural source of fresh water.⁷⁷ The Taiwanese government uses the presence of fresh water and lush vegetation to argue that the feature can be considered an island under UNCLOS, and as such it is entitled to a territorial sea and an EEZ. In contrast, the Philippines claims that Itu Aba Island is a rock that cannot sustain human habitation or economic life of its own, an argument supported by the Arbitral Tribunal in The Hague. Nevertheless, roughly 180 people are currently stationed on the island, including 150 personnel from Taiwan's Coast Guard Administration.⁷⁸ In addition, infrastructure built on Itu Aba Island includes a runway capable of supporting C-130 Hercules aircraft, and in December 2015 a lighthouse was constructed and a wharf was renovated to accommodate coast guard ships.⁷⁹

Taiwan's Position on the Disputes

While Taiwan adheres to the same territorial claims as China and has stated that it does not accept the arbitration ruling between China and the Philippines, Taiwan has also routinely

⁷⁵ *Xinhua*, "China Conducts Test Flights on Two New Airports on Nansha Islands", July 13, 2016, http://news.xinhuanet.com/english/photo/2016-07/13/c_135510656.htm.

⁷⁶ David E. Sanger and Rick Gladstone, "New Photos Cast Doubt on China's Vow Not to Militarize Disputed Islands", *The New York Times*, August 8, 2016, <http://www.nytimes.com/2016/08/09/world/asia/china-spratly-islands-south-china-sea.html>.

⁷⁷ Ministry of Foreign Affairs of the Republic of China (Taiwan). "Remarks by President Ma Ying-jeou on Taiping Island". January 28, 2016, http://www.mofa.gov.tw/en/News_Content.aspx?n=8157691CA2AA32F8&sms=4F8ED5441E33EA7B&s=9B04614B26F7FD33, para. 27.

⁷⁸ *The Guardian*, "Taiwan President to Visit Disputed Taiping Island in South China Sea", January 28, 2016, <http://www.theguardian.com/world/2016/jan/28/taiwan-president-ma-ying-jeou-visit-south-china-sea->, para. 15.

⁷⁹ Ministry of Foreign Affairs of the Republic of China (Taiwan). "Remarks by President Ma Ying-jeou", para. 23.

called for all claimants to abide by international law and to “exercise restraint, safeguard peace and stability in the South China Sea, and refrain from taking any unilateral action that might escalate tensions.”⁸⁰ To that end, in May 2015 President Ma advanced the South China Sea Peace Initiative, which urged claimants to settle disputes peacefully, guarantee the freedom of navigation and overflight, and establish coordination mechanisms on areas of mutual concern including research, humanitarian assistance and environmental protection.⁸¹ The Initiative also proposed that “all important actors [be] included”⁸² when drafting a regional code of conduct, as Taiwan was not included in the 2002 Declaration on Conduct that was signed by China and the members of the Association of Southeast Asian Nations. Another important aspect of the Initiative is the notion of joint development. While reaffirming the claim that the maritime features of the South China Sea and their surrounding waters are indisputably an inherent part of Taiwanese territory, the Initiative also embraced the principle that “sovereignty cannot be divided, but resources can be shared”.⁸³ During President Ma’s visit to Itu Aba Island in January 2016, he unveiled a roadmap for the Initiative, supporting cooperation, resource-sharing, and pragmatism over confrontation, monopolizing, and intransigence.⁸⁴ Thus far, while the South China Sea Peace Initiative has been received positively internationally, it has also failed to receive significant levels of support.

Taiwan’s connection to China figures prominently in the South China Sea disputes. In many ways, China benefits from Taiwanese activity in the region. China’s territorial claims were first published by authorities in the Republic of China. Furthermore, China has been less critical of the Taiwanese occupation of Itu Aba Island than it has of the outposts staffed by other nations nearby. It is likely that China’s acceptance or ambivalence towards Taiwan’s position is due to the fact that it considers Taiwan to be a part of China awaiting reunification. In that sense, the Taiwanese presence in the South China Sea could eventually bolster China’s claims. However, this scenario is complicated by the recent election of the Democratic Progressive Party (DPP) in January 2016. The DPP has traditionally championed a distinct Taiwanese political and social identity and has advocated formal independence from China. The DPP has also rejected the “One China principle” and the 1992 consensus that governs Taiwanese relations with China. Their electoral victory is due in part to the previous government’s attempts to improve ties with China. The resulting public perception of economic dependence upon China proved to be politically unpopular. Now, with both the presidency and control of the Legislative Yuan in the hands of the DPP, calls for movement towards independence from within the party will likely grow. At the same time, Beijing has repeatedly stated that it considers relations with Taiwan to be a domestic issue and has repeatedly warned against calls for independence. President Tsai Ing-wen must

⁸⁰ Ministry of Foreign Affairs of the Republic of China (Taiwan). “Statement on the South China Sea”. September 7, 2015, http://www.mofa.gov.tw/en/News_Content.aspx?n=0E7B91A8FBEC4A94&sms=220E98D761D34A9A&s=EDEB CA08C7F51C98, para. 5.

⁸¹ Ministry of Foreign Affairs of the Republic of China (Taiwan). “President Ma Proposes South China Sea Peace Initiative”. May 26, 2015. http://www.mofa.gov.tw/en/News_Content.aspx?n=8157691CA2AA32F8&sms=4F8ED5441E33EA7B&s=F71CA 7963F189938, para. 3.

⁸² Ibid., para. 3.

⁸³ Ibid., para. 5.

⁸⁴ Ministry of Foreign Affairs of the Republic of China (Taiwan), “Remarks by President Ma Ying-jeou on Taiping Island”, January 28, 2016, para. 9.

carefully consider China's economic and military leverage over Taiwan when addressing the desire to pursue independence.

Taiwan has neither signed nor ratified UNCLOS, as it is not a member of the United Nations and has not been recognized by the international community as a sovereign state.

Socialist Republic of Vietnam

Vietnam claims the Paracel and Spratly Islands, based on historical evidence of periodic occupation of the islands. In addition to long-standing use of the islands by Vietnamese fishermen, there is ample evidence to suggest that authorities in Vietnam periodically sent expeditions to the Paracels to survey the islands, monitor the fishing fleets, salvage wrecked ships and conduct search and rescue operations. Vietnamese sources indicate that such activity increased under the rule of emperors Gia Long and Minh Mang, who ruled from 1802 to 1820 and 1820 to 1841, respectively. Vietnamese activity during this period includes deploying soldiers to the Paracels in 1816⁸⁵ and erecting steles proclaiming Vietnamese sovereignty over the islands in 1836.⁸⁶ In the face of competing claims from China and Taiwan, whether such activity constitutes uninterrupted and exclusive sovereignty over the entire region is a matter of fierce debate. Vietnam also claims that it has exercised authority over the Paracels and Spratlys through French activity undertaken on its behalf during the colonial period from 1884 to 1954.

On September 4, 1958, the Chinese government issued a declaration on the limits of China's territorial sea which stated that

- 1) The breadth of the territorial sea of the People's Republic of China shall be twelve nautical miles. This provision applies to all territories of the People's Republic of China, including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas.
- 2) China's territorial sea along the mainland and its coastal islands takes as its baseline the line composed of the straight lines connecting basepoints on the mainland coast and on the outermost of the coastal islands...
- 3) No foreign vessels for military use and no foreign aircraft may enter China's territorial sea and the air space above it without the permission of the Government of the People's Republic of China.
- 4) The principles provided in paragraphs 2) and 3) likewise apply to Taiwan and its surrounding islands, the Penghu Islands, the Tungsha [Pratas] Islands, and Hsisha [Paracel] Islands, the Chungsha Islands [Macclesfield Bank], the Nansha [Spratly] Islands, and all other islands belonging to China.⁸⁷

By way of reply, the prime minister of the Democratic Republic of Vietnam, Pham Văn Đồng, sent a personal letter to Chinese Prime Minister Zhou Enlai on September 14. The letter stated that

⁸⁵ Duy Chien, "Vietnamese Emperors Claimed Sovereignty", para. 10.

⁸⁶ Hong Thao Nguyen, "Vietnam's Position on the Sovereignty over the Paracels & the Spratlys: Its Maritime Claims", *Journal of East Asia & International Law* 5, issue 1 (Spring 2012), p. 176.

⁸⁷ United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, "Limits in the Seas No. 43 – Straight Baselines: People's Republic of China", July 1, 1972, <http://www.state.gov/documents/organization/58832.pdf>, 2.

We solemnly inform you that the Government of the Democratic Republic of Vietnam acknowledges and supports the declaration dated September 4th, 1958 by the Government of the People's Republic of China regarding the decision on the breadth of China's territorial sea.

The Government of the Democratic Republic of Vietnam respects that decision and will direct its state agencies to absolutely respect the 12-nautical mile breadth of China's territorial sea in all the relations with People's Republic of China at sea.⁸⁸

China claims that through this letter, Vietnam has recognized China's claims to the Spratlys and Paracels and has abandoned its own claims to the islands. Supporters of Vietnam's claims have argued that Prime Minister Đồng's reply did not mention the islands by name and addressed only the decision to establish the limits of territorial sea. It has been argued that the Democratic Republic of Vietnam was in no position to abandon a claim to the islands, as the French and Vietnamese claim to the Paracels and Spratlys had been transferred to the Republic of Vietnam. It could also be argued that the letter merely represents an exchange of views between the leaders of two communist states that enjoyed close relations at the time, and that Đồng's private correspondence was not representative of the official policy of the Democratic Republic of Vietnam. For these reasons, the validity of China's claims concerning this letter is a matter of debate.

In 1974, military forces of the Republic of Vietnam attempted to eject Chinese troops and warships present in the Paracel Islands. As a result of the ensuing battle, Chinese forces succeeded in controlling the entire archipelago and the Vietnamese were forced to retreat. In 1988, Vietnamese forces began occupying the Spratly Islands near Fiery Cross Reef, which China had chosen as the location for an observation post commissioned by the UNESCO Intergovernmental Oceanographic Commission. The two forces clashed repeatedly as both sides scrambled to occupy nearby maritime features, culminating in an armed skirmish on March 14, 1988. As a result, 64 Vietnamese military personnel lost their lives and China extended its control over the Spratlys, in contravention of the 1974 Paris Peace Accords which listed China as a participant in an international conference to guarantee peace in Indochina.

The Sino-Vietnamese Relationship

General Secretary Le Kha Phieu visited China in February 1999. On February 27, a joint declaration was issued which included references to the South China Sea. Accordingly, both Vietnam and China agreed to reach a settlement through negotiation and to pursue cooperation in areas such as environmental conservation while also pledging to "refrain from any actions that are likely to further complicate or widen the dispute".⁸⁹ After three prolonged rounds of negotiations beginning in 1974, Vietnam and China signed an agreement establishing a maritime boundary in the Gulf of Tonkin in 2000. This border agreement is the first maritime boundary agreement concluded between China and its neighbours.⁹⁰ Interestingly, although China demanded that the area under negotiation be divided equally, Vietnam emerged with control over

⁸⁸ Thao Vi, "Late Vietnam PM's Letter Gives No Legal Basis to China's Island Claim", *Thanh Nien News*, June 2, 2014, <http://www.thanhniennews.com/politics/late-vietnam-pms-letter-gives-no-legal-basis-to-chinas-island-claim-26821.html>, paras. 12–13 (translated in source).

⁸⁹ Vietnam News Agency, "Vietnam-China Joint Declaration", reproduced in *Vietnam Law & Legal Forum* 5, no. 54 (February 1999), p. 13.

⁹⁰ Keyuan Zou, "The Sino-Vietnamese Agreement", p. 19.

a slight majority of the area under discussion, roughly 8,000 km² more than China,⁹¹ indicating Beijing's willingness to negotiate with Hanoi. Efforts to replicate the agreement's success elsewhere have failed, and the circumstances in the South China Sea are markedly different.⁹² It was two Vietnamese submissions to the CLCS made in 2009 that prompted the Chinese government to publish its nine-dash map and to assert its "indisputable" sovereignty over the Paracels and Spratlys and escalate the disputes.

The Vietnamese government has a complex relationship with China. On one hand, China is an important trade partner for Vietnam and has expressed ties of solidarity with its neighbour. On the other hand, relations have also gone through periods of animosity and conflict. Vietnam has long faced domination by its powerful northern neighbour and has established closer ties to the United States, Russia and its Asian neighbours as a means of countering Chinese influence as a result. To that end, Vietnam has signed the Trans-Pacific Partnership free trade agreement, and has entered into discussion with the Philippines concerning joint military patrols in the region.

The Vietnamese government continues to contest Chinese claims to the South China Sea. In June 2012, Vietnam's National Assembly passed the *Law of the Sea of Vietnam*, which reiterated Vietnamese sovereignty over the Paracels and Spratlys and set out Vietnam's baselines, maritime boundaries, and its EEZ in accordance with UNCLOS. In addition, on December 11, 2014, Vietnam submitted an intervention in the arbitration case between the Philippines and China. In its statement, Vietnam supported the Philippines' position, rejected China's nine-dash line as the basis for a territorial claim, and reiterated its claims to the Paracel and Spratly Islands before the Court. Lastly, in May 2014 a Chinese oil rig was deployed in a disputed section of the South China Sea claimed by both China and Vietnam, near the Paracel Islands and roughly 120 nautical miles from the Vietnamese coast. This sparked public anger and led to a series of public demonstrations against perceived Chinese exploitation. While the government generally does not lightly tolerate dissent, in this case authorities did not stop the protests, and their number, size, and intensity increased rapidly. These protests eventually gave way to rioting and resulted in several foreign-owned factories being attacked and torched, including several Chinese and Taiwanese plants. The government eventually stepped in and stopped the protests when the anti-China sentiment gave way to violence and protesting about more domestic grievances.⁹³ The same oil rig has since been deployed in the region in both 2015 and 2016.

Vietnam has taken steps to assert its position militarily. Since 1975, Vietnam has occupied 21 maritime features in the Spratly Islands, and occupies 14 lookout structures on six underground banks southwest of the Spratlys.⁹⁴ Vietnam has also begun island reclamation efforts, most notably at West Reef, Sand Cay, and Spratly Island. In 1976, Vietnam began

⁹¹ Ibid., p. 15.

⁹² For further information on the context of the Gulf of Tonkin agreement and how it differs from the South China Sea, see Isaac B. Kardon, "The Other Gulf of Tonkin Incident: China's Forgotten Maritime Compromise", Asia Maritime Transparency Initiative, October 21, 2015, <http://amti.csis.org/the-other-gulf-of-tonkin-incident-chinas-forgotten-maritime-compromise/>.

⁹³ Eva Dou and Richard C. Paddock, "Behind Vietnam's Anti-China Riots, a Tinderbox of Wider Grievances", *The Wall Street Journal*, June 17, 2014, <http://www.wsj.com/articles/behind-vietnams-anti-china-riots-a-tinderbox-of-wider-grievances-1403058492>.

⁹⁴ Alexander L. Vuving, "South China Sea: Who Occupies What in the Spratlys?" *The Diplomat*, May 6, 2016, <http://thediplomat.com/2016/05/south-china-sea-who-claims-what-in-the-spratlys/>, paras. 4, 7.

constructing a 550-metre-long airstrip on Spratly Island in the eponymous archipelago.⁹⁵ Land reclamation activity between January 2014 and November 2016 has extended the runway's length to 1,200 metres.⁹⁶ Lastly, the armed forces have been acquiring new equipment to improve their power projection capabilities. In 2009, a US\$2 billion deal was reached to purchase six new submarines from Russia, Vietnam's traditional arms supplier.⁹⁷ These Kilo-class submarines are among the quietest diesel submarines in the world, specifically-designed for anti-sub and anti-naval warfare in shallow water. Thus far, five of the submarines have arrived in Vietnam and the last is expected to arrive in mid-2016. In addition, on a state visit to Vietnam on May 23, 2016, President Obama announced that the American arms embargo that had been in place since 1975 would be fully lifted, as part of the United States' "desire to complete what has been a lengthy process of moving towards normalization with Vietnam".⁹⁸ Signs point to a warming relationship between Vietnam and the United States. In October 2016, American warships visited Vietnam's Cam Ranh Bay naval base for the first time,⁹⁹ while Vietnam's defence ministry voiced support for American intervention in the region.¹⁰⁰ Lastly, reports surfaced in August 2016 that mobile rocket launchers with a range of 150 kilometres had been stationed at several Vietnamese positions near Chinese airstrips in the Spratly Islands, in anticipation of increased tensions following the decision rendered by the Arbitral Tribunal.¹⁰¹

Vietnam ratified UNCLOS on July 25, 1994.

Republic of the Philippines

The Philippines claims part of the Spratly Islands and the Scarborough Shoal based on the historical presence of Philippine fishermen on the islands, their geographical proximity to the Philippine Islands and that they are included in the Philippines' exclusive economic zone. Following the Second World War, Philippine forces occupied the region on the understanding that the islands were considered *res nullius* and therefore not under the jurisdiction of any state. In September 2012, President Benigno Aquino III signed Administrative Order No. 29, mandating that all government agencies refer to the parts of the South China Sea that fall within the Philippines' EEZ as the "West Philippine Sea".¹⁰²

⁹⁵ Asia Maritime Transparency Initiative, "Airpower in the South China Sea", n.d., last accessed April 6, 2016, <http://amti.csis.org/airstrips-scs/>.

⁹⁶ Asia Maritime Transparency Initiative, "Vietnam Responds with Spratly Air Upgrades", December 1, 2016, <https://amti.csis.org/vietnam-responds/>.

⁹⁷ Prashanth Parameswaran, "Vietnam Gets Fifth Submarine from Russia". *The Diplomat*, February 10, 2016, <http://thediplomat.com/2016/02/vietnam-gets-fifth-submarine-from-russia/>, para.4.

⁹⁸ David Nakamura, "In Historic Move, U.S. Lifts Embargo on Arms Sales to Vietnam", *The Washington Post*, May 23, 2016, <https://www.washingtonpost.com/news/post-politics/wp/2016/05/23/in-historic-move-u-s-lifts-arms-sales-embargo-to-vietnam/>, para. 4.

⁹⁹ *Reuters*, "U.S. Warships Make Landmark Visit to Strategic Vietnam Port", October 4, 2016, <http://www.reuters.com/article/us-usa-vietnam-navy-idUSKCN1241D3>.

¹⁰⁰ *Reuters*, "Vietnam Gives Thumbs-Up to U.S. Regional Role as Pivot Stumbles", October 18, 2016, <http://www.reuters.com/article/us-vietnam-usa-idUSKCN12I1BR>.

¹⁰¹ Greg Torode, "Exclusive: Vietnam Moves New Rocket Launchers into Disputed South China Sea – Sources", *Reuters*, August 10, 2016, <http://www.reuters.com/article/us-southchinesea-vietnam-idUSKCN10K2NE>, para. 9.

¹⁰² Official Gazette of the Republic of the Philippines, "Administrative Order No. 29, s. 2012", September 5, 2012, <http://www.gov.ph/2012/09/05/administrative-order-no-29-s-2012/>.

In 1947, a Filipino fishing magnate named Tomás Cloma claimed to have discovered several uninhabited islands west of Palawan. In 1956, Cloma announced the formation of the state of Kalayaan, or “Freedomland”, with borders encompassing most of the Spratly Islands, including Itu Aba Island, but excluding Spratly Island itself and the islands to the west. This announcement was immediately dismissed by Taiwan, China, and Vietnam, who each reiterated their claims to the islands and sent naval parties of their own to the area. By 1971, the Marcos government in the Philippines was claiming jurisdiction over Freedomland and considered the islands to be part of the Province of Palawan. In 1974, shortly after changing Freedomland’s name to “Colonia”, Cloma was detained by the Philippine government and was coerced into ceding any claim he had to Colonia to the Philippines for one peso.¹⁰³ Freedomland’s legality as an independent state and whether the cession of Colonia’s territory to the Philippines was legitimate is debateable. Regardless, the Philippines definitively announced its claim to what it calls the Kalayaan Island Group through Presidential Decree 1596, signed by President Marcos in 1978. This decree claimed that control of the Kalayaan Island Group was “vital to the security and economic survival of the Philippines”¹⁰⁴ and created the Municipality of Kalayaan to administer them as part of Palawan province, with a low-level administrative unit established on Thitu/Pagasa Island.

In 2009, the *Philippine Archipelagic Baselines Law* established new baselines around the Philippine archipelago, bringing its maritime boundaries in line with the Convention. The law also reaffirmed that the Philippines “exercises sovereignty and jurisdiction” over the Scarborough Shoal and the Kalayaan Island Group, but did not determine their baselines. Instead, the law stated that baselines around these areas shall eventually be determined in accordance with the Convention.¹⁰⁵

Philippine Activity in the South China Sea

The Philippines has occupied nine maritime features in the Spratly Islands and maintains effective control over several others.¹⁰⁶ The number of troops present and their living conditions vary, ranging from crews living on the *BRP Sierra Madre*, an old warship that was grounded on Second Thomas Shoal in 1999, to a garrison serviced by air on Thitu Island. The second-largest island in the Spratlys behind Itu Aba, Thitu is currently home to the Philippines’ only airstrip in the disputed region and is the only maritime feature occupied by Philippine forces to boast a small civilian population. Since the government opened up settlement of the island in 2002, the civilian population has grown to approximately 120 people.¹⁰⁷

However, its position is constantly being challenged by China. Chinese coast guard vessels frequently disrupt attempts to resupply these outposts and prevent Filipino fishermen

¹⁰³ Kingdom of Colonia St John, “The History of the Kingdom of Colonia St John”, n.d., last accessed July 15, 2016, <http://www.colonia.asia/history%20-%20the%20history%20of%20the%20kingdom%20of%20colonia%20st%20john.htm>.

¹⁰⁴ Official Gazette of the Republic of the Philippines, “Presidential Decree No. 1596, s. 1978”, June 11, 1978, <http://www.gov.ph/1978/06/11/presidential-decree-no-1596-s-1978/>, preamble.

¹⁰⁵ Official Gazette of the Republic of the Philippines. “Republic Act No. 9522”. March 10, 2009, <http://www.gov.ph/2009/03/10/republic-act-no-9522/>, Section 2.

¹⁰⁶ Vuving, Alexander L. “Who Occupies What?”, para.10.

¹⁰⁷ Tomas Etzler, “Wrecks, Rats, and Roaches: Standoff in the South China Sea”, *CNN*, July 2014, <http://www.cnn.com/interactive/2014/07/world/south-china-sea-dispute/>.

from accessing their traditional fishing grounds such as the Scarborough Shoal. To counteract this, the Philippines has raised its defence spending to record levels, reaching 115.8 billion pesos (US\$2.5 billion) in 2015.¹⁰⁸ Even so, the Philippine defence budget is dwarfed by China's, which is estimated at 954 billion yuan (US\$147 billion). Instead, the Philippine government is forming closer ties with its neighbours and with the United States, its longstanding ally. In June 2015, it was announced that 10 new patrol boats would be procured from Japan, and plans are in place to acquire new fighter aircraft and possibly submarines as well. In addition, the Enhanced Defence Cooperation Agreement between the Philippines and the United States was ratified in March 2016, allowing American use of five military bases, including an air base on Palawan. In April 2016, it was announced that American forces that had taken part in the annual joint military exercises with the Philippines would remain stationed in the region, and that the United States and the Philippines would undertake joint patrols of the region in the future.¹⁰⁹

The election of Rodrigo Duterte as President of the Philippines in May 2016 has complicated the Philippines' stance on the South China Sea. Duterte has at times adopted an aggressive stance, promising during the campaign to personally travel to the disputed Spratly Islands to affirm Philippine sovereignty over the islands. On the other hand, in the past he has also publicly questioned the need for an international arbitration tribunal to assert the Philippines' rights under the Convention, and has called for bilateral talks and joint development of the disputed region with China.¹¹⁰ Since assuming office, President Duterte has made several statements criticizing the United States, has called for the end of joint exercises with the American military,¹¹¹ and has expressed a desire to negotiate a settlement with China, attract Chinese investment, and improve relations with Beijing.¹¹²

President Duterte's state visit to China in October 2016 at the head of a large trade delegation encapsulated the Philippines' shifting foreign policy. Duterte had declared prior to the visit that in addition to encouraging trade, the South China Sea disputes would be on the agenda, stating that "I will not bargain anywhere, we will continue to insist that [it] is ours".¹¹³ Duterte then walked that comment back by stating that the disputes, "while in the broader outline of talks", would "take a back seat" and that he would make no "hard impositions" regarding the topic.¹¹⁴ On October 20, shortly after meeting Chinese President Xi Jinping, Duterte announced

¹⁰⁸ The *Japan Times*, "Philippines Weighs Investing in Submarine Fleet Amid South China Sea Row", March 30, 2016, http://www.japantimes.co.jp/news/2016/03/30/asia-pacific/philippines-weighs-investing-submarine-fleet-amid-south-china-sea-row/#.Vw_XgpwrJpj.

¹⁰⁹ *CBC News*, "U.S. Conducts Joint Patrols with the Philippines in the South China Sea", April 14, 2016, <http://www.cbc.ca/news/world/us-south-sea-patrols-1.3535092>.

¹¹⁰ David Feith, "The New Political Risk in the South China Sea", *Wall Street Journal*, May 17, 2016, <http://www.wsj.com/articles/the-new-political-risk-in-the-south-china-sea-1463505005>, paras. 3–5.

¹¹¹ Teresa Cerojano, "Philippines Tells U.S. Joint South China Sea Patrols Are on Hold", *The Globe and Mail*, October 7, 2016, <http://www.theglobeandmail.com/news/world/philippines-tells-us-joint-south-china-sea-patrols-are-on-hold/article32288652/>.

¹¹² *South China Morning Post*, "Duterte Announces China Visit, Dismisses Washington as 'Arrogant'", October 11, 2016, <http://www.scmp.com/news/china/diplomacy-defence/article/2027108/duterte-announces-china-visit-dismisses-washington>.

¹¹³ *Reuters*, "Philippine Leader Says Will Raise Arbitration Case with China, Won't Bargain", October 16, 2016, <http://www.reuters.com/article/us-philippines-china-idUSKBN12G06D>, para. 5.

¹¹⁴ *Reuters*, "Philippines' Duterte Says South China Sea Arbitration Case to Take 'Back Seat'", October 19, 2016, <http://www.reuters.com/article/us-china-philippines-idUSKCN12J10S>, paras. 6, 9, 11.

his “separation from the United States... America has lost”.¹¹⁵ A joint statement by the Philippine Finance and Economic Planning Secretaries released a few hours later toned those remarks down, stating that “We will maintain relations with the West but we desire stronger integration with our neighbours”.¹¹⁶ White House spokesman Eric Schultz reaffirms the United States’ commitment to the Philippines, declaring that “The U.S.-Philippine alliance is built on a 70-year history... We have not received any official requests from Filipino officials to alter any of our many issues where we bilaterally cooperate”.¹¹⁷ Duterte himself later softened his stance, stating that he would not sever diplomatic ties with the United States or break the treaty alliance between the two states in his pursuit of an independent foreign policy.¹¹⁸ It remains to be seen what impact President Duterte’s populist policies will have upon the South China Sea disputes and both Chinese and American diplomacy in the region.

The Philippines ratified UNCLOS on May 8, 1984.

Malaysia

Malaysia claims Swallow Reef in addition to several rock formations and LTEs that lie within its claimed EEZ. In addition, it reportedly claims several maritime features that are occupied by Vietnam, including two rocks, and Commodore Island, occupied by the Philippines.¹¹⁹ In total, Malaysia has troops stationed on five maritime features and has established indirect control over three others.¹²⁰ Malaysia published what it determined to be its maritime boundaries in 1979, but those borders have been challenged by several neighbouring states.¹²¹ Malaysia announced the boundaries of its claimed continental shelf to the southeastern portion of the South China Sea in a Joint Submission to the CLCS with Vietnam in 2009, but a final boundary there has not been established due to competing claims from China and Taiwan. A maritime border between Johor and Indonesia has been established in the South China Sea, while the border between Malaysia, Indonesia, and the Philippines in the Celebes Sea is disputed. A 1930 treaty between the United States and the United Kingdom has divided control of the islands present in the Celebes Sea between what are now Malaysia and the Philippines, but did not include a defined maritime boundary.

Malaysia has occupied Swallow Reef/Layang-Layang Island since 1983¹²² and the island has been home to a civilian diving resort since 1991. Swallow Reef is also home to a radar station, a maritime research facility, and Malaysia’s airstrip in the Spratlys. Under construction from 1991 to 1995 and expanded in 2003, the runway is, at 1,368 metres in length,¹²³ slightly longer than the Philippines’ strip on Thitu Island and Taiwan’s strip on Itu Aba Island and is second only to China’s strip on Fiery Cross Reef.

¹¹⁵ *Reuters*, “Duterte Aligns Philippines with China, Says U.S. Has Lost”, October 20, 2016, <http://www.reuters.com/article/us-china-philippines-idUSKCN12K0AS>, paras. 3–4.

¹¹⁶ *Ibid.*, paras. 14–15.

¹¹⁷ *Ibid.*, para. 13.

¹¹⁸ James Griffiths, Matt Rivers, and Pamela Boykoff, “Philippines Not Really Severing Ties with US, Duterte Says”, *CNN*, October 22, 2016, <http://www.cnn.com/2016/10/21/asia/duterte-china-philippines-us/>.

¹¹⁹ J. Ashley Roach, “Malaysia and Brunei: An Analysis of their Claims in the South China Sea”, *CNA Corporation* (August 2014), <https://seasresearch.files.wordpress.com/2014/08/malaysia-brunei-claims.pdf>, p. i.

¹²⁰ Alexander L. Vuving, “Who Occupies What?”, para. 28.

¹²¹ *Ibid.*, p. ii.

¹²² *Ibid.*, p. 10.

¹²³ Asia Maritime Transparency Initiative, “Airpower in the South China Sea”.

While Vietnam and the Philippines have publicly spoken out against Chinese aggression in the South China Sea, Malaysia has traditionally taken a quieter approach, preferring to “play it safe”¹²⁴ rather than risk its bilateral relationship with China. This policy is not unappreciated in Beijing. In November 2014 President Xi Jinping praised Malaysia’s use of a “quiet diplomacy approach” over confrontation or arbitration.¹²⁵ Malaysia was the first ASEAN member to normalize ties with China, which it did in 1974, and China is Malaysia’s biggest trading partner. Thanks to this special relationship, the limited nature of Malaysia’s claims in the Spratlys, and Malaysia’s somewhat reserved presence in the South China Sea, China has not been as assertive in disputing Malaysia’s claims as it has been Vietnam’s or the Philippines’. In keeping with this *modus vivendi*, the Malaysian government had refrained from explicitly supporting the Philippines’ arbitration case against China, instead calling for all parties to exercise self-restraint and avoid activity that would increase tensions.¹²⁶

At the same time, Malaysia has a powerful incentive to assert its sovereignty in the South China Sea: as Southeast Asia’s second-largest producer of oil and natural gas and the world’s third-largest exporter of liquefied natural gas, one third of the Malaysian government’s annual revenue comes from the oil and gas sector, and several of the hydrocarbon fields are within China’s nine-dash line.¹²⁷ In addition, given the importance of trade to the Malaysian economy, Malaysia also has an interest in maintaining peace and stability in the region and upholding the freedom of navigation in international waters and in EEZs. Furthermore, China’s militarization of the South China Sea—and the growing number of incursions by Chinese fishing boats and coast guard vessels into Malaysia’s maritime claims—have not gone unnoticed by the Malaysian defence establishment. Patrols and surveillance around maritime features occupied by Malaysian forces have increased in recent years. Malaysia is also reportedly looking to replace its fleet of aging MiG-29 interceptors after several years of delays, purchasing up to 18 new fighter jets for US\$2.5 billion.¹²⁸ The defence minister, Hishammuddin Hussein, has stated that Malaysia is being forced to “push back” against China and has held meetings with his counterparts from the Philippines, Australia, and Vietnam in response to Chinese assertiveness.¹²⁹ However, given that Malaysia’s capabilities remain limited compared to China’s, it is likely that Malaysia will continue to prioritize friendly relations with Beijing and pursue a diplomatic solution to the disputes based on a code of conduct governing China and ASEAN’s activities in the South China Sea.

Malaysia ratified UNCLOS on October 14, 1996.

¹²⁴ Prashanth Parameswaran, “Playing It Safe: Malaysia’s Approach to the South China Sea and Implications for the United States”, *Center for a New American Security – Maritime Security Series* (February 2015), http://www.cnas.org/sites/default/files/publications-pdf/CNAS%20Maritime%206_Parameswaran_Final.pdf, p. 4.

¹²⁵ *Ibid.*, p. 6.

¹²⁶ Lee Seok Hwai, “Malaysia Calls for South China Sea Dispute to Be Resolved by Diplomatic and Legal Processes After Hague Ruling”, *The Straits Times*, July 13, 2016, <http://www.straitstimes.com/asia/se-asia/malaysia-calls-for-south-china-sea-dispute-to-be-resolved-by-diplomatic-and-legal>.

¹²⁷ *Ibid.*, p. 4.

¹²⁸ Siva Govindasamy and Joseph Sipalan, “In China’s Shadow, SE Asia Looks to Replace Aging Fighter Jets”, *Reuters*, April 21, 2016, <http://www.reuters.com/article/us-asean-aerospace-southchinasea-idUSKCN0X12WO>, para. 4.

¹²⁹ Tang Siew Mun, “Why Malaysia Is Adopting a Tougher South China Sea Stance”, *The Malay Mail Online*, March 20, 2016, <https://sg.news.yahoo.com/why-malaysia-adopting-tougher-south-china-sea-stance-224700272.html>, paras. 2–3.

Negara Brunei Darussalam

Brunei's claim in the South China Sea is based on its exclusive economic zone and extended continental shelf. It claims Louisa Reef, which lies within this zone, but has not established any military presence there or anywhere else in the South China Sea. Until 2009, its claimed EEZ was disputed by Malaysia. A British Order in Council from 1958 established the maritime borders between Brunei and Malaysia only to the 100-fathom isobath, and Malaysia claimed that its EEZ effectively enveloped Brunei's maritime boundaries at that point. Under an Exchange of Letters dated March 16, 2009, the two states resolved their boundary dispute. In conjunction with this, it appears that Malaysia has ceded its claim to Louisa Reef.¹³⁰ However, neither state has publicized the agreement.

Brunei has consistently portrayed itself as a neutral party in the South China Sea disputes and has repeatedly called for a peaceful solution. It has sought to maintain friendly relations with China and with the members of ASEAN. Recently, Brunei has also sought closer ties with Japan as a customer for its liquefied natural gas exports and as a partner to help diversify its economy.¹³¹

Brunei ratified UNCLOS on November 5, 1996.

Republic of Indonesia

Indonesia occupies a few areas of the South China Sea, notably the Natuna Islands to the southwest. However, its sovereignty over these islands is not disputed and its maritime boundary has largely been settled. As such, Indonesia is a non-claimant South China Sea state that has portrayed itself as an "honest broker" of the disputes. Furthermore, given its commanding position overlooking the sea lines of communication from the Indian Ocean to the South China Sea, Indonesia shares Singapore and Malaysia's interest in ensuring the free movement of trade. It is estimated that one third of the world's liquefied natural gas passes through the Straits of Malacca each year while roughly 3,900 ships transit the Lombok Strait¹³² and over 75,000 ships pass through the Straits of Malacca annually.

Indonesia has sought to strengthen its economic ties with China while remaining neutral in the South China Sea. However, an incident in March 2016 served to heighten tensions between the two countries. On March 20, a Chinese coast guard ship prevented an Indonesian fisheries law enforcement vessel from seizing a Chinese fishing trawler that had been fishing illegally inside Indonesia's territorial waters, less than four kilometres from Indonesia's Natuna Islands. This incident caused an uproar among the Indonesian public. In response, Indonesia's fisheries ministry destroyed several fishing boats that had been caught trespassing in Indonesian waters and the defence ministry announced plans to militarize the Natuna Islands. Tensions had abated by the end of April, when Chinese and Indonesian officials pledged to strengthen

¹³⁰ J. Ashley Roach, "Malaysia and Brunei: An Analysis", p. 23.

¹³¹ The *Japan Times*, "Japan, Brunei Agree on Need to Peacefully Resolve Disputes in South China Sea", January 28, 2016, http://www.japantimes.co.jp/news/2016/01/28/national/politics-diplomacy/japan-brunei-agree-need-peacefully-resolve-disputes-south-china-sea/#.VxAD_ZwrJpg.

¹³² Masyithoh-Annisa Ramadhani, "An Indonesian Perspective Toward Maritime Vision: Is Pursuing National Interest while Maintaining Neutrality in the South China Sea Possible?" *European Scientific Journal* SE 1 (November 2015), p. 390.

maritime cooperation in areas such as anti-terrorism and law enforcement. In late May, another Chinese fishing vessel was observed off the coast of the Natunas. An Indonesian Navy frigate fired upon the vessel and apprehended it.¹³³

Indonesia ratified UNCLOS on February 3, 1986.

Republic of Singapore

Singapore's maritime borders between Indonesia and Malaysia have largely been settled. While some segments of the border are undefined, these disputes are relatively minor. Singapore does not claim any territory in the South China Sea and has not occupied any maritime features.

The growing militarization in the region has not gone unnoticed in Singapore, and the government has responded in kind. Singapore spends nearly 4% of its GDP on defence, more than any other Southeast Asian nation, and its defence budget is predicted to reach US\$10.7 billion within five years.¹³⁴ Singapore's defence minister, Ng Eng Hen, has justified this increased spending due to "rising nationalism" in the region.¹³⁵ However, Singapore has an interest in resolving the South China Sea disputes peacefully. As a regional trade hub, Singapore's economy depends on flourishing trade and, by extension, on ensuring that the region remains peaceful and that the right to freedom of navigation and overflight is respected. Given these interests, Minister Ng Eng Hen has previously criticized the discrepancy between China's economic collaboration in the region (through its One Belt, One Road initiative, for example) and its militarization of the South China Sea.¹³⁶ Singapore has also championed the role of ASEAN in resolving the disputes peacefully, particularly the ASEAN Defence Ministers' Meeting (ADMM) and the ADMM-plus, which includes eight dialogue partners (Australia, China, India, Japan, New Zealand, Russia, South Korea and the United States). Singapore has also supported finalizing the binding code of conduct in the South China Sea, an ASEAN initiative that has stalled for several years. Singapore has also publicly supported several other proposals, including expanding the Code for Unplanned Encounters at Sea to cover coast guard and fishing vessels in addition to naval vessels, and proposing similar guidelines governing submarines and aircraft encounters.¹³⁷

Singapore ratified UNCLOS on November 17, 1994.

¹³³ Niniek Karmini, "South China Sea: Indonesian Navy Fires Shot, Seizes Chinese Fishing Boat", *Sydney Morning Herald*, May 31, 2016, <http://www.smh.com.au/world/south-china-sea-indonesian-navy-fires-shots-seizes-chinese-fishing-boat-20160531-gp7s45.html>.

¹³⁴ Rob Taylor, "Singapore, Australia Expand Military Partnership with Eye on China", *Wall Street Journal*, May 6, 2016, <http://www.wsj.com/articles/singapore-australia-expand-military-partnership-with-eye-on-china-1462519648>, para. 8.

¹³⁵ *Ibid.*, para. 9.

¹³⁶ Rosalind Mathieson and John Fraher, "China Security Push Should Match Economic Model, Says Singapore", *Bloomberg*, March 28, 2016, <http://www.bloomberg.com/news/articles/2016-03-28/china-must-tie-territorial-ambition-to-new-rules-singapore-says>, para. 4.

¹³⁷ Prashanth Parameswaran, "Singapore Wants New Rules to Defuse Asia's Tensions", *The Diplomat*, April 21, 2016, <http://thediplomat.com/2016/04/singapore-wants-new-rules-to-defuse-asias-tensions/>, paras. 6–10.

Section C: International Perspectives on the South China Sea Disputes

The Association of Southeast Asian Nations (ASEAN)

ASEAN has emerged as the primary intergovernmental forum working towards a multilateral solution to the South China Sea disputes. The disputes are of vital concern for several of ASEAN's 10 members; four have claims and several others, such as Singapore and Indonesia, have expressed an interest in resolving the disputes. ASEAN's position on the issue was made clear with the 1992 Declaration on the South China Sea. Recognizing the danger the conflicts posed to regional peace and stability, the Declaration urged all parties involved to resolve the competing claims peacefully and to cooperate in areas of mutual concern, such as navigation safety, protection against pollution, search and rescue, and combatting piracy in the region. The Declaration also recommended the creation of a code of conduct based on the principles enshrined in the 1976 *Treaty of Amity and Cooperation in Southeast Asia*.¹³⁸ However, the Declaration's effectiveness was limited due to its non-binding nature and the exclusion of China and Taiwan.

In Pursuit of a Code of Conduct

ASEAN made progress toward rectifying these problems with the Declaration on the Conduct of Parties in the South China Sea, signed by the governments of ASEAN's members and the government of China on November 4, 2002. This landmark agreement was significant in a number of ways. In addition to reiterating the principles outlined in the 1992 Declaration, the signatories agreed to uphold UNCLOS, respect the freedom of navigation and overflight, resolve the territorial and jurisdictional disputes peacefully in accordance with international law and the UN Convention, build trust and confidence between signatories, and "exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability".¹³⁹ The signatories also reaffirmed that "the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective."¹⁴⁰

Despite commitments from all involved to negotiate a code of conduct and the rapid escalation of Chinese activity in the South China Sea in recent years, a binding code of conduct remains elusive. After nearly 15 years of inactivity in the face of increased Chinese aggression, ASEAN's position as the best-placed forum for dialogue may be undermined as individual members turn elsewhere to counter China. After repeatedly attempting to foster a common position on the South China Sea disputes within ASEAN, the Philippines' pursuit of a settlement through international arbitration and its decision to renew closer defence ties with the United States may be an example of this. As one diplomat involved with the code of conduct negotiations reportedly said, "People aren't giving up on ASEAN... But some of the countries

¹³⁸ Association of Southeast Asian Nations, "1992 ASEAN Declaration on the South China Sea", July 22, 1992, <https://cil.nus.edu.sg/rp/pdf/1992%20ASEAN%20Declaration%20on%20the%20South%20China%20Sea-pdf.pdf>.

¹³⁹ Association of Southeast Asian Nations, "Declaration on the Conduct of Parties in the South China Sea", November 4, 2002, http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2.

¹⁴⁰ Ibid., Article 10.

are looking at other options to stop the situation from getting worse.”¹⁴¹ With its growing military and economic presence in the Asia-Pacific, the United States may present one such alternative.

ASEAN Divided

Progress on concluding a code of conduct has been hampered not only by Chinese foot-dragging but also by disunity within ASEAN itself. Joint statements, communiques, and declarations released by ASEAN are developed by consensus, and a divide has emerged among ASEAN members regarding the South China Sea disputes. Some members, Vietnam and the Philippines in particular, have attempted to leverage the combined diplomatic strength of ASEAN’s members in their disputes with China and have argued that ASEAN should take a more proactive stance. Others such as Cambodia and Laos recognize that the South China Sea is not a critical issue for every member state while trade with China is becoming increasingly important for all members of ASEAN. As such, some ASEAN members are hesitant to antagonize China or otherwise jeopardize their trade relationships with Beijing for the sake of the South China Sea. For that reason, ASEAN has been hesitant to criticize China for its behaviour, despite pressure from some of its members and from the United States¹⁴² to do so.

This disunity was exposed in July 2012 when ASEAN failed to issue a joint communique after the 45th annual ASEAN Ministerial Meeting in Phnom Penh, the first time such a failure occurred. Galvanized by China’s occupation of Scarborough Shoal five weeks earlier, the Philippine Secretary of Foreign Affairs, Albert del Rosario, entered the meeting determined to ensure that the final communique mentioned the Shoal and criticized Chinese activity in the South China Sea. Secretary del Rosario also sought to make progress on the code of conduct, a draft of which had been proposed by the Philippines and vetted by an ASEAN working group of senior officials. Prior to the meeting, the foreign ministers from the Philippines, Indonesia, Malaysia, and Vietnam had produced a draft communique to be considered during the retreat at the conclusion of the Ministerial Meeting. The South China Sea was mentioned in four of the draft’s 132 paragraphs, and both the Scarborough Shoal incident and Vietnam’s concerns about the China National Offshore Oil Company issuing oil exploration leases in contested waters claimed by Vietnam were only mentioned in one paragraph.¹⁴³

Following the session on July 9, the Secretary of State from the Cambodian foreign ministry reported that the foreign ministers had adopted key elements of the proposed Code and that ASEAN senior officials would meet with their Chinese counterparts to discuss it,¹⁴⁴ signalling that progress was being made at last. During the plenary session, the Philippines opened the discussion on the South China Sea. Del Rosario urged ASEAN to support the code of conduct and the Philippines’ position on the Scarborough Shoal, listed examples of Chinese

¹⁴¹ Trefor Moss and Chun Han Wong, “Asian Nations Look Beyond ASEAN to Solve South China Sea Disputes”, *The Wall Street Journal*, November 22, 2015, <http://www.wsj.com/articles/asian-nations-look-beyond-asean-to-solve-south-china-sea-disputes-1448171986>.

¹⁴² Jeff Mason and Bruce Wallace, “Obama, ASEAN Discuss South China Sea Tensions, but No Joint Mention of China”, *Reuters*, February 17, 2016, <http://www.reuters.com/article/us-usa-asean-idUSKCN0VP1F7>.

¹⁴³ Bill Hayton, *The South China Sea*, p. 196.

¹⁴⁴ Michael Lipin, “Cambodia Says ASEAN Ministers Agree to ‘Key Elements’ of Sea Code”, *Voice of America*, July 9, 2012, http://www.voanews.com/content/cambodia_asean_ministers_agree_to_key_elements_of_sea_code/1381574.html.

“expansion and aggression” in the region, and urged ASEAN to play a greater role in fostering dialogue and promoting peace and stability in the region.¹⁴⁵ This last comment was echoed by the ministers of several other delegations, and several also stressed the importance of remaining united on the issue, with most expressing general support for the draft communique.¹⁴⁶ However, the Chair of the meeting, Cambodian foreign minister Hor Namhong, declared that there was no consensus and that the paragraphs concerning the South China Sea needed further discussion.¹⁴⁷ In the debates that followed, the Chair objected to listing the specific areas by name and supported a blanket statement mentioning only “disputed areas”. However, both Vietnam and the Philippines insisted that the Scarborough Shoal and Vietnam’s EEZ were not disputed but rather that their sovereignty was being infringed upon by China.¹⁴⁸ Discussion on the wording of the communique continued for another four days, and 18 drafts were produced. Several diplomatic sources allege that the Chair shared these drafts with advisors outside the closed meeting room, with others claiming that these advisors were Chinese officials.¹⁴⁹ At the last meeting, after Vietnam and the Philippines agreed to a compromise, the Chair allegedly stormed out.¹⁵⁰ The exact nature of Chinese pressure on Cambodia remains unknown, but few outside observers believe that Cambodia acted entirely independently.¹⁵¹

In the aftermath of the summit, thanks to the shuttle diplomacy performed by the Indonesian foreign minister, the ASEAN foreign ministers did agree to a joint statement outlining their Six-Point Principles on the South China Sea, released on July 20. The statement reiterated their support for the Declaration on Conduct, the code of conduct, self-restraint, the UN Convention, and peaceful dispute resolution.¹⁵² While articulating the Six-Point Principles did much to restore ASEAN unity, it did not break any new ground and no concrete progress toward the conclusion a code of conduct was made. Rather than demonstrate ASEAN’s willingness to broach sensitive topics with a united voice, the 2012 Ministerial Meeting demonstrated China’s ability to successfully leverage ASEAN’s internal divisions.

ASEAN’s lack of unity in the face of Chinese pressure was on display once more after the Special ASEAN–China Foreign Ministers Meeting held in Kunming in June 2016 to mark the 25th anniversary of the ASEAN–China dialogue. Reports indicate that the South China Sea disputes were raised during the meetings and that ASEAN members were ready to read a prepared statement at the joint press conference following the meeting. However, the Chinese delegation had arrived at the summit with a joint statement of its own, which repeated the general principles covered under the 1992 Declaration and the 2002 Declaration on Conduct, but was vaguer than ASEAN’s prepared version and made no mention of land reclamation and

¹⁴⁵ Carlyle A. Thayer, “ASEAN’s Code of Conduct in the South China Sea: A Litmus Test for Community-Building?”, *The Asia-Pacific Journal*, 10, issue 34, no. 4 (August 2012), p. 6.

¹⁴⁶ Bill Hayton, *The South China Sea*, p. 197.

¹⁴⁷ Carlyle A. Thayer, “ASEAN’s Code of Conduct”, p. 11.

¹⁴⁸ Bill Hayton, *The South China Sea*, p. 197.

¹⁴⁹ *Ibid.*, p. 198.

¹⁵⁰ Carlyle A. Thayer, “ASEAN’s Code of Conduct”, p. 14.

¹⁵¹ *Ibid.*, p. 15.

¹⁵² Council on Foreign Relations, “ASEAN’s Six Point Principles on the South China Sea”, July 20, 2012, <http://www.cfr.org/asia-and-pacific/aseans-six-point-principles-south-china-sea/p28915>.

militarization.¹⁵³ As such, many viewed the Chinese statement as unacceptable.¹⁵⁴ Reports indicate that China advocated heavily for the adoption of its statement, and, when it became clear that ASEAN members would not support it, instead argued that no statement be released at all. This option was equally unpalatable. Instead, the ASEAN members decided to release their own statement separately. On this they were united initially. However, under pressure from China, Cambodia and Laos, the current ASEAN chair, both reconsidered.¹⁵⁵ With a new lack of consensus, no joint statement was released. By this time, the meeting had gone several hours late and most ASEAN delegations had already left.¹⁵⁶ In the confusion, and out of a sense of frustration felt by several ASEAN members, Malaysia released a copy of the prepared ASEAN statement to the media that was critical of China, stating in part that ASEAN's members

cannot ignore what is happening in the South China Sea as it is an important issue in the relations and cooperation between ASEAN and China... We expressed our serious concerns over recent and ongoing developments, which have eroded trust and confidence, increased tensions and which may have the potential to undermine peace, security and stability... We emphasized the importance of non-militarisation and self-restraint in the conduct of all activities, including land reclamation, which may raise tensions in the South China Sea.¹⁵⁷

The statement was retracted three hours later, pending "urgent amendments",¹⁵⁸ and no updated statement was released.

In July 2016, the foreign ministers of ASEAN's member states met in Vientiane for the 49th Annual Ministerial Meeting, the first such gathering since the Arbitral Tribunal rendered its decision in the case between the Philippines and China. As in 2012, the Philippines pressed for the inclusion of the South China Sea in the joint communique. In this they were supported by Vietnam, and both called for the statement to include references to the arbitration ruling.¹⁵⁹ Just as in 2012 the proposed language was opposed by Cambodia, who had received a soft loan of US\$600 million from China the week before the meeting.¹⁶⁰ Cambodia argued that it was not ASEAN's place to take a position on the bilateral ruling and that doing so would only escalate tensions.¹⁶¹ While China publicly thanked Cambodia for supporting its position,¹⁶² this

¹⁵³ Prashanth Parameswaran, "Exclusive: China's South China Sea Statement That Divided ASEAN", *The Diplomat*, June 23, 2016, <http://thediplomat.com/2016/06/exclusive-chinas-south-china-sea-statement-that-divided-asean/>.

¹⁵⁴ Carlyle A. Thayer, "Revealed: The Truth Behind ASEAN's Retracted Kunming Statement", *The Diplomat*, June 19, 2016, <http://thediplomat.com/2016/06/revealed-the-truth-behind-aseans-retracted-kunming-statement/>, para. 2.

¹⁵⁵ Prashanth Parameswaran, "What Really Happened at the ASEAN-China Special Kunming Meeting", *The Diplomat*, June 21, 2016, <http://thediplomat.com/2016/06/what-really-happened-at-the-asean-china-special-kunming-meeting/>, para. 10.

¹⁵⁶ Chun Han Wong, "ASEAN Members Walk Back Statement on South China Sea", *The Wall Street Journal*, June 15, 2016, <http://www.wsj.com/articles/asean-members-walk-back-statement-on-south-china-sea-1465924238>.

¹⁵⁷ *VietnamPlus*, "Press Statement of ASEAN's FMs at Meeting with China FM", June 16, 2016, <http://en.vietnamplus.vn/press-statement-of-asean-fms-at-meeting-with-china-fm/94837.vnp>, paras. 5, 15, 18.

¹⁵⁸ Prashanth Parameswaran, "What Really Happened", para. 15.

¹⁵⁹ Michael Martina, Manuel Mogato, and Ben Blanchard, "ASEAN Breaks Deadlock on South China Sea, Beijing Thanks Cambodia for Support", *Reuters*, July 26, 2016, <http://www.reuters.com/article/southchinasea-ruling-asean-idUSL4N1AB2GZ>, para. 5.

¹⁶⁰ *Reuters*, "Cambodia Says Urged ASEAN to Avoid Words That Would 'Escalate Tension'", July 27, 2016, <http://www.reuters.com/article/us-cambodia-asean-idUSKCN1071PD>, para. 9.

¹⁶¹ *Ibid.*, paras. 4–7.

behaviour was characterized by one diplomat as “hostage-taking”¹⁶³ and dragged the talks into an emergency session. In the end, Philippine foreign minister Perfecto Yasay Jr. agreed to back down in order to preserve unity and to avoid the debacle of 2012. Although the final version of the communique mentioned the South China Sea as one of the regional and international issues of concern to ASEAN members, no mention was made of the arbitration ruling and it contained watered-down language.¹⁶⁴ As a compromise, the statement does allow that “some Ministers” had expressed concern at land reclamation and escalation of the disputes.¹⁶⁵ While not as resolute and unambiguous as had been hoped by the Philippines and Vietnam, this language allows individual ASEAN members to take a stronger stance while also providing diplomatic cover for those members that would prefer a vaguer, more general statement.

Going forward, ASEAN will continue to strike a balance between the economic and diplomatic pressure exerted by China and the desires of some of its members to take a more assertive role in the disputes. Nevertheless, ASEAN remains an important forum for several of the South China Sea claimants to engage with one another, to conduct trust-building exercises, and to make progress toward multilateral solutions to shared problems.

Commonwealth of Australia

China is Australia’s biggest trading partner and the United States remains a close military ally. As a result, Australia has adopted a balanced approach between the two. Polls suggest that the Australian public is, however, broadly supportive of American freedom of navigation operations in the region.¹⁶⁶ While Australia has not sided with any one state in the South China Sea, it has consistently called for the application of international law in the South China Sea and has called for the claimants to settle the disputes peacefully. Australia’s Prime Minister, Malcolm Turnbull, has also said that China’s military deployments in the South China Sea are “counterproductive”.¹⁶⁷

Australia has also taken steps to increase its military presence in the region. An agreement was signed in May 2016 with Singapore that increases the number of Singapore Armed Forces troops that will train in Australia and opened the door to further defence cooperation.¹⁶⁸ The Turnbull government’s defence white paper, released in February, pledged to increase defence spending by A\$26 billion to 2% of GDP.¹⁶⁹ These funds will primarily be directed toward Australia’s maritime capabilities and will be used to purchase anti-submarine

¹⁶² Michael Martina, Manuel Mogato, and Ben Blanchard, “ASEAN Breaks Deadlock”, para. 2.

¹⁶³ Prashanth Parameswaran, “Assessing ASEAN’s South China Sea Position in its Post-Ruling Statement”, *The Diplomat*, July 25, 2016, <http://thediplomat.com/2016/07/assessing-aseans-south-china-sea-position-in-its-post-ruling-statement/>, para. 3.

¹⁶⁴ *Ibid.*, paras. 8–10.

¹⁶⁵ Association of Southeast Asian Nations, “Joint Communique of the 49th ASEAN Foreign Ministers’ Meeting”, July 24, 2016, <http://asean.org/storage/2016/07/Joint-Communique-of-the-49th-AMM-ADOPTED.pdf>, para. 174.

¹⁶⁶ Erik Slavin, “Aussies Support South China Sea Ops, but Some Wary of Trump”, *Stars and Stripes*, June 21, 2016, <http://www.stripes.com/news/aussies-support-south-china-sea-ops-but-some-wary-of-trump-1.415510>.

¹⁶⁷ *Reuters*, “Australia Calls China’s South China Sea Moves ‘Counterproductive’”, March 23, 2016, <http://www.reuters.com/article/us-southchinasea-china-australia-idUSKCN0WP0VS>.

¹⁶⁸ Rob Taylor, “Singapore, Australia Expand Military”.

¹⁶⁹ Daniel Hurst, “Australia to Increase Defence Spending by \$26bn Amid Rising Regional Tensions”, *The Guardian*, February 25, 2016, <http://www.theguardian.com/australia-news/2016/feb/25/australia-to-increase-defence-spending-by-26bn-amid-rising-regional-tensions>, para. 3.

frigates, patrol vessels, surveillance aircraft, and fighter jets. The white paper also committed to building 12 new submarines, and a US\$40 billion deal to purchase them from the French DNCS Group was announced in April 2016.¹⁷⁰

The white paper also noted with concern the rising tensions in the South and East China Seas. Accordingly, Australia welcomes China's economic growth and will work to increase defence cooperation with China, but also recognizes that its "strategic interests may differ in relation to some regional and global security issues",¹⁷¹ and that the United States will "continue to be Australia's most important strategic partner".¹⁷² China expressed dissatisfaction with what it termed "negative" remarks.¹⁷³ Australia has also been conducting what it calls "routine maritime patrol" flights in the South China Sea since at least December 2015¹⁷⁴ but, unlike the United States, has been hesitant to conduct such operations publicly. Some Australian politicians, such as former Prime Minister Tony Abbott, have called for public FONOPs.¹⁷⁵ In late October 2016, Australia and Indonesia agreed in a bilateral meeting to increase maritime cooperation between the two countries,¹⁷⁶ with the possibility of expanding the scope of joint patrols in the Timor Sea to include the South China Sea.

It should be noted that Australia is one of the few UNCLOS signatories that, like China, has refused to be bound by the dispute resolution mechanisms included in the Convention.¹⁷⁷ This is largely due to the unresolved maritime border with East Timor, as the seafloor between the two states is rich in oil and natural gas. In April, East Timor announced that it would initiate conciliation proceedings under the Convention in order to establish a maritime boundary.¹⁷⁸ Australia has refused to negotiate, citing a previous revenue-sharing treaty signed in 2006, which includes a 50-year freeze on negotiating a permanent boundary.¹⁷⁹

European Union and Member States

Like the United States, the European Union (EU) has not taken a position on the territorial disputes, emphasizing instead the need for all parties to abide by international law and

¹⁷⁰ Tim Kelly, Cyril Altmeyer and Colin Packham. "How France Sank Japan's \$40 Billion Australian Submarine Dream", *Reuters*, April 29, 2016, <http://www.reuters.com/article/us-australia-submarines-japan-defence-in-idUSKCN0XQ1FC>.

¹⁷¹ Daniel Hurst, "Australia to Increase", para. 21.

¹⁷² *Ibid.*, para. 20.

¹⁷³ Eliza Borrello, "South China Sea: Beijing 'Dissatisfied' with 'Negative' Remarks in Australia's Defence White Paper", *ABC News*, February 25, 2016, <http://www.abc.net.au/news/2016-02-25/china-'dissatisfied'-with-defence-white-paper-comments/7201062>, para. 7.

¹⁷⁴ *BBC News*, "Australia Conducting 'Freedom of Navigation' Flights in South China Sea", December 15, 2015, <http://www.bbc.com/news/world-australia-35099445>, para. 5.

¹⁷⁵ Greg Sheridan, "We Must Challenge China on Freedom of Navigation: Tony Abbott", *The Australian*, February 25, 2016, <http://www.theaustralian.com.au/national-affairs/foreign-affairs/abbotts-call-on-freedom-of-navigation-will-be-blow-to-china/news-story/afdace60c4e83653d77326c18710c2d>.

¹⁷⁶ Rob Taylor, "Australia, Indonesia in Talks Over Joint South China Sea Patrols", *The Wall Street Journal*, November 1, 2016, <http://www.wsj.com/articles/australia-and-indonesia-discuss-joint-patrols-in-south-china-sea-1477979242>.

¹⁷⁷ Tom Allard, "East Timor Takes Australia to UN over Sea Border", *The Sydney Morning Herald*, April 11, 2016, <http://www.smh.com.au/federal-politics/political-news/east-timor-takes-australia-to-un-over-sea-border-20160411-go39tl.html>, para. 18.

¹⁷⁸ *Ibid.*, para. 2.

¹⁷⁹ *Ibid.*, paras. 16–17.

the UN Convention. In March 2016, the EU's High Representative for Foreign Affairs and Security, Federica Mogherini, expressed concern about the deployment of missiles on Chinese-occupied islands in the South China Sea and called on all claimants to refrain from militarization and to engage in confidence-building measures.¹⁸⁰ The EU has also previously expressed support for the United States Navy's FONOPs in the region¹⁸¹ and, in November 2015, Mogherini declared that the EU "opposed any attempt to assert territorial or maritime claims through the use of intimidation, coercion, force or any unilateral actions which would cause further friction".¹⁸²

The European Union recently updated its official overarching position governing relations with China. A document released by the European Commission in June 2016 stated that

The EU should continue to contribute actively to regional security in the Asia-Pacific through diplomatic and economic means while further developing its partnerships in the region. The EU remains concerned about the situation in the East and South China Seas, and should continue to emphasise the importance of peaceful settlement of disputes and to oppose unilateral actions that could alter the status quo and increase tensions. The EU upholds its position on compliance with international law by China and others in the context of their claims in the South China Sea. The large volume of international maritime trade passing through that area means that freedom of navigation and overflight are of prime importance to the EU. The EU should encourage China to contribute constructively to regional stability through confidence-building measures and support for the rules-based international order, especially respect for the UN Convention on the Law of the Sea and its arbitration procedures, and the rapid conclusion of the ASEAN-China negotiations on a "Code of Conduct".¹⁸³

Some of the European Union's member states have a more nuanced position. Many EU members share the EU's policy; the United Kingdom,¹⁸⁴ Italy,¹⁸⁵ and Germany,¹⁸⁶ among others, have expressed support for the arbitration process between the Philippines and China and for the use of international law to settle the disputes. The French defence minister has called for European navies to maintain a "regular and visible" presence in the region.¹⁸⁷ However, European leaders are also concerned with attracting Chinese trade and investment. A number of EU member states, including Germany, the United Kingdom, France, and Italy have joined the Chinese-led Asian

¹⁸⁰ Council of the European Union, "Declaration by the High Representative on Behalf of the EU on Recent Developments in the South China Sea", March 11, 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/11-hr-declaration-on-bealf-of-eu-recent-developments-south-china-sea/>.

¹⁸¹ *Reuters*, "European Union Sides with United States on South China Sea Incident", October 30, 2015, <http://www.reuters.com/article/us-southchinasea-usa-eu-idUSKCN0SO22G20151031>.

¹⁸² Robin Emmott, "Europe Warns Against Escalation in South China Sea Dispute", *Reuters*, November 6, 2015, <http://www.reuters.com/article/us-southchinasea-eu-idUSKCN0SV1LS20151106>, para. 3.

¹⁸³ European Commission, "Joint Communication to the European Parliament and the Council – Elements for a New EU Strategy on China", June 22, 2016, http://eeas.europa.eu/china/docs/joint_communication_to_the_european_parliament_and_the_council_-_elements_for_a_new_eu_strategy_on_china.pdf, p. 11.

¹⁸⁴ *Reuters*, "China Angered by Britain's Comments on South China Sea", April 20, 2016, <http://uk.reuters.com/article/uk-southchinasea-china-britain-idUKKCN0XH0QS>.

¹⁸⁵ *Rappler*, "Italy Affirms Support for PH Fight in South China Sea Row", December 3, 2015, <http://www.rappler.com/nation/114816-italy-support-ph-south-china-sea-row>.

¹⁸⁶ *Reuters*, "Merkel Suggests China Resolve South China Sea Row in Courts", October 29, 2015, <http://www.reuters.com/article/southchinasea-china-germany-idUSL8N12T2WQ20151029>.

¹⁸⁷ Tan Hui Yee, "France Calls for European Patrols in South China Sea", *The Straits Times*, June 6, 2016, <http://www.straitstimes.com/asia/se-asia/france-calls-for-european-patrols-in-south-china-sea>, para. 4.

Infrastructure Investment Bank, and some members, such as Hungary, Greece, and Cyprus have received Chinese investments tied to its One Belt, One Road initiative. These competing interests and internal divisions reduced the rhetorical strength of the EU's statement on the arbitration ruling in July 2016. The statement, released after three days of debate, simply "acknowledged"¹⁸⁸ the ruling without directly referring to China or the Philippines.¹⁸⁹

Many European states are currently preoccupied with problems closer to home, such as the civil war in Syria, the migrant crisis, the euro crisis, dealing with the implications of the United Kingdom's Brexit referendum, and maintaining sanctions against Russia in response to the latter's annexation of Crimea and covert invasion of Ukraine. Compared to these pressing matters, the South China Sea is not atop the list of priorities facing the European Union.

Two members of the European Union—the United Kingdom and France—have a direct stake in the South China Sea as they both maintain claims to portions of the Spratly archipelago. The British claim to Spratly Island and Amboyna Cay dates to 1877, when the British colony of Labuan (today part of Malaysia) issued a license to hoist the British flag over Spratly Island and Amboyna Cay and to use them for commercial purposes.¹⁹⁰ Since then, the British government has not taken substantial action to effectively administer the islands or justify its claim, and its inchoate title through discovery has been arguably superseded by the effective occupation of the islands by other states. During the Kalayaan imbroglio of 1956, the British Foreign Office admitted that, in its own view, the British claim was "too weak, in view of the lack of effective exercise of sovereignty, ever to be likely to win acceptance before the International Court [of Justice]".¹⁹¹ It also concluded that control of the islands was not economically or strategically imperative. As a result, the British claim has never been pressed. However, it has also not been formally abandoned.

France's role in the South China Sea is somewhat more involved than Britain's. During the colonial period it occupied and administered the Paracels on behalf of Annam (today part of Vietnam), building upon the legacy of Minh Mang and Gia Long. France also annexed several islands in the Spratlys in 1933, which it had deemed to be *terra nullius*. These islands were assigned to the Cochinchinese province of Bà Rịa in December 1933.¹⁹² On March 8, 1949, the French government signed the Élysée Agreement with former emperor Bảo Đại whereby France agreed to recognize the independence of Vietnam and transferred the administration of Tonkin, Annam, and Cochinchina to the Vietnamese government. With the Paracels assigned to Annam in 1932 and the Spratlys assigned to Cochinchina in 1933, French claims to the islands were

¹⁸⁸ European Council and the Council of the European Union, "Declaration by the High Representative on Behalf of the EU on the Award Rendered in the Arbitration between the Republic of the Philippines and the People's Republic of China", July 15, 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/07/15-south-china-sea-arbitration/>.

¹⁸⁹ Robin Emmott, "EU's Statement on South China Sea Reflects Divisions", *Reuters*, July 15, 2016, <http://www.reuters.com/article/us-southchinasea-ruling-eu-idUSKCN0ZVITS>.

¹⁹⁰ Stein Tønneson, "The South China Sea in the Age of European Decline", *Modern Asian Studies* 40, no. 1 (2006), p. 3.

¹⁹¹ *Ibid.*, p. 54.

¹⁹² Raul Pedrozo, "China versus Vietnam: An Analysis of the Competing Claims in the South China Sea", *CNA Analysis & Solutions* (2014), p. 117.

transferred to the new unified Vietnamese state,¹⁹³ which would achieve full independence following the adoption of the Geneva Accords in 1954.

There is evidence to suggest that some groups within the French government believed that France maintained a separate claim to the islands it had annexed in 1933. With China, Vietnam, and the Philippines expressing a growing interest in the Spratlys after the Second World War, the French government clarified that the islands had been claimed in the name of France and not on behalf of Vietnam, and had therefore not been ceded to Vietnam at all. In line with this stance, a request received in May 1951 to conduct commercial activity in the Spratlys was sent to Jean Letourneau, Minister of Associated States (responsible for French relations with Vietnam, Laos, and Cambodia). With the support of the French Foreign Ministry, Letourneau forwarded the request to the Ministry of Overseas France (governing French colonies in Africa, the Caribbean, and the Pacific), on the grounds that the islands had been only nominally attached to the French administration in Cochinchina and were French, not Vietnamese.¹⁹⁴ This assertion is predicated upon an exchange of letters in March 1949 that mentioned the Paracels, but not the Spratlys, as being part of Vietnam.¹⁹⁵ This stance was reiterated in September 1953 in a memo produced by the Foreign Ministry which stated that “These islands, French, were not attached to Vietnam in 1949, when the former colony of Cochinchina was ceded to this Associated State. They therefore depend on the Ministry of Overseas France”.¹⁹⁶ Three years later, in 1956, France—like the United Kingdom—was prompted by Tomás Cloma’s claim to the Spratlys and the counterclaims from Taiwan, the Republic of Vietnam, and the Philippines to reiterate its position. However, given the weakness of the French claim following the transfer of administrative authority to Vietnam in 1949 and 1954, it was decided in the end to remain passive, neither abandoning nor pressing the French claim.

Apart from its claims to the Paracels and Spratlys, France maintains an active presence in the broader Asia-Pacific region. France retains close ties with the overseas collectivities of French Polynesia and Wallis and Futuna and the special collectivity of New Caledonia. Accordingly, the number of French citizens living in Asia-Pacific countries exceeded 120,000 in 2012, rivalling the number of French citizens living in sub-Saharan Africa.¹⁹⁷ France is also the only European country to maintain a permanent naval presence in the Asia-Pacific region.¹⁹⁸ French defence contractors are making inroads in the region. 40 percent of submarine contracts and 20 percent of naval contracts in Southeast Asia involve French companies,¹⁹⁹ as the recent decision by the Australian government to purchase 12 French submarines demonstrates. With its

¹⁹³ Ibid., p. 126.

¹⁹⁴ Stein Tønneson, “The South China Sea in the Age of European Decline”, p. 38.

¹⁹⁵ Ibid., p. 36.

¹⁹⁶ « Ces îles, françaises, n’ont pas été rattachées au Vietnam lors de la cession à cet état associé de l’ancienne colonie de Cochinchine, en 1949. Elles dépendent, en conséquence, du Ministère d’outremer », Ibid., 39 (translation provided by the source).

¹⁹⁷ Quoc-Thanh Nguyen, “France Unveils its Defence Strategy in the South China Sea and Beyond”, *The Diplomat*, September 27, 2016, <http://thediplomat.com/2016/09/france-unveils-its-defense-strategy-in-the-south-china-sea-and-beyond/>, para. 4.

¹⁹⁸ Ministère de la défense de la République française [French Ministry of Defence], « La France présente sa politique de défense en Asie-Pacifique » [“France’s Defence Policy in the Asia-Pacific”], last updated June 27, 2016, <http://www.defense.gouv.fr/dgris/action-internationale/enjeux-regionaux/la-france-presente-sa-politique-de-defense-en-asie-pacifique>, para. 3.

¹⁹⁹ Quoc-Thanh Nguyen, “France Unveils its Defence Strategy”, para. 4.

own naval defence spending increasing, France will play an increasingly active role alongside and as an alternative to the United States in upholding the freedom of navigation and promoting peace and stability in the region.

Japan

Japan is not a claimant state in the South China Sea, having surrendered its control over Taiwan, the Spratlys, and the Paracels in accordance with the Treaty of San Francisco after the Second World War. However, Japan maintains a presence on several islands in the Pacific and the East China Sea. Sovereignty over several of these maritime features is contested by China, Taiwan, and South Korea.

Japan currently controls the Senkaku Islands. The islands are also claimed by China, which refers to them as the Diaoyu Islands, and by Taiwan, which refers to them as the Diaoyutai. This archipelago consists of eight uninhabited islets, located roughly 170 kilometres northeast of Taiwan and 400 kilometres west-southwest of Okinawa. Japan annexed the islands on January 14, 1895,²⁰⁰ during the course of the First Sino-Japanese War. The islands were occupied by the United States after the Second World War until 1972, when they reverted back to Japanese control. It should be noted that neither China nor Taiwan disputed the American administration of the Senkaku/Diaoyu Islands at the time.²⁰¹ In 1969, the United Nations Economic Commission for Asia and the Far East determined that significant oil reserves were located in the vicinity of the islands.²⁰² The surrounding sea is also home to sizeable fish stocks and strategically-important sea lanes. In 1971, both Taiwan and China advanced sovereignty claims to the islands: Taiwan, on the basis of geographical proximity and continual use of the islands by Taiwanese residents, and China, on the basis of historic occupation and discovery in the 14th century.²⁰³ Japan's claim is based on the assumption that the islands were considered *terra nullius* prior to their annexation in 1895, and on their exercising effective sovereignty since then.²⁰⁴

The Senkaku/Diaoyu Islands have been a source of controversy since the competing claims were advanced in 1971. Activists from China, Taiwan, and Japan have each travelled to the islands to assert their respective nations' sovereignty over the archipelago. In April 2012, Tokyo governor Shintaro Ishihara announced plans to buy three of the disputed islands with the goal of "protecting Japanese territory".²⁰⁵ The announcement inflamed tensions between Japan and China. On August 15, 14 activists from Hong Kong travelled to the islands by boat. All 14 were arrested for "alleged illegal entry", and Japan lodged a diplomatic protest with China over

²⁰⁰ *BBC News*, "How Uninhabited Islands Soured China-Japan Ties", November 10, 2014, <http://www.bbc.com/news/world-asia-pacific-11341139>, para. 6.

²⁰¹ Ministry of Foreign Affairs of Japan, "The Senkaku Islands", March 2013, last accessed June 2, 2016, http://www.mofa.go.jp/region/asia-paci/senkaku/pdfs/senkaku_en.pdf, p. 4.

²⁰² Ministry of Foreign Affairs of Japan, "The Senkaku Islands", p. 7.

²⁰³ *Ibid.*, p. 7.

²⁰⁴ Carlos Ramos-Mrosovsky, "International Law's Unhelpful Role in the Senkaku Islands", *University of Pennsylvania Journal of International Law* 29, no. 4 (2008), [https://www.law.upenn.edu/journals/jil/articles/volume29/issue4/RamosMrosovsky29U.Pa.J.Int'l.L.903\(2008\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume29/issue4/RamosMrosovsky29U.Pa.J.Int'l.L.903(2008).pdf), p. 923.

²⁰⁵ *The Japan Times*, "Ishihara Seeking to Buy Senkaku Islands", April 18, 2012, <http://www.japantimes.co.jp/news/2012/04/18/national/ishihara-seeking-to-buy-senkaku-islands/#.V1h0DjUrKUk>, para. 2.

the incident.²⁰⁶ A group of conservative Japanese parliamentarians and politicians landed on one of the disputed islands and displayed a Japanese flag on August 19. This elicited a protest from the Chinese foreign ministry in turn,²⁰⁷ and Taiwan lodged a protest with the Japanese representative in Taipei.²⁰⁸ The landings sparked large-scale demonstrations across China, the largest since the normalization of diplomatic relations in 1972,²⁰⁹ with protesters attacking Japanese cars, vandalizing Japanese restaurants, and burning Japanese flags.²¹⁰ The move also triggered several military confrontations between Chinese and Japanese naval and air forces near the islands.²¹¹ The protests continued into September, peaking on the 11th after the Japanese government purchased three of the remaining private islands, and on the 18th, the anniversary of the Mukden Incident which served as the pretext for the Japanese invasion of Manchuria in 1931.²¹² Tensions eventually abated, but the sovereignty dispute continues to hinder China-Japan relations, and their respective coast guards clash frequently in the vicinity of the islands. Most recently, Japan issued a diplomatic protest after six Chinese coast guard ships and 230 fishing boats approached the islands, some entering the contiguous zone of water surrounding the islands.²¹³

Japanese Prime Minister Abe's government has made it a priority to take a firm stance on the sovereignty disputes in the East and South China Seas. Under his tenure, Japan has rescinded its ban on exporting arms and has signed agreements to lease military equipment to the Philippines and to provide patrol vessels to Vietnam. In addition, Japanese naval destroyers visited Vietnam for the first time since the Second World War in April 2016. Speaking at the Shangri-La Dialogue in 2014, Abe argued that Japan should take more responsibility for maintaining regional security, play a greater role in countering Chinese assertion in the South China Sea, and offer military support to the countries of Southeast Asia.²¹⁴ In September 2016, defence minister Inada announced plans to hold joint patrols with the United States and to increase the number of naval exercises held with other regional navies.²¹⁵ Abe was also behind the Quadrilateral Security Dialogue, a short-lived attempt to strengthen defence cooperation between Australia, India, Japan, and the United States. These actions coupled with nationalist sentiment among the Chinese and Japanese publics may constrain the Sino-Japanese relationship in the future.

²⁰⁶ *BBC News*, "Japan Arrests Pro-China Activist Swimmers in Island Row", August 15, 2012, <http://www.bbc.com/news/world-asia-china-19264633>.

²⁰⁷ *The Guardian*, "Japanese Activists Land on Disputed Islands", August 19, 2012, <https://www.theguardian.com/world/2012/aug/19/japanese-activists-land-senkaku-islands>, para. 5.

²⁰⁸ Tania Branigan, "China Protests over Japanese Activists' Visit to Disputed Island", *The Guardian*, August 19, 2012, <https://www.theguardian.com/world/2012/aug/19/china-protest-japan-senkaku-diaoyu-island>, para. 15.

²⁰⁹ Sui-lee Wee and Maxim Duncan, "Anti-Japan Protests Erupt in China over Islands Row", *Reuters*, September 15, 2012, <http://www.reuters.com/article/us-china-japan-idUSBRE88E01I20120915>, para. 17.

²¹⁰ *Ibid.*

²¹¹ R. Jade Harry, "A Solution Acceptable to All? A Legal Analysis of the Senkaku-Diaoyu Island Dispute", *Cornell International Law Journal* 46 (2013), 663.

²¹² Brian Spegele and Takashi Nakamichi, "Anti-Japan Protests Mount in China", *Wall Street Journal*, September 16, 2012, <http://www.wsj.com/articles/SB10000872396390443720204578000092842756154>, para. 22.

²¹³ *Reuters*, "Japan Protests After Chinese Coastguards and Fishing Boats Sail Near Disputed Islets", August 6, 2016, <http://www.reuters.com/article/us-japan-china-islands-idUSKCN10G1KP>.

²¹⁴ Martin Fackler, "Japan Offers Support to Nations in Disputes with China", *The New York Times*, June 2, 2014, <http://cn.nytimes.com/asia-pacific/20140602/c02japan/dual/>.

²¹⁵ *Reuters*, "Japan to Boost South China Sea Role with Training Patrols with U.S.: Minister", September 16, 2016, <http://www.reuters.com/article/us-southchinesea-japan-patrols-idUSKCN11L2FE>, para. 6.

Republic of India

The South China Sea is an important strategic region for India, as 40% of its trade traverses the region.²¹⁶ Accordingly, the Indian government has expressed a greater interest in the disputes. This interest accompanies India's "Act East" policy, which seeks to promote trade and increase political ties between India and the countries of eastern Asia and the Asia-Pacific region, including the members of ASEAN. The Indian Navy has also sought to increase its presence in the South China Sea and the Western Pacific. To that end, an Indian delegation was present at the Western Pacific Naval Symposium held in April 2016 in Indonesia, and India has participated in the Malabar joint exercises with the United States since 1992. In May 2016, four Indian warships were deployed in the South China Sea for over two months. The warships visited Cam Ranh Bay in Vietnam and Subic Bay in the Philippines, with additional stops in Japan, South Korea, Russia, and Malaysia. The goal of the deployment was to undergo interoperability exercises with the navies of the region.²¹⁷

India has maintained a neutral stance on the South China Sea disputes, emphasizing its support for the freedom of navigation and overflight as enshrined in the UN Convention and the peaceful resolution of disputes.²¹⁸ However, India has ruled out conducting joint patrols with the United States, Japan, and Australia in the contested region.²¹⁹ India is wary of antagonizing China. India's northern border with China is disputed, and China is India's largest trading partner, with bilateral trade between the two countries standing at US\$70.25 billion in 2014.²²⁰

Republic of Korea

Like Japan, South Korea has no territorial claims in the South China Sea. However, it controls the Liancourt Rocks, which are claimed by Japan. The situation is complicated by the growing importance some nationalist groups in both Japan and South Korea ascribe to the Liancourt Rocks. This populist pressure makes it politically damaging for either government to withdraw their country's sovereignty claim. It is also currently engaged in a dispute with China over control of Socotra Rock in the Yellow Sea. Socotra Rock, also known as Ieodo in Korea and Suyan Rock in China, is a submerged seamount located 149 kilometres southwest of Jeju Island. According to the Convention, submerged rocks do not constitute territory and cannot be used to extend a state's maritime boundaries. However, obtaining legal title to the rock is one indicator of where the as-yet-unresolved maritime boundary between China and South Korea will eventually be drawn. Both states claim that Socotra Rock forms a part of their respective continental shelves and therefore falls within each state's EEZ. South Korea also claims that Socotra Rock falls on the Korean side of the mid-point line between the two states.²²¹ South

²¹⁶ Ashok Sajjanhar, "2 Years On, Has Modi's 'Act East' Policy Made a Difference for India?" *The Diplomat*, June 3, 2016, <http://thediplomat.com/2016/06/2-years-on-has-modis-act-east-policy-made-a-difference-for-india/>, para. 10.

²¹⁷ Franz-Stefan Gady, "India Sends Stealth Warships", para. 5.

²¹⁸ Ashok Sajjanhar, "2 Years On", para. 10.

²¹⁹ Anjana Pasricha, "India Rejects Joint Naval Patrols with US in South China Sea", *Voice of America*, March 11, 2016, <http://www.voanews.com/content/india-rejects-joint-naval-patrols-with-us-in-south-china-sea/3231567.html>.

²²⁰ Embassy of India in Beijing, People's Republic of China, "Economic and Trade Relations", n.d., last accessed July 14, 2016, <http://www.indianembassy.org.cn/DynamicContent.aspx?MenuId=97&SubMenuId=0>.

²²¹ Stratfor, "Why China Would Compromise in the Yellow Sea", December 10, 2015, <https://www.stratfor.com/analysis/why-china-would-compromise-yellow-sea>, para. 8.

Korea currently maintains effective control over the rock, having built a helipad and a research station there in 2003.²²² Formal discussions to resolve the dispute and establish a maritime boundary between China and South Korea were to begin in December 2015.²²³

South Korea maintains that the freedom of navigation and overflight in the South China Sea must be respected and that the disputes must be resolved peacefully in accordance with international law. President Park Geun-hye has also called on the parties involved to abide by the Declaration on the Conduct of Parties in the South China Sea.²²⁴ The South China Sea plays a critical role in the Korean economy. South Korea is the world's sixth-largest trading nation by volume, and it depends upon the trade routes that traverse the South China Sea. In 2014, over 1.1 billion tons of trade goods traveled along these routes. In addition, South Korea imports 86% of the oil it consumes from the Middle East, most of which is shipped through the South China Sea.²²⁵ South Korea's security interests on the Korean Peninsula and in the surrounding region require close cooperation with the United States, and South Korea's public stance on the South China Sea reflects American policy in the region. At the same time, South Korea is economically dependent on China. China accounts for over 30% of South Korea's trade—more than the United States and Japan combined.²²⁶ China also enjoys unparalleled leverage over the North Korean regime through its economic support. South Korea must therefore strike a balance between the United States and China, taking care not to antagonize either party.

Russian Federation

Russia and China share a strategic partnership and cooperate frequently on economic and security-related issues in Central Asia. Russia's economy is driven heavily by exports of raw resources, oil, and natural gas. With Russian exports crippled by the sanctions imposed by the West in the wake of the Ukraine crisis, China has become an important consumer of these goods. As the European Union takes steps to diversify its energy supply away from Russian natural gas, China has stepped into the vacuum, signing several trade deals worth billions of dollars in the past few years. In May 2014, the two signed a deal selling US\$400 billion of Russian gas to China over a period of 30 years, the largest trade agreement in the history of Russia's state-owned gas company, Gazprom.²²⁷ Russia has also signalled that it is willing to grant China a stake in its oil and gas exploration projects, including offshore blocks in the Arctic Ocean.²²⁸ This is a significant development; well aware that its petroleum resources are a major source of wealth and political leverage at home and abroad, the Russian government has historically been reluctant to allow foreign oil companies to operate unchecked for long, especially in the Arctic.

²²² Ibid., para. 9.

²²³ Ibid., para. 10.

²²⁴ Lee Jaehyon, "South Korea and the South China Sea: A Domestic and International Balancing Act", *Asia Policy*, no. 21 (2016), p. 36.

²²⁵ Ibid., p. 37.

²²⁶ Ibid., p. 38.

²²⁷ Alex Luhn, "Russia Signs 30-Year Deal Worth \$400bn to Deliver Gas to China", *The Guardian*, May 21, 2014, <https://www.theguardian.com/world/2014/may/21/russia-30-year-400bn-gas-deal-china>.

²²⁸ Daniel J. Graeber, "Russia Sees Chinese Role in Arctic Oil", *United Press International*, November 16, 2015, http://www.upi.com/Business_News/Energy-Industry/2015/11/16/Russia-sees-Chinese-role-in-arctic-oil/7571447677381/.

In addition to increased economic cooperation, Russia and China frequently work together in international affairs and share a belief in the inviolability of state sovereignty and in not interfering in the internal affairs of other states. It was in this context that Russian foreign minister Sergey Lavrov remarked in April 2016 that the South China Sea disputes should be resolved “directly between the countries involved in a peaceful and diplomatic manner, without any interference from third parties or any attempts to internationalize these disputes”.²²⁹ Lavrov then called on all outside parties to refrain from taking sides. Like China, Russia has long opposed the internationalization of the South China Sea disputes. However, China’s opposition to internationalization is calculated as a means of maximizing its political leverage, allowing it to approach the issue on a bilateral basis with each of the other claimants. Russia, on the other hand, opposes the internationalization of issues pertaining to Russian interests, particularly regarding what it views as unwelcome interference by the United States, the European Union, and NATO in Central Asia and Eastern Europe.

Given the problems facing Russia closer to home, the South China Sea is not a high priority for Russia. Furthermore, the Sino-Russian relationship is not without problems. President Putin’s foreign policy has positioned Russia as a Eurasian power distinct from and equal to both Europe and Asia. It looks to rebuild Russian influence in Central Asia, where it is seeking a leading role in providing security through the Collective Security Treaty Organization and in economic integration through the Eurasian Economic Union. At the same time, China has been making inroads in the region through the Shanghai Cooperation Organization and the Silk Road Economic Belt. China has now eclipsed Russia to become Central Asia’s largest trading partner,²³⁰ a fact that has elicited consternation in Moscow. The conceptualization of a multipolar world with Russia and China working together as equals to counter American hegemony in the international system is a fundamental element of Russia’s foreign policy. However, with Western sanctions continuing to target the Russian leadership and the country’s economy, Russia’s ability to act as China’s equal is constrained. As a result, the Sino-Russian partnership has become unbalanced. In order to hedge against Chinese influence, Russia must turn to China’s neighbours.

One of those neighbours, Vietnam, already enjoys a long-standing and strong bilateral relationship with Russia. Prior to 2002, the Russian Navy had sole access to Vietnam’s Cam Ranh Bay, a key deep-water harbour giving onto the South China Sea. A 2013 agreement renewed Russia’s priority access to the coveted naval base.²³¹ In addition, Russia is Vietnam’s primary arms supplier and has provided roughly 90% of the arms that Vietnam has purchased recently,²³² including six diesel submarines. Gazprom has also partnered with PetroVietnam in the past to explore the waters off Vietnam’s coast.²³³ In addition to Vietnam, Russia is seeking to strengthen its ties with ASEAN, and has expressed support for ASEAN’s Declaration on Conduct and the code of conduct. Unlike China, Russia supports UNCLOS as a tool to establish

²²⁹ Anton Tsetov, “Did Russia Just Side with China on the South China Sea?” *The Diplomat*, April 21, 2016, <http://thediplomat.com/2016/04/did-russia-just-side-with-china-on-the-south-china-sea/>, para. 3.

²³⁰ Simon Denyer, “In Central Asia, Chinese Inroad in Russia’s Backyard”, *The Washington Post*, December 27, 2015, https://www.washingtonpost.com/world/asia_pacific/chinas-advance-into-central-asia-ruffles-russian-feathers/2015/12/27/cfedeb22-61ff-11e5-8475-781cc9851652_story.html, para. 19.

²³¹ Jeremy Maxie, “Russia’s South Sea Conundrum”, *Forbes*, May 9, 2016, <http://www.forbes.com/sites/jeremymaxie/2016/05/09/russias-south-china-sea-conundrum/#3cfeda2f4fc6>, para. 18.

²³² *Ibid.*, para. 19.

²³³ *Ibid.*, para. 20.

maritime boundaries. By adopting the Ilulissat Declaration of 2008, Russia and the other four Arctic coastal states agreed to abide by the Convention to delineate their respective claims and to settle any disputes in an orderly manner. When the CLCS ruled that Russia's initial claim in the Arctic Ocean lacked sufficient evidence, Russian scientists collected more data and submitted revised claims in 2015 and 2016 rather than ignore the ruling.

For the time being, while Russia is seeking a more prominent role on the international stage it does not appear to be seeking to undermine the law of the sea. Nor would it welcome having to choose between supporting China or Vietnam and ASEAN in the South China Sea should the disputes escalate.

United States of America

The South China Sea is a matter of growing concern for the United States, as it is increasingly being linked to the future of America's relationship with China. The disputes also challenge core American strategic interests such as maintaining the integrity of international law and upholding the freedom of navigation and overflight in the region. As such, the United States has been increasingly determined to support its regional allies and, when necessary, to take direct action in pursuit of these goals. The United States' growing military presence can be seen in its heightened interest in renewing defence agreements with the Philippines, lifting the Vietnam arms embargo, deploying aircraft carrier groups to the South China Sea, and conducting FONOPs near disputed maritime features. It is also seeking to engage economically with the region through its support for the Trans-Pacific Partnership trade agreement, as, in the words of President Barack Obama, "If we don't write the rules [governing trade in the Asia-Pacific], China will".²³⁴ The United States' growing military, economic, and political support for the countries of Southeast Asia forms part of its "rebalance to Asia": a term popularized in 2011 that reflects the long-term shift of the United States' economic and security interests toward the Asia-Pacific.²³⁵

As stated in Section A, the United States has not ratified the 1982 UN Convention on the Law of the Sea. However, it considers the contents of the Convention to be part of customary international law, and the Navy operates according to its provisions. Furthermore, the United States attended the first Conference on the Law of the Sea in 1956 and has ratified the four binding conventions produced at that Conference, which include language identical to the 1982 Convention.²³⁶ In the South China Sea specifically, the United States remains officially neutral in the territorial sovereignty disputes, provided that the freedom of navigation and overflight as stipulated under UNCLOS and customary international law is upheld. At the annual meeting of the ASEAN Regional Forum on July 23, 2010, American Secretary of State Hillary Clinton clarified the United States' position on the South China Sea disputes:

²³⁴ Gerald F. Seib, "Obama Presses Case for Asia Trade Deal, Warns Failure Would Benefit China", *The Wall Street Journal*, April 27, 2015, <http://www.wsj.com/articles/obama-presses-case-for-asia-trade-deal-warns-failure-would-benefit-china-1430160415>, para. 2.

²³⁵ Hillary Rodham Clinton, "America's Pacific Century", *Foreign Policy*, October 11, 2011, <http://foreignpolicy.com/2011/10/11/americas-pacific-century/>.

²³⁶ United Nations, "1958 Geneva Conventions on the Law of the Sea", Audiovisual Library of International Law, n.d., last accessed October 4, 2016, <http://legal.un.org/avl/ha/gclos/gclos.html>.

The United States supports a collaborative diplomatic process by all claimants for resolving the various territorial disputes without coercion. We oppose the use or threat of force by any claimant. While the United States does not take sides on the competing territorial disputes over land features in the South China Sea, we believe claimants should pursue their territorial claims and accompanying rights to maritime space in accordance with the UN Convention on the Law of the Sea. Consistent with customary international law, legitimate claims to maritime space in the South China Sea should be derived solely from legitimate claims to land features.²³⁷

Section D: Timeline of Major and Recent Events

This timeline highlights major developments in the South China Sea disputes from the beginning of the 20th century and recent events that reflect the increase in tensions following the publication of the nine-dash line map in 2009 and the Scarborough Shoal incident in 2012. The goal of this timeline is to pinpoint specific milestones which can be reliably assumed to have occurred on the dates provided and which, where possible, have been corroborated by multiple sources. Events that cannot reasonably be said to meet these criteria were not listed here, although in some cases they are included in Section B. 1909 was chosen as the timeline's starting point as that year marked some of the earliest formal declarations of sovereignty made by the current South China Sea claimants as the concept of state sovereignty is applied today.

It is not the goal of this paper to assess the legal validity of the claims put forward by the South China Sea states, but instead to present factual information. The task of sorting out the overlapping sovereignty claims is here left to the specialists, negotiators, and diplomats. As such, the inclusion or exclusion of specific events in this timeline should under no circumstances be construed as the acceptance or rejection of a given state's sovereignty claims. As an example, that this timeline notes the Chinese claim to historic title over the Paracels in 1909 does not constitute a rejection of Vietnam's historic claims, nor does including France's annexation of Spratly Island in 1930 necessarily discredit China's assertion in 1935 of sovereignty over the Spratly Islands.

Indeed, it is clear from the historical record that the inhabitants of lands bordering the South China Sea have made use of the Sea's waters and maritime features since time immemorial. However, after a careful review of the available evidence, the Arbitral Tribunal concluded that nothing more than a temporary human presence was ever established in the Spratly Islands.²³⁸ Nor is it clear that any of the political actors that governed the coasts of the South China Sea established the continuous and exclusive exercise of their authority over the Sea's maritime features prior to the 20th century. As such, it is difficult to determine which sovereignty claims put forward by China, Taiwan, Vietnam, and the Philippines to the islands, reefs, and other maritime features present in the South China Sea should take precedence.

March to October 1909: News that a Japanese businessman had claimed Pratas Island, which had previously been unoccupied, reaches the Chinese government in March. Domestic pressure to

²³⁷ Hillary Rodham Clinton, "Remarks at Press Availability", United States Department of State, July 23, 2010, <http://www.state.gov/secretary/20092013clinton/rm/2010/07/145095.htm>, para. 10.

²³⁸ Permanent Court of Arbitration, "Award in the Matter of the South China Sea Arbitration", p. 252.

demonstrate China's ownership of the island results in a settlement on October 12. In exchange for handing control of the island over to Chinese officials, the businessman receives 130,000 silver dollars.²³⁹

May to June 1909: Zhang Yen Jun, governor of Guangdong province, dispatches a fleet to the Paracels. This expedition serves as the basis for the Chinese sovereignty claim through effective occupation of the islands in addition to the historical presence of Chinese fishermen. While accounts vary as to the length of time the ships spent near the Paracel Islands, most sources concur that the voyage did indeed take place on June 6.²⁴⁰ Most subsequent Chinese maps of China's territory include the Pratas and Paracel Islands but not the Spratlys.²⁴¹

April 13, 1930: After both Japan and the governor of Cochinchina expressed an interest in the Spratlys, France dispatches its warship *La Malicieuse* to the region and takes possession of Spratly Island.

July 26, 1933: After receiving a British request to produce an official declaration of annexation for Spratly Island, France officially annexes it and several other maritime features in the Spratlys including North Danger Reef, Amboyna Cay, Itu Aba Island, Loaita Island, Thitu Island, and their dependent islands.²⁴² Despite claims made by China that the islands are Chinese territory, only Japan lodges a diplomatic protest.²⁴³ The islands are subsequently assigned to French Cochinchina that December.²⁴⁴

January 1935: China's Review Committee for Land and Water Maps publishes a list of 132 islands and shoals located in the South China Sea, including Scarborough Shoal, the Paracel Islands and the Spratly Islands, and claims Chinese sovereignty over them.²⁴⁵

1937 to 1938: Japan begins its occupation of Pratas Island and of the largest of the Paracel and Spratly Islands, including Woody and Lincoln Islands in the former and Spratly and Itu Aba Islands in the latter.²⁴⁶ This occupation lasts throughout the Second World War.

July 1946: Philippine Vice-President Quirino asserts the Philippines' claim to the Spratly Islands.²⁴⁷

October 5, 1946: Finding the Spratlys uninhabited following the end of the Second World War, the French ship FR *Chevreuil* places a marker re-establishing French sovereignty over Itu Aba Island. Two ships from the Republic of China land on Itu Aba, raise their own sovereignty marker, and establish a garrison on December 7.²⁴⁸

²³⁹ The *Straits Times*, "The Pratas Settlement: China to Receive Island Back on Certain Terms", October 28, 1909, <http://eresources.nlb.gov.sg/newspapers/Digitised/Article/straitstimes19091028-1.2.65.aspx>, p. 7.

²⁴⁰ Bill Hayton, *The South China Sea*, p. 52.

²⁴¹ Ibid., 53; François-Xavier Bonnet, "Geopolitics of Scarborough Shoal", p. 14.

²⁴² Stein Tønneson, "The South China Sea in the Age of European Decline", p. 9.

²⁴³ François-Xavier Bonnet, "Geopolitics of Scarborough Shoal", p. 16.

²⁴⁴ Raul Pedrozo, "China Versus Vietnam", p. 117.

²⁴⁵ Embassy of the People's Republic of China in the Republic of the Philippines, "Some Basic Facts", para. 2.

²⁴⁶ Stein Tønneson, "The South China Sea in the Age of European Decline", p. 12.

²⁴⁷ Ibid., p. 21.

²⁴⁸ Bill Hayton, *The South China Sea*, p. 58.

1947: Filipino Tomás Cloma claims to have discovered several uninhabited islands to the east of Spratly Island.

January 4, 1947: Two ships land roughly 60 troops from the Republic of China on Woody Island in the Amphitrite Group of the Paracels. A French expedition tasked with establishing effective occupation of the Paracels on behalf of its protectorate Annam—now part of Vietnam—lands on Pattle Island in the Crescent Group two weeks later.²⁴⁹

December 1, 1947: The Geography Department of China's Ministry of Internal Affairs publishes a comprehensive list of 159 islets and islands in the South China Sea that it considers to be part of its territory, and places these features under the administration of the Hainan Special District.²⁵⁰

May 4 to 5, 1950: Forces from the Republic of China stationed on Woody Island and Itu Aba Island are recalled to Taiwan. Preoccupied with the ongoing war in Vietnam, neither French nor Vietnamese forces occupy Woody Island in their absence.

September 8, 1951: The Treaty of San Francisco is signed. Japan cedes control of Taiwan, Korea, and both the Paracels and the Spratlys, which had been occupied since 1938, without declaring to whom the latter would be ceded to.

April 29, 1952: The Treaty of Taipei is signed between China, Taiwan, and Japan, as both China and Taiwan were excluded from the Treaty of San Francisco. Japan renounces all rights, claims, and titles to Taiwan and the Pescadores as well as the Spratly Islands and the Paracel Islands. While China and Taiwan view this as recognition of their claims to the islands, the Japanese foreign minister maintains that this is not the case and merely repeats the earlier renunciation of territory included in the San Francisco Treaty.²⁵¹

1956: Taiwanese forces re-establish a presence on Itu Aba Island and Chinese forces occupy Woody Island and the Amphitrite Group of the Paracels, both left vacant by the Taiwanese in 1950.

May 15, 1956: Tomás Cloma formally takes possession of the islands discovered in 1947, and founds "The Free Territory of Freedomland" in an area encompassing most of the Spratlys. After notifying the Philippine government, Cloma offers to make Freedomland a protectorate under Philippine control.

May 31, 1956: China declares that it will not tolerate any infringement on its claims in the islands. The Republic of Vietnam condemns Cloma's actions on June 1, and France reiterates its territorial claim on June 2.²⁵²

October 1, 1956: Filemon Cloma's ship, anchored off North Danger Reef, is accosted by two Taiwanese navy ships. Cloma signs a statement, allegedly under duress, testifying that he had been trespassing in Chinese territory.²⁵³

²⁴⁹ Ibid., p. 63.

²⁵⁰ Ibid., p. 58.

²⁵¹ Stein Tønneson, "The South China Sea in the Age of European Decline", p. 43.

²⁵² Bill Hayton, *The South China Sea*, p. 67.

January 14, 1974: A Republic of Vietnam naval patrol detects the presence of two Chinese trawlers anchored near the Vietnamese holdings in the Paracels. By the time Vietnamese reinforcements arrive on January 16, Chinese forces have already occupied two of the islands that had previously been under Vietnamese control. Vietnamese armed forces are deployed to three of the remaining five islands on January 17. By January 18, three more Vietnamese ships had arrived and attempted to land forces on Chinese-occupied Duncan Island before being intercepted and driven off by two Chinese corvettes. On January 19, another attempted landing was aborted after entrenched Chinese troops fired upon the advancing Vietnamese soldiers. The four Vietnamese and six Chinese vessels engage in naval combat. Although they inflicted significant damage on two of the Chinese ships, one Vietnamese ship is sunk and the other three are forced to retreat. Following the naval engagement, Chinese forces establish control over the remaining Paracel Islands.²⁵⁴

August 24, 1974: Freedomland is renamed the “Kingdom of Colonia”, and Cloma, its head of state, steps down. He is arrested by the Philippine government later that year and cedes control of Colonia and his claim to the Spratly Islands to the Philippines.²⁵⁵

April 1975: Prior to the fall of Saigon, forces from the Socialist Republic of Vietnam occupy six maritime features in the Spratlys occupied by the Republic of Vietnam.²⁵⁶

June 11, 1978: Renamed the Kalayaan Island Group, Colonia is officially incorporated into the Philippines by presidential decree.²⁵⁷

December 10, 1982: The United Nations Convention on the Law of the Sea is signed.

January 21, 1988: China occupies Fiery Cross Reef in the Spratly Islands.

February 18, 1988: China occupies Cuarteron Reef, eliciting a diplomatic protest from Vietnam. In response, Vietnamese forces attempt to land on the nearby Collins, Lansdowne, and Johnson South Reefs on March 13. While the first two features are successfully occupied, the third party is intercepted by Chinese forces on March 14. Chinese and Vietnamese accounts of the resulting clash differ, but in total 64 Vietnamese soldiers died, the Vietnamese transport vessels involved were destroyed or incapacitated, and China assumed control of Johnson South Reef.²⁵⁸

April 8, 1988: After consolidating control over Johnson South Reef, Chinese forces extend their control to the nearby McKennan, Subi, and Gaven Reefs.

February 25, 1992: China’s National People’s Congress passes the *Law on the Territorial Sea and the Contiguous Zone*.²⁵⁹ This law establishes China’s territorial sea of 12 nautical miles and contiguous zone of 24 nautical miles adjacent to what China declares to be its territorial land,

²⁵³ Ibid., p. 68.

²⁵⁴ Bill Hayton, *The South China Sea*, pp. 73–78.

²⁵⁵ Kingdom of Colonia St. John, “The History of the Kingdom of Colonia St. John”.

²⁵⁶ Bill Hayton, *The South China Sea*, p. 79.

²⁵⁷ Official Gazette of the Republic of the Philippines, “Presidential Decree No. 1596”.

²⁵⁸ Bill Hayton, *The South China Sea*, p. 83.

²⁵⁹ National People’s Congress of the People’s Republic of China, “Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone”, February 25, 1992, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383846.htm.

including the Spratlys and Paracels. The law also requires foreign ships to obtain permission from the Chinese government before entering the territorial sea, which contradicts the right of innocent passage as set out in the UN Convention.

July 22, 1992: The foreign ministers of ASEAN member states sign the Declaration on the South China Sea, urging all parties involved to resolve the competing claims peacefully, cooperate in areas of mutual concern, and develop a code of conduct.²⁶⁰

November 16, 1994: The 1982 United Nations Convention on the Law of the Sea enters into force, one year after its ratification by a sixtieth UN member state.

January 1995: China occupies and builds structures upon Mischief Reef, 200 kilometres from the Philippine island of Palawan.

April 1, 2001: A Chinese F-8 interceptor and an American reconnaissance aircraft collide above the South China Sea, killing the Chinese pilot.

November 4, 2002: The Declaration on the Conduct of Parties in the South China Sea is signed by ASEAN members and China.²⁶¹ China's willingness to engage in multilateral talks is notable, given its usual preference for bilateral negotiations.

March 5 to 8, 2009: While monitoring submarine activity near the Yulin submarine base on Hainan from international waters, the USNS *Impeccable* (T-AGOS-23), is approached several times by Chinese naval vessels and spotter planes and is ordered to leave the area. When the *Impeccable* refuses, it is confronted on March 8 by three Chinese naval vessels and two fishing trawlers. After attempting to sever a sensor system towed by the *Impeccable*, the fishing vessels approach the bow and force the American ships to stop. The impasse is resolved only when the *Impeccable* announces its intention to leave the area. After the incident, the destroyer USS *Chung-Hoon* (DDG-93) is assigned to escort the *Impeccable* for the remainder of its deployment.²⁶²

May 6, 2009: Vietnam and Malaysia submit a joint claim to the UN Commission on the Limits of the Continental Shelf. In response, on May 7 China sends a diplomatic note verbale containing the nine-dash line map to the Commission affirming "indisputable sovereignty" over the islands of the South China Sea.²⁶³

June 11, 2009: In what is termed an "inadvertent encounter" near Subic Bay off the coast of the Philippines, a Chinese submarine collides with a sonar array towed by the American destroyer USS *John McCain* (DDG-56). Both American²⁶⁴ and Chinese²⁶⁵ sources label the incident an accident and not deliberate harassment.

²⁶⁰ Association of Southeast Asian Nations, "1992 ASEAN Declaration".

²⁶¹ Association of Southeast Asian Nations, "Declaration on the Conduct of Parties".

²⁶² Ann Scott Tyson, "Navy Sends Destroyer to Protect Surveillance Ship After Incident in South China Sea", *Washington Post*, March 13, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/12/AR2009031203264.html>.

²⁶³ Permanent Mission of the People's Republic of China, Notes Verbales CML/17/2009, May 7, 2009.

²⁶⁴ Barbara Starr, "Sub Collides with Sonar Array Towed by U.S. Navy Ship", *CNN*, June 12, 2009, <http://www.cnn.com/2009/US/06/12/china.submarine/>.

June 2011: Vietnamese and Chinese vessels clash repeatedly in the Spratly Islands over PetroVietnam's attempt to conduct a seismic survey in the area. Chinese foreign ministry spokesperson Hong Lei remarks that "By conducting unlawful oil and gas surveys in seas around the Wanan Bank of the Spratly archipelago and by driving out a Chinese fishing vessel, Vietnam has gravely violated China's sovereignty and maritime rights", that "China demands that Vietnam cease all violations", and that Vietnam should "not take actions that would complicate and expand the dispute". Nguyen Phuong Nga, a spokesperson from Vietnam's foreign ministry, describes the incident as a "premeditated and carefully calculated" attack that is "unacceptable to Vietnam".²⁶⁶

April 8 to June 4, 2012: Confrontation between the Philippines and China over the Scarborough Shoal. The Philippine warship *BRP Gregorio del Pilar* confirms the presence of Chinese fishing vessels near the shoal. Attempts to arrest the fishermen for illegally harvesting coral, giant clams, and live sharks are impeded by the arrival of two Chinese maritime surveillance ships. Both parties eventually agree to withdraw forces on June 4, but Chinese forces remain in the area beyond the deadline and occupy the shoal to this day.

June 2012: Vietnam passes a law affirming its claims to Paracel and Spratly Islands; China formally creates an administrative unit under the authority of the Province of Hainan encompassing the waters and features within the nine-dash line with its capital of Sansha City on Woody Island in the Paracels.

June 25, 2012: The Chinese National Offshore Oil Corporation announces plans to develop nine offshore blocks in areas of the South China Sea also claimed by Vietnam. Vietnam issues a public statement condemning the action on June 30, and four Chinese patrol vessels are dispatched to the area on July 1.

July 13, 2012: For the first time in ASEAN's 45-year history, the annual Ministerial Meeting concludes without issuing a joint communique. The Philippine delegation makes several attempts to include language pertaining to the Scarborough Shoal standoff and the South China Sea disputes. Despite enjoying support from other ASEAN members, these attempts are blocked by the meeting chair, Cambodia.²⁶⁷ According to Philippine reports, the Cambodian Foreign Minister repeatedly consulted with advisors outside of the meeting room while the draft communique was being discussed and shared drafts with Chinese "interlocutors".²⁶⁸

September 25, 2012: China's first aircraft carrier, the *Liaoning*, is commissioned into the People's Liberation Army Navy.

January 1, 2013: A Chinese law authorizing the inspection and expulsion of all foreign ships within the waters claimed by China enters into force.

²⁶⁵ Li Xiaokun, "Sub, Sonar Collision 'Inadvertent'", *China Daily*, June 15, 2009, http://www.chinadaily.com.cn/china/2009-06/15/content_8282359.htm.

²⁶⁶ *BBC News*, "China Accuses Vietnam in South China Sea Row", June 10, 2011, <http://www.bbc.co.uk/news/mobile/world-asia-pacific-13723443>.

²⁶⁷ Erlinda F. Basilio, "Why There's No ASEAN Joint Communique", *Philippine Daily Inquirer*, July 19, 2012, <http://globalnation.inquirer.net/44771/why-there%E2%80%99s-no-asean-joint-communique>, para. 12.

²⁶⁸ Ernest Z. Bower, "China Reveals its Hand on ASEAN in Phnom Penh", *Center for Strategic & International Studies*, July 20, 2012, <http://csis.org/publication/china-reveals-its-hand-asean-phnom-penh>, para. 4.

January 22, 2013: The Philippines initiates an international arbitration case under UNCLOS against Chinese sovereignty claims in the Spratlys and the Scarborough Shoal.

February 13, 2013: China responds to the Philippines' arbitration process, citing its "indisputable" sovereignty over the Spratlys and their adjacent waters and claims that the boundary disputes are caused by illegal Philippine occupation of some of the Spratlys and that arbitration runs counter to a prior agreement to settle the issue bilaterally. Furthermore, it rejects the Philippine Notification and Statement of Claim for containing errors and violating the One China principle.

March 2013: Four of China's five maritime law enforcement agencies—China Marine Surveillance, China Fisheries Law Enforcement, Maritime Police and Border Control, and Maritime Anti-Smuggling Police—are amalgamated into the China Coast Guard.

April 2013: The Hainan Strait Shipping Company's cruise ship the *Coconut Princess* begins offering tours of the Paracel Islands to mainland Chinese citizens.²⁶⁹

November 23, 2013: An Air Defence Identification Zone is established in the East China Sea. American military aircraft fly through it in protest.

December 5, 2013: During the Chinese aircraft carrier *Liaoning*'s first deployment to the South China Sea, the USS *Cowpens* (CG-63), which was monitoring the carrier group, is approached by a People's Liberation Army Navy Amphibious Dock Ship. When asked to leave the area, the *Cowpens* responds that it is in international waters and refuses to change course. The dock ship then crosses the *Cowpens*' bow at a distance of less than 500 metres and stops in the missile cruiser's path, forcing the latter to take evasive action and stop as well.²⁷⁰

December 2013: Chinese land reclamation activity begins in the Spratly Islands. As of the end of 2015, 3,200 acres, or 13 km², have been reclaimed by China—accounting for over 95% of the total land reclaimed by all parties in the Spratlys over the past 40 years. Militarization and infrastructure construction continues in both the Spratlys and the Paracels.

May 1 to July 15, 2014: The oil rig *Haiyang Shiyou 981*, known in Vietnam as *Hải Dương 981*, is deployed inside Vietnam's contested EEZ near the Paracels, 120 nautical miles from Vietnam's coast. Vietnamese and Chinese vessels clash several times, sinking one Vietnamese fishing vessel.²⁷¹ The incident ignites several massive anti-Chinese protests. Initially tolerated by the Vietnamese government, they are quickly suppressed once the protests give way to rioting. Several Chinese- and Taiwanese-owned factories are set on fire.²⁷²

²⁶⁹ Shannon Tiezzi, "China Revamps South China Sea Cruise Line", *The Diplomat*, September 2, 2014, <http://thediplomat.com/2014/09/china-revamps-south-china-sea-cruise-line/>.

²⁷⁰ Carl Thayer, "USS *Cowpens* Incident Reveals Strategic Mistrust Between U.S. and China", *The Diplomat*, December 13, 2013, http://thediplomat.com/2013/12/uss-cowpens-incident-reveals-strategic-mistrust-between-u-s-and-china/?utm_content=buffer16b17&utm_source=buffer&utm_medium=twitter&utm_campaign=Buffer.

²⁷¹ Chris Brummitt, "China Ship 'Sinks Vietnam Fishing Boat After Ramming'", *The Independent*, May 27, 2014, <http://www.independent.co.uk/news/world/asia/china-ship-sinks-vietnam-fishing-boat-after-ramming-9437036.html>.

²⁷² Eva Dou and Richard C. Paddock, "Behind Vietnam's Anti-China Riots".

August 19, 2014: In the fourth such incident in 2014, a Chinese fighter jet makes several “dangerous and unprofessional” manoeuvres as close as 20 feet from a United States Navy P-8 reconnaissance plane during roughly 200 kilometres from Hainan Island.²⁷³

June 25–October 20, 2015: The *Haiyang Shiyou 981* oil rig is redeployed to the South China Sea, 110 nautical miles east of Vietnam, and 72 nautical miles south of Hainan Island.²⁷⁴

October 26, 2015: The United States Navy conducts a freedom of navigation operation by the USS *Lassen* within 12 nautical miles of Subi Reef. China’s ambassador to the United States calls the operation a “serious provocation, politically and militarily”.²⁷⁵

January 2, 2016: A civilian aircraft lands on Fiery Cross Reef in the Spratlys for the first time. At 3,000 metres in length, it is the longest runway in the South China Sea islands and the only one capable of accommodating heavy bombers. Two passenger airliners land there on January 7.

January 30, 2016: The USS *Curtis Wilbur* conducts a freedom of navigation operation near Triton Island in the Paracels. The guided-missile destroyer passed within 12 nautical miles of the disputed feature in order to challenge the decision made by Chinese authorities to establish archipelagic baselines around Triton Island and the Paracels, in contravention of UNCLOS. Lu Kang, a spokesperson for China’s Ministry of Foreign Affairs, criticizes the operation, stating that “Its essence is to push the United States’ maritime hegemony in the name of freedom of navigation, which has always been resolutely opposed by most of the international community, especially certain developing nations. What the United States has done is dangerous and irresponsible.”²⁷⁶

February 12, 2016: It is reported by the Asia Maritime Transparency Initiative that helipads and radar sites have been established at Chinese outposts on Cuarteron Reef, Gaven Reef, Hughes Reef, and Johnson South Reef in the Spratlys and on Duncan Island in the Paracels.²⁷⁷

February 16, 2016: An ASEAN-United States Special Leaders’ Summit is held at the Sunnylands Center in California. Although the South China Sea disputes were discussed, a joint statement released following the summit was restricted to broad commitments to shared principles, such as respect for peaceful dispute resolution and the freedom of navigation and overflight.²⁷⁸

February 17, 2016: Satellite imagery indicates that surface-to-air missiles and a radar station have been placed on Woody Island in the Paracels.

²⁷³ Stephanie Brown, “Stop Spy Flights, China Warns the U.S.”, *CNN*, August 29, 2014, <http://www.cnn.com/2014/08/29/world/asia/china-us-spy-flights/>.

²⁷⁴ *Reuters*, “China Oil Rig to Keep Drilling in Waters Disputed with Vietnam”, August 25, 2015, <http://www.reuters.com/article/us-southchinasea-china-vietnam-idUSKCN0QU0UG20150825>.

²⁷⁵ Jim Sciutto and Katie Hunt, “China Says it Warned and Tracked U.S. Warship in South China Sea”, *CNN*, October 27, 2015, <http://www.cnn.com/2015/10/27/asia/us-china-south-china-sea/>, para. 2.

²⁷⁶ *Reuters*, “China Says U.S. Seeks ‘Hegemony’ After South China Sea Sailing”, February 1, 2016, <http://www.reuters.com/article/us-southchinasea-china-usa-idUSKCN0VA1ST>, para. 7.

²⁷⁷ Asia Maritime Transparency Initiative, “Another Piece of the Puzzle”, February 22, 2016, <http://amti.csis.org/another-piece-of-the-puzzle/>.

²⁷⁸ Jeff Mason and Bruce Wallace, “Obama, ASEAN Discuss”, paras. 7–8.

March 18, 2016: The Enhanced Defence Cooperation Agreement is signed between the Philippines and the United States, granting the latter's military partial use of five Philippine military bases, including air bases well within range of the Spratlys.

March 20, 2016: An Indonesian law enforcement vessel apprehends a Chinese fishing vessel, the *Kway Fey 10078*, less than four kilometres from the Natuna Islands (the islands are near, but not enclosed by China's nine-dash line; as they are recognized as being sovereign Indonesian territory, this incident occurred well within Indonesia's territorial sea as established by UNCLOS). While the Indonesian ship tows the Chinese vessel to port, a China Coast Guard vessel allegedly rams the Chinese vessel, forcing the Indonesians to release it. Indonesia's fisheries minister, Susi Pudjiastuti, calls China's behaviour "arrogant", and the Chinese chargé d'affaires is summoned by the foreign minister, who accuses China of sabotaging Indonesia's diplomatic efforts to maintain peace in the South China Sea. The incident took place while the Indonesian Coordinating Ministry for Politics, Law, and Security is conducting a review of Indonesia's South China Sea policy.²⁷⁹ In response, Indonesia accelerates the militarization of the islands. Militarization plans include a submarine base, warships, squadrons of fighter jets, and the Skyshield air defence system.²⁸⁰

March 21, 2016: Images posted online suggest that Chinese YJ-62 anti-ship cruise missiles with a range of 280 kilometres have been stationed on Woody Island in the Paracels, in addition to the anti-air missiles with a 250-kilometre range installed there in February.

March 23, 2016: A group of local and international media are permitted to visit Itu Aba Island for the first time in order to bolster Taiwan's claims in advance of the arbitration ruling. Another group visits Itu Aba on April 15 as part of the "International Conference on the South China Sea Dispute and International Law" held in Taipei.

March 27, 2016: The Malaysian National Security Minister asserts that 100 Chinese fishing boats were "encroaching" upon Malaysian waters. A Chinese Foreign Ministry spokesperson, Mr. Hong Lei, claimed that these boats were taking part in the annual fishing season and did not constitute a threat.²⁸¹

April 3, 2016: Two Japanese destroyers and one submarine arrive in the Philippines on a goodwill visit.²⁸² Following the port call, the two destroyers continue on to Vietnam's Cam Ranh Bay, marking the first visit of Japanese Maritime Self-Defence Force naval vessels to the strategic port.

April 7, 2016: China stations two fighter jets on Woody Island.

²⁷⁹ Aaron L. Connelly, "Will Indonesia, Provoked, Now Choose to Lead on the South China Sea?" Asia Maritime Transparency Initiative, March 21, 2016, <http://amti.csis.org/will-indonesia-provoked-now-choose-lead-south-china-sea/>.

²⁸⁰ Ridzwan Rahmat, "Indonesia to Deploy Skyshield Air Defence System in South China Sea", *IHJS Jane's 360*, April 5, 2016, <http://www.janes.com/article/59305/indonesia-to-deploy-skyshield-air-defence-system-in-south-china-sea>.

²⁸¹ *Reuters*, "A Hundred Chinese Boats Encroach in Malaysian Waters: Minister", March 25, 2016, <http://www.reuters.com/article/us-southchinesea-malaysia-idUSKCN0WR03H>.

²⁸² Prashanth Parameswaran, "Japan Submarine, Destroyers Visit Philippines", *The Diplomat*, April 4, 2016, <http://thediplomat.com/2016/04/japan-submarine-destroyers-visit-philippines/>.

April 7, 2016: Vietnam demands that China remove the *Haiyang Shiyou 981* oil rig, which has been moved into a disputed region of the Gulf of Tonkin.²⁸³

April 11, 2016: A statement on maritime security released by the G7 foreign ministers calls on all states to settle the maritime disputes in the South China Sea in good faith in accordance with international law and expresses a strong opposition to “any intimidating, coercive or provocative unilateral actions that could alter the status quo and increase tensions [including] land reclamation”.²⁸⁴ The Chinese foreign ministry responds that it is “strongly dissatisfied” with the statement, calls on G7 states to “stop all irresponsible words and actions, and make constructive contribution to peace and stability”, and states that the G7 “should have focused on global economic governance and cooperation instead of hyping up maritime issues and fuelling tensions in the region”.²⁸⁵

April 15, 2016: After visiting India and the Philippines, United States Secretary of Defense Ash Carter visits the USS *John C. Stennis*, an American aircraft carrier that has been stationed in the South China Sea since March. During his visit, he commented that the American presence is only “an issue” because of “Chinese behaviour”, stating that “What’s new is not an American carrier in this region. What’s new is the context of tension which exists, which we want to reduce”.²⁸⁶ Chinese foreign ministry spokesman Lu Kang states that the United States and the Philippines had “poisoned country-to-country relations, intensified regional contradictions and undermined peace and stability in the South China Sea”.²⁸⁷ At roughly the same time, General Fan Changlong (Vice Chairman of the Central Military Commission, second in military rank only to President Xi) tours China’s artificial islands in the Spratlys.²⁸⁸

April 18, 2016: In the first public admission of military aircraft landing there, Chinese state media reports that a military transport plane landed on Fiery Cross Reef, demonstrating that the airfield meets military standards.²⁸⁹ This follows the landing of civilian aircraft there in January.

April 26, 2016: The *South China Morning Post* reports that Chinese forces will establish a permanent outpost on Scarborough Shoal and suggests that an airstrip will be constructed there, corroborating American reports of increased activity there in March. This would bring China’s total number of airstrips in the region to five, with completed facilities at Woody Island in the

²⁸³ *Reuters*, “Vietnam Tells China to Shift its Rig and Stop Complicating Ties”, April 7, 2016, <http://www.reuters.com/article/us-southchinasea-vietnam-china-idUSKCN0X41GD>.

²⁸⁴ European External Action Service. “G7 Foreign Ministers’ Statement on Maritime Security”. April 11, 2016. http://eeas.europa.eu/statements-eeas/2016/160411_05_en.htm.

²⁸⁵ The *Guardian*, “South China Sea: Beijing Tells G7 Foreign Ministers to Keep Out of Territorial Dispute”, April 12, 2016, <http://www.theguardian.com/world/2016/apr/12/south-china-sea-beijing-tells-g7-foreign-ministers-to-keep-out-of-territorial-dispute>.

²⁸⁶ *Reuters*, “U.S. Defense Secretary Visits Carrier in Disputed South China Sea”, April 15, 2016, <http://in.reuters.com/article/us-southchinasea-philippines-carter-idINKCN0XC074>, para. 4.

²⁸⁷ The *Japan Times*, “Top U.S., China Military Officials in Rival South China Sea Tours”, April 16, 2016, <http://www.japantimes.co.jp/news/2016/04/16/asia-pacific/top-u-s-china-military-officials-in-rival-south-china-sea-tours/#.V4ko7dIrJpj>, para. 8.

²⁸⁸ *Ibid.*, para. 2.

²⁸⁹ The *Guardian*, “Chinese Military Plane Lands on Disputed South China Sea Island”, April 18, 2016, <http://www.theguardian.com/world/2016/apr/18/chinese-military-plane-lands-on-disputed-south-china-sea-island-media>.

Paracels and Fiery Cross Reef in the Spratlys, and airstrips under construction at Subi Reef and Mischief Reef in the Spratlys.

April 29 to May 6, 2016: Japanese foreign minister Fumio Kishida conducts a tour of China, Thailand, Myanmar, Laos, and Vietnam. During the trip he calls repeatedly for parties to uphold the rule of law in the South China Sea and calls for a code of conduct.

May 4, 2016: Japan agrees to lease five TC-90 surveillance planes to the Philippines. With a range of 1,900 kilometres, the planes will double the area that the Philippines can patrol. This is the first lease of Japan's Self-Defence Force aircraft to another state.²⁹⁰

May 6, 2016: A new Comprehensive Strategic Partnership agreement between Singapore and Australia is announced that will increase the number of Singaporean troops sent to train in Australia to 14,000 per year. Singapore's Prime Minister Lee Hsien Loong stated that their "economies will become more integrated and intertwined. Defence cooperation will be stepped up", while Australian Prime Minister Malcolm Turnbull called the agreement "a massive upgrading of our relationship with Singapore".²⁹¹

May 10, 2016: The Chinese (Taiwan) Society of International Law intervenes in the arbitration process between China and the Philippines, affirming Taiwan's claims to Itu Aba Island and its status as an island as defined under the Convention. The Taiwanese government had previously announced that it would not respect the ruling, as it had not been consulted and has not ratified UNCLOS. The Society making the submission is not officially affiliated with the Taiwanese government.

May 10, 2016: The USS *William P. Lawrence* conducts a freedom operation in the Spratly Islands, the third such operation in the South China Sea since October 2015. The *William P. Lawrence* passed within 12 nautical miles of Fiery Cross Reef under innocent passage. Two Chinese fighter jets are scrambled and three Chinese warships shadow the ship in response.²⁹² China's Defence Ministry asserts that the FONOP "again proves that China's construction of defensive facilities on the relevant reefs in the Nansha [Spratly] Islands is completely reasonable and totally necessary".²⁹³ Chinese Ministry of Foreign Affairs spokesperson Lu Kang stated that "This action by the U.S. side threatened China's sovereignty and security interests, endangered the staff and facilities on the reef, and damaged regional peace and stability".²⁹⁴

May 17, 2016: According to the Pentagon, two Chinese fighter jets intercept an American EP-3 reconnaissance aircraft over the South China Sea. The Pentagon claims that the "routine patrol" was intercepted in an "unsafe" manner. China's Foreign Ministry responds that the aircraft was close to Hainan, was "endangering Chinese maritime security", and that the intercept was

²⁹⁰ Raul Dancel, "Japan Leasing 5 Military Aircraft to Philippines", *The Straits Times*, May 4, 2016, <http://www.straitstimes.com/asia/se-asia/japan-leasing-5-military-aircraft-to-philippines>.

²⁹¹ Rob Taylor, "Singapore, Australia Expand Military", paras. 4, 6.

²⁹² Michael Martina, Greg Torode and Ben Blanchard, "China Scrambles Fighters", para. 7.

²⁹³ Ibid., para. 8.

²⁹⁴ Sam LaGrone, "U.S. Destroyer Passes".

performed “completely in keeping with safety and professional standards”.²⁹⁵ The *Guardian* reports that the fighter jets flew within 15 metres of the aircraft.²⁹⁶

May 23, 2016: On the first day of a state visit to Vietnam, President Obama announces that the embargo on arms sales to Vietnam will be lifted, clearing the way for arms sales to Vietnam on a case-by-case basis. He also announces that cooperation in emergency preparedness will be improved and that patrol boats and training for Vietnam’s coast guard will be provided.²⁹⁷

May 25, 2016: The defence ministers of ASEAN member states meet in Vientiane. While the meetings are focused on counterterrorism, a joint declaration also calls for a binding code of conduct in the South China Sea and reiterates the importance of the freedom of navigation and of upholding UNCLOS.²⁹⁸

May 26, 2016: The leaders of the G7 agree on the need to send “a clear signal” regarding maritime claims in the South China Sea. In a response echoing the one issued after the G7 foreign ministers’ meeting in April, Chinese Foreign Ministry spokeswoman Hua Chunying states that the South China Sea has “nothing to do” with the G7 and that “China is resolutely opposed to individual countries hyping up the South China Sea for personal gain”.²⁹⁹

May 26, 2016: The *Guardian* reports that the Chinese navy is preparing to begin patrolling the Pacific Ocean with submarines armed with nuclear missiles for the first time, although no start date for these patrols is given.³⁰⁰

May 30, 2016: Two Indian warships arrive in Vietnam’s Cam Ranh Bay for a four-day visit. The goal of the visit is to increase interoperability and to conduct joint training exercises. From Vietnam, the ships will make stops at Subic Bay in the Philippines, Sasebo in Japan, Busan in South Korea, Vladivostok in Russia, and Port Klang in Malaysia.³⁰¹

²⁹⁵ Idrees Ali and Megha Rajagopalan, “Chinese Jets Intercept U.S. Military Plane over South China Sea: Pentagon”, *Reuters*, May 20, 2016, <http://uk.reuters.com/article/us-usa-china-south-china-sea-idUKKCN0Y92ZA>.

²⁹⁶ The *Guardian*, “Chinese Fighter Makes ‘Unsafe’ Intercept of US Plane over East China Sea”, June 8, 2016, <http://www.theguardian.com/us-news/2016/jun/08/chinese-fighter-makes-unsafe-intercept-of-us-plane-over-east-china-sea>, para. 4.

²⁹⁷ Jim Garamone, “Lifting Embargo Allows Closer U.S., Vietnam Cooperation, Obama, Carter Say”, *U.S. Department of Defense*, May 24, 2016, <http://www.defense.gov/News-Article-View/Article/779762/lifting-embargo-allows-closer-us-vietnam-cooperation-obama-carter-say>, paras. 5–6.

²⁹⁸ Cliff Venzon, “ASEAN Defense Talks on South China Sea Subdued by Terrorism Concerns”, *Nikkei Asian Review*, May 26, 2016, <http://asia.nikkei.com/Politics-Economy/International-Relations/ASEAN-defense-talks-on-South-China-Sea-subdued-by-terrorism-concerns>.

²⁹⁹ Thomas Wilson and Kiyoshi Takenaka, “G7 Agrees Need Strong Message on South China Sea; China Says Don’t ‘Hype’”, *Reuters*, May 26, 2016, <http://www.reuters.com/article/us-g7-summit-idUSKCN0YH016>, paras. 3, 6–7.

³⁰⁰ Julian Borger, “China to Send Nuclear-Armed Submarines into Pacific Amid Tensions with US”, *The Guardian*, May 26, 2016, <http://www.theguardian.com/world/2016/may/26/china-send-nuclear-armed-submarines-into-pacific-us>.

³⁰¹ Franz-Stefan Gady, “India Sends Warships to South China Sea”, *The Diplomat*, May 19, 2016, <http://thediplomat.com/2016/05/india-sends-stealth-warships-to-south-china-sea/>.

May 30, 2016: The Indonesian Navy reports that one of its frigates intercepted a Chinese fishing vessel, the *Gui Bei Yu-27088*, near the Natuna Islands. After ignoring repeated warnings to stop, the vessel was fired upon by the frigate and seized. No one was injured.³⁰²

June 8, 2016: Pentagon officials report that a Chinese J-10 fighter aircraft intercepted an American RC-135 reconnaissance aircraft in international airspace over the East China Sea. The intercept was deemed unsafe due to the fighter's "high rate of speed".³⁰³

June 9, 2016: For the first time, a Chinese navy warship sails within 24 nautical miles of the Senkaku/Diaoyu Islands, remaining near the islands for about an hour. Three Russian naval vessels sailed close to the islands at around the same time as the Chinese frigate did.³⁰⁴

June 10 to July 17, 2016: The annual Malabar joint naval drills are held in the Philippine Sea with participation from Indian, Japanese, and American naval vessels, including the USS *John C. Stennis* aircraft carrier.³⁰⁵ Exercise Malabar began in 1992. Originally a bilateral exercise between India and the United States, Japan became a permanent partner in 2015. As the USS *John C. Stennis* left the South China Sea following the exercise, its carrier strike group conducted coordinated operations with the USS *Ronald Reagan* aircraft carrier strike group in the Philippine Sea on June 18. These two strike groups have a combined complement of 12,000 sailors and 140 aircraft aboard the carriers and six smaller warships.³⁰⁶

June 14, 2016: The foreign ministers of ASEAN members meet with Chinese Foreign Minister Wang Yi during a Special ASEAN-China Foreign Ministers' Meeting in Kunming, to commemorate the 25th anniversary of the dialogue process between China and ASEAN. After the meeting, the Malaysian foreign ministry releases a statement on behalf of the organization. The statement is highly critical of Chinese activity in the South China Sea, citing "recent and ongoing developments, which have eroded trust and confidence, increased tensions and which may have the potential to undermine peace, security, stability, safety and freedom of navigation in and overflight above the South China Sea".³⁰⁷ The statement is retracted hours later pending the addition of "urgent amendments", but no updated joint statement is released.³⁰⁸ After the meeting, several ASEAN members publicly supported the statement, and an Indonesian foreign

³⁰² Niniek Karmini, "Indonesian Navy Fires Shot".

³⁰³ The *Guardian*, "Chinese Fighter Makes 'Unsafe' Intercept", para. 3.

³⁰⁴ *Reuters*, "Japan Protests After Chinese Warship Sails Near Disputed East China Sea Islands", June 9, 2016, <http://www.reuters.com/article/us-japan-china-islands-idUSKCN0YV01U>.

³⁰⁵ The *Japan Times*, "Japan, U.S., India Kick Off Key Joint Naval Exercises Amid Growing Chinese Maritime Assertiveness", June 11, 2016, <http://www.japantimes.co.jp/news/2016/06/11/national/japan-u-s-india-kick-off-key-joint-naval-exercises-amid-growing-chinese-maritime-assertiveness/#.V2FGpdIrJpg>.

³⁰⁶ Jane Perlez, "U.S. Carriers Sail in Western Pacific, Hoping China Takes Notice", *New York Times*, June 18, 2016, <http://www.nytimes.com/2016/06/19/world/asia/us-carriers-sail-in-western-pacific-hoping-china-takes-notice.html>.

³⁰⁷ South China Sea Research, "Full Text of ASEAN Foreign Ministers' Press Statement on Special ASEAN-China Foreign Ministers' Meeting", June 20, 2016, <https://seasresearch.wordpress.com/2016/06/20/full-text-of-asean-fms-press-statement-on-special-asean-china-foreign-ministers-meeting/>, para. 15.

³⁰⁸ *Reuters*, "Southeast Asian Countries Retract Statement Expressing Concerns on South China Sea", June 15, 2016, <http://www.reuters.com/article/us-southchinasea-asean-idUSKCN0Z10KX>, para. 4.

ministry spokesperson claims that ASEAN members had reached a consensus on the wording of the statement before the meeting.³⁰⁹

June 18, 2016: The Indonesian Navy reports that one of its corvettes, the KRI *Imam Bonjol*, fired upon a group of 12 Chinese fishing ships that were detected in Indonesian waters near the Natunas. The corvette fired several warning shots before detaining the *Qiong Dan Zhou 19038* and seven of its crew. In response, the Chinese government lodged a diplomatic protest with Jakarta and accused the navy of violating international law and jeopardizing the lives and property of Chinese fishermen.³¹⁰

June 20, 2016: Chinese media reports that Cambodia will not support the arbitration tribunal's ruling and that Cambodia will not support a joint statement by ASEAN concerning the ruling.³¹¹ On June 29, Chinese foreign ministry spokesperson Hong Lei stated that "The Chinese side highly commends Prime Minister Hun Sen and the CPP [Cambodian People's Party] for their objective and impartial position on the issue of the South China Sea. The statement by the Cambodian side once again proves that countries that are trying to drive a wedge between China and ASEAN and sabotage peace and stability of the region by making use of the South China Sea arbitration case will find their attempt rejected and doomed to failure."³¹²

June 23, 2016: Indonesian President Joko Widodo visits the Natuna Islands in response to recent incursions of Chinese fishing vessels into Indonesia's territorial waters.³¹³

July 5 to 11, 2016: The Chinese navy holds a series of military drills in the South China Sea near the Paracels culminating a day before the Arbitral Tribunal issues its ruling. The Navy declares a 100,000 km² "no sail zone" between Hainan and the Paracels.³¹⁴ The *Shenyang* and *Ningbo* guided-missile destroyers and the *Chaozhou* missile frigate take part.³¹⁵ A statement released by Vietnam's foreign ministry states that "Such activity once again seriously violates Viet Nam's sovereignty... Viet Nam strongly opposes the above-said action and demands China to [sic] respect Viet Nam's sovereignty, behave in a responsible manner, immediately stop the activity

³⁰⁹ Liza Yosephine, "Indonesia Stresses ASEAN Common Stance on South China Sea Consistent", *Jakarta Post*, June 17, 2016, <http://www.thejakartapost.com/seasia/2016/06/17/indonesia-stresses-asean-common-stance-on-south-china-sea-consistent.html>.

³¹⁰ Ridzwan Rahmat, "Indonesian Corvette Opens Fire on Chinese Fishing Ships in South China Sea", *IHS Jane's 360*, June 20, 2016, <http://www.janes.com/article/61602/indonesian-corvette-opens-fire-on-chinese-fishing-ships-in-south-china-sea>.

³¹¹ *Xinhua*, "Cambodian PM Says Not to Back Arbitral Tribunal's Upcoming Decision Over South China Sea", June 20, 2016, http://news.xinhuanet.com/english/2016-06/20/c_135451406.htm.

³¹² Ministry of Foreign Affairs of the People's Republic of China, "Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on June 29, 2016", June 29, 2016, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1376270.shtml.

³¹³ Jun Suzuki, "Indonesia Toughens Up Against Beijing in South China Sea", *Nikkei Asian Review*, June 24, 2016, <http://asia.nikkei.com/Politics-Economy/International-Relations/Indonesia-toughens-up-against-Beijing-in-South-China-Sea>.

³¹⁴ David B. Larter, "U.S. Navy Destroyers Stalk China's Claims in the South China Sea", *Navy Times*, July 6, 2016, <http://www.navytimes.com/story/military/2016/07/06/us-navy-destroyers-stalk-chinas-claims-south-china-sea/86777268/>, para. 20.

³¹⁵ Tom Phillips, "South China Sea: Beijing Begins Military Drills Ahead of Key Territorial Ruling", *The Guardian*, July 5, 2016, <https://www.theguardian.com/world/2016/jul/05/south-china-sea-beijing-begins-military-drills-ahead-of-key-territorial-ruling>.

and restrain from further actions that threaten the security and safety of navigation in the East Sea or escalate tension in the region”.³¹⁶

July 12, 2016: The Tribunal of the Permanent Court of Arbitration issues an Award in the arbitration process between the Philippines and China. The Tribunal rules that China’s nine-dash line has no legal basis as a maritime boundary, that none of the Spratly Islands could be considered an island capable of generating maritime zones either individually or collectively, and that China had violated the Philippines’ right to its EEZ.³¹⁷ China declares the award “null and void”,³¹⁸ the Philippines calls on “all those concerned to exercise restraint and sobriety”,³¹⁹ and the United States calls the ruling an “important contribution” to peace in the South China Sea and expressed the hope that both parties would comply with the ruling.³²⁰

July 13, 2016: A China Southern Airlines passenger jet lands at Mischief Reef and a Hainan Airlines jet lands at Subi Reef in the Spratlys,³²¹ demonstrating that construction on the runways on these features is complete.

July 13, 2016: A Taiwanese frigate begins a tour of the South China Sea, its departure date moved up in the wake of the Arbitral Tribunal’s ruling. In a speech before the ship’s departure, President Tsai Ing-wen declared that “The mission of this voyage is to display Taiwan people’s [sic] resolve in defending the national interest”.³²²

July 18, 2016: *Xinhua* reports that the Chinese air force recently flew a “combat air patrol” over the South China Sea and that such patrols would become “regular practice” in the future.³²³

July 24, 2016: In conjunction with a meeting of the ASEAN Regional Forum, the foreign ministers of ASEAN member states meet in Vientiane for their 49th Meeting, the first such gathering since the arbitration ruling was issued. As in 2012, internal divisions and obstruction from Cambodia over the South China Sea hinders efforts to draft a joint communique. The final document, issued on July 25, does not mention the arbitration process or China by name, repeating ASEAN’s general principles on the disputes instead.

August 7, 2016: Six Chinese coast guard ships and roughly 230 fishing vessels sail near the territorial waters surrounding the Senkaku Islands, prompting Japan to issue a diplomatic protest.³²⁴

³¹⁶ Vietnam Ministry of Foreign Affairs, “Remarks by MOFA Spokesperson Le Hai Binh on Viet Nam’s Reaction to China’s Announcing of Military Exercise from 5th to 11th July 2016 within Area that Covers Viet Nam’s Hoang Sa Archipelago”, July 4, 2016, http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns160706145155/view.

³¹⁷ Permanent Court of Arbitration, “Eleventh Press Release 12072016”, July 12, 2016, <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>, p. 1–2.

³¹⁸ *Xinhua*, “Full Text of Statement”, para. 2.

³¹⁹ *Philippine Daily Inquirer*, “Full Text: DFA Secretary Yasay Statement on West PH Sea”, July 12, 2016, <http://globalnation.inquirer.net/140968/full-text-dfa-foreign-affairs-perfecto-yasay-west-philippine-sea>, para. 3.

³²⁰ John Kirby, “Decision in the Philippines-China Arbitration”, para. 1.

³²¹ *Xinhua*, “China Conducts Test Flights”.

³²² Austin Ramzy, “Taiwan, After Rejecting South China Sea Decision, Sends Patrol Ship”, *The New York Times*, July 13, 2016, http://www.nytimes.com/2016/07/14/world/asia/south-china-sea-taiwan.html?_r=0, para. 3.

³²³ Michael Forsythe, “China Begins Air Patrols”, para. 2.

³²⁴ *Reuters*, “Japan Protests After Chinese”.

August 8, 2016: The Asia Maritime Transparency Initiative reports that aircraft hangars are under construction on Fiery Cross, Mischief, and Subi Reefs, improving China's ability to stage aircraft on the artificial islands.³²⁵

August 10, 2016: *Reuters* reports that mobile rocket launchers have been shipped to five maritime features occupied by Vietnam, according to unnamed diplomatic and military sources.³²⁶ The launchers have a range of 150 kilometres, enabling them to target Chinese runways on Subi, Mischief and Fiery Cross Reefs.³²⁷ The launchers were reportedly stationed near Chinese positions in anticipation of increased tensions in the wake of the arbitration ruling.³²⁸ Vietnam's foreign ministry states that the information was "inaccurate", but does not elaborate.³²⁹

August 17, 2016: Indonesia announces that it will rename the portion of the South China Sea that lies within the EEZ surrounding Indonesia's Natuna Islands the "Natuna Sea".³³⁰ On the same day, the Indonesian government destroys 60 foreign impounded fishing boats,³³¹ bringing the total number of vessels destroyed since December 2014 to 236.

September 7, 2016: The Center for Strategic and International Studies releases a report providing details regarding incidents involving maritime law enforcement agencies in the South China Sea between May 2010 and July 2016. According to the report, Chinese maritime law enforcement vessels were involved in 71% of the 45 incidents listed, and four other clashes involved Chinese naval vessels acting in a law enforcement capacity. The report only covers incidents reported in the media and does not account for clashes occurring between private vessels.³³² As a result, the number of incidents is likely underreported.

September 12 to 19, 2016: Russia and China hold joint naval exercises in the South China Sea off Guangdong. The Joint Sea-2016 exercises feature surface vessels, submarines, aircraft, and marines and include live-fire drills and amphibious island-landing operations.³³³ *Xinhua* portrays the drill as being routine and not targeted against any third party.³³⁴ Nevertheless, Admiral Scott

³²⁵ David E. Sanger and Rick Gladstone, "New Photos Cast Doubt".

³²⁶ Greg Torode, "Vietnam Moves New Rocket Launchers", para. 2.

³²⁷ *Ibid.*, paras. 16–17.

³²⁸ *Ibid.*, para. 9.

³²⁹ *Ibid.*, para. 4.

³³⁰ *Kyodo News*, "Indonesia Outlines Plan to Change Name of S. China Sea to Natuna Sea", August 18, 2016, <https://english.kyodonews.jp/news/2016/08/428400.html>.

³³¹ Sara Schonhardt, "Indonesia Sinks 60 Fishing Boats on Independence Day", *The Wall Street Journal*, August 17, 2016, <http://www.wsj.com/articles/indonesia-sinks-60-fishing-boats-on-independence-day-1471428634>.

³³² ChinaPower, "Are Maritime Law Enforcement Forces Destabilizing Asia?" *Center for Strategic and International Studies*, n.d., last accessed September 7, 2016, <http://chinapower.csis.org/maritime-forces-destabilizing-asia/>.

³³³ Jesse Johnson, "Joint China-Russia Naval Drills in South China Sea Focus on Anti-Submarine, 'Island-Seizing' Operations", *The Japan Times*, September 12, 2016, <http://www.japantimes.co.jp/news/2016/09/12/asia-pacific/joint-china-russia-naval-drill-in-contested-south-china-sea-set-to-kick-off/#.V-vnTYgrJpg>.

³³⁴ *Xinhua*, "China, Russia Navies to Hold Drill in South China Sea", July 28, 2016, http://news.xinhuanet.com/english/2016-07/28/c_135547357.htm, para. 3.

Swift, commander of the United States Pacific Fleet, declared that the choice of location was not conducive to stabilizing the region.³³⁵

September 16, 2016: Tomomi Inada, Japan's Minister of Defence, announces plans to hold joint naval patrols with the United States. The United States Navy responded positively, stating that "The United States welcomes Japan's interest in expanding its maritime activities in the South China Sea. We continue to explore ways to enhance U.S.-Japan cooperative efforts to contribute to the security and stability of the region".³³⁶

September 20, 2016: The foreign ministers of G7 member states release a statement on recent developments in Asia including the South China Sea, expressing strong opposition to unilateral acts that raise tensions and declaring the Award issued by the Arbitral Tribunal to be a "useful basis for further efforts to peacefully resolve disputes".³³⁷

October 2, 2016: In a symbolic move, two American warships, the submarine tender USS *Frank Cable* (AS-40) and the guided-missile destroyer USS *John S. McCain* (DDG-56) make port calls at Vietnam's Cam Ranh Bay.³³⁸

October 6, 2016: The Indonesian Air Force stages exercises, its largest ever, near the Natuna Islands³³⁹ in a move to strengthen the Indonesian presence in the region after several clashes between the Indonesian Navy and Chinese vessels earlier this year.

October 17, 2016: Vietnam defence ministry voices support for American "intervention" in the South China Sea "as long as it brings peace, stability and prosperity".³⁴⁰

October 18 to 21, 2016: Philippine President Rodrigo Duterte undertakes a state visit to China at the head of a large trade delegation, during which he declares his "separation from the United States"³⁴¹ and announces the resumption of bilateral talks on the South China Sea disputes.

October 21, 2016: The USS *Decatur* conducts a freedom of navigation operation in international waters near Triton and Woody Islands in the Paracels.³⁴² The guided-missile destroyer was shadowed by two Chinese naval vessels during the operation.³⁴³

October 22, 2016: Three Chinese warships returning from deployment in the Gulf of Aden arrive in Vietnam's Cam Ranh Bay, the first such visit by the Chinese People's Liberation Army Navy.³⁴⁴

³³⁵ *Associated Press*, "US Says More Military Transparency Needed in South China Sea", *The New York Times*, August 9, 2016, <http://www.nytimes.com/aponline/2016/08/09/world/asia/ap-as-south-china-sea.html>, para. 2.

³³⁶ *Reuters*, "Japan to Boost South China Sea Role", paras. 6, 9.

³³⁷ Global Affairs Canada, "G7 Foreign Ministers' Statement on Recent Developments in Asia", September 20, 2016, http://www.international.gc.ca/g7/assets/pdfs/g7_2016_fm_statement_asia_en.pdf, para. 6.

³³⁸ *Reuters*, "U.S. Warships Make Landmark Visit".

³³⁹ Eveline Danubrata, "Amid South China Sea Uncertainty, Indonesia Stages a Show of Force", *Reuters*, October 6, 2016, <http://www.reuters.com/article/us-southchinasea-indonesia-idUSKCN1261AW>, para. 5.

³⁴⁰ *Reuters*, "Vietnam Gives Thumbs-Up", para. 4.

³⁴¹ *Reuters*, "Duterte Aligns Philippines with China, Says U.S. Has Lost", October 20, 2016, <http://www.reuters.com/article/us-china-philippines-idUSKCN12K0AS>, para. 3.

³⁴² Idrees Ali and Matt Spetalnick, "U.S. Warship Challenges China's Claims", para. 6.

³⁴³ *Reuters*, "China Protests 'Illegal'", para. 4.

October 27, 2016: Chinese forces hold military drills in the South China Sea, south of Hainan and northwest of the Paracels.³⁴⁵

November 1, 2016: During a visit by Malaysian prime minister Najib Razak to China, Malaysia agrees to buy four littoral mission ships from China, the first significant defence deal between the two countries and a sign that Malaysia will pursue closer ties with China.³⁴⁶

November 15, 2016: The Chinese state-run *Global Times* reports that China's aircraft carrier *Liaoning*, which has served as a training vessel since it was commissioned into the People's Liberation Army Navy in 2012, is now ready for combat and "constantly prepared for war". The *Liaoning* carries a complement of 24 fighter jets and 10 helicopters. Although its weaker power plant and aircraft-launching systems—underpowered by modern standards—restrict its operational range, it is capable of operations in the South China Sea.³⁴⁷

November 15, 2016: Satellite imagery published by the Asia Maritime Transparency Initiative indicates that land reclamation on Vietnamese-controlled Spratly Island has lengthened the runway there from 2,500 feet to 3,300 feet, with future reclamation likely to extend the runway beyond 4,000 feet. Accordingly, the island's runway can now accommodate Vietnamese maritime surveillance aircraft and transport planes. Land reclamation activity at Spratly Island has increased the size of the maritime feature by 57 acres (0.23 km²).³⁴⁸

November 21, 2016: Plans for Philippine President Duterte to declare a maritime sanctuary and no-fishing zone at Scarborough Shoal are publicized.³⁴⁹ The proposed area includes the shoal's lagoon but would not cover the shoal's outer banks. The unilateral move, to which the Chinese government has not yet responded, would be difficult to enforce without Chinese cooperation, as the lagoon in question and the shoal itself remain under the control of Chinese forces. Although Philippine fishing boats have generally been permitted by the China Coast Guard to fish in the vicinity, access to the lagoon itself is highly restricted.

Section E: Impacts of the Disputes

Environmental Impacts

The environmental ramifications of the South China Sea disputes are often overlooked, despite the fact that they are the most visible and tangible effect of the disputes. Media analysis

³⁴⁴ Jesse Johnson, "Chinese Warships Make First Visit to Vietnam's Cam Ranh Bay as South China Sea Tensions Simmer", *The Japan Times*, October 23, 2016, <http://www.japantimes.co.jp/news/2016/10/23/asia-pacific/chinese-warships-make-first-visit-vietnams-cam-ranh-bay-south-china-sea-tensions-simmer/#.WA98I-UrJph>, para. 3.

³⁴⁵ *Reuters*, "China to Carry Out More Military Drills in South China Sea", October 26, 2016, <http://www.reuters.com/article/us-southchinasea-china-idUSKCN12Q125>.

³⁴⁶ Sue-Lin Wong, "China and Malaysia Sign Deals on Navy Vessels", *Reuters*, November 1, 2016, <http://www.reuters.com/article/us-china-malaysia-idUSKBN12W3WF>.

³⁴⁷ Franz-Stefan Gady, "Next Stop South China Sea? China's 1st Aircraft Carrier 'Ready for Combat'", *The Diplomat*, November 16, 2016, <http://thediplomat.com/2016/11/next-stop-south-china-sea-chinas-1st-aircraft-carrier-ready-for-combat/>, paras. 2, 4, 5.

³⁴⁸ Asia Maritime Transparency Initiative, "Vietnam Responds".

³⁴⁹ Mike Ives, "Philippines to Declare Marine Sanctuary in South China Sea", *The New York Times*, November 21, 2016, <http://www.nytimes.com/2016/11/22/world/asia/philippines-rodrido-duterte-scarborough-shoal-china.html>.

and coverage often highlights the implications of the disputes for security, state sovereignty, geopolitics, and diplomacy in the region instead. In an effort to bolster their territorial claims, China and the other littoral states of the South China Sea are reshaping maritime features into artificial islands, while fishermen are encouraged to ply their trade in contested areas in order to demonstrate the effective occupation and historical presence of the claimant states in the region. Both land reclamation and increased fishing have had significant effects on the environment of the South China Sea.

Land Reclamation

Most of the claimant states that have occupied reefs and islands in the South China Sea have engaged in land reclamation efforts. By June 2015, Vietnam had reclaimed a total of approximately 80 acres; Malaysia, 70 acres; the Philippines, 14 acres; and Taiwan, 8 acres.³⁵⁰ China began reclaiming land in the Spratly Islands on a large scale in December 2013. By late 2015, over 3,200 acres (13 km²) of land had been reclaimed at its outposts in the archipelago.³⁵¹ Images of land reclamation activity in the South China Sea are provided in Appendix B.

The primary method of land reclamation used in the South China Sea consists of depositing sand and ground-up coral atop the reef, which kills the underlying coral in the process. The aggregate used is dredged from the nearby reefs, causing significant damage that will require years to repair, and that threatens the long-term health of the coral as well. In addition, once deposited on the new reef the aggregate, sand, and silt can be washed back into the sea. The plumes this creates effectively smother nearby coral and prevent aquatic life from inhabiting the reef. As a result, an additional area of coral reefs totalling 55 km² has been damaged or destroyed due to land reclamation activity.³⁵² These effects, coupled with other environmental stressors such as rising sea levels, ocean acidification, pollution, and damage caused by destructive fishing methods are jeopardizing the long-term survivability of coral reefs in the South China Sea.

The South China Sea is an incredibly biodiverse area. It is home to 571 species of reef coral, while the Spratly Islands alone contain 333 species of coral.³⁵³ Furthermore, the reefs play a critical role in the fisheries of the region by acting as a spawning ground and habitat for fish species that would otherwise be easy prey for open-water fish. Atolls and shallow lagoons are the preferred habitat for reef-dwelling fish. Unfortunately, they are also the ideal candidate for artificial island construction. Information about the scope of the damage caused is limited, but it is clear that land reclamation will negatively impact the biodiversity of the area and the region's fisheries. In its Award in the arbitration case between the Philippines and China, the Arbitration

³⁵⁰ United States Department of Defense, "The Asia-Pacific Maritime Security Strategy: Achieving U.S. National Security Objectives in a Changing Environment", http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P_Maritime_Security_Strategy-08142015-1300-FINALFORMAT.PDF, p. 16.

³⁵¹ Office of the Secretary of Defense, "Annual Report to Congress: Military and Security Developments Involving the People's Republic of China", April 26, 2016, p. 13.

³⁵² Shannon Tiezzi, "South China Sea Ruling: China Caused 'Irreparable Harm' to Environment", *The Diplomat*, July 15, 2016, <http://thediplomat.com/2016/07/south-china-sea-ruling-china-caused-irreparable-harm-to-environment/>, para. 11.

³⁵³ Danwei Huang et al., "Extraordinary Diversity of Reef Corals in the South China Sea", *Maritime Biodiversity* 45, no. 2 (June 2015), pp. 157–168.

Tribunal found that China had violated Articles 192 and 194 of the UN Convention,³⁵⁴ which calls on state parties to “protect and preserve the marine environment”³⁵⁵ such that “activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment”³⁵⁶ and to “protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life”.³⁵⁷

Giant clam poaching has received particular attention after the Chinese government began turning a blind eye to the illegal practice in 2013,³⁵⁸ shortly before embarking upon its land reclamation program. By 2015, the giant clam industry was supporting an estimated 100,000 people³⁵⁹ and was a significant industry in Hainan. In order to harvest the clams, poachers use the propellers of their boats to chop the clams from the reef, carving and scarring the reef and killing the coral in the process. This practice has destroyed roughly 104 km² of coral reef,³⁶⁰ nearly twice the size of the area damaged by land reclamation. The Arbitral Tribunal estimated that China was responsible for 99% of this destruction.³⁶¹ While officially illegal, the practice has been openly tolerated by the China Coast Guard and has often been carried out in close proximity to Chinese military installations.³⁶² Furthermore, extensive reef chopping at Fiery Cross, Subi, and Mischief reefs has acted as a prelude to Chinese land reclamation,³⁶³ killing the reef before island-building did. China’s lax enforcement of its ban on giant clam poaching was noted by the Arbitral Tribunal, which found that China was

fully aware of the practice and has actively tolerated it as a means to exploit the living resources of the reefs in the months prior to those reefs succumbing to the near permanent destruction brought about by the island-building activities... Accordingly, the Tribunal finds that China has also breached its obligation to protect and preserve the marine environment in respect of its toleration and protection of the harvesting of giant clams by the propeller chopping method.³⁶⁴

Fisheries Management

Fish and seafood are a major dietary component and a major source of income and employment for the coastal populations of Southeast Asia. There are an estimated 1.72 million fishing vessels employing 5.4 million people in the South China Sea alone.³⁶⁵ The demand for fish will only increase as populations and economies grow, outstripping the supply found in the South China Sea. Between 1960 and 2000, the stocks of larger species of fish in the South China

³⁵⁴ Permanent Court of Arbitration, “Eleventh Press Release 12072016”, July 12, 2016, <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>, p. 10.

³⁵⁵ *Convention on the Law of the Sea*, Article 192.

³⁵⁶ *Ibid.*, Article 194 (2).

³⁵⁷ *Ibid.*, Article 194 (5).

³⁵⁸ Zhang Hongzhou, “South China Sea: The Story of the Tanmen Fishermen”, *The Diplomat*, January 8, 2016, <http://thediplomat.com/2016/01/south-china-sea-the-story-of-the-tanmen-fishermen/>, para. 5.

³⁵⁹ *Ibid.*, para. 2.

³⁶⁰ Tiezzi, “China Caused ‘Irreparable Harm’”, para. 11.

³⁶¹ Permanent Court of Arbitration, “Award in the Matter of the South China Sea Arbitration”, p. 384.

³⁶² Zhang Hongzhou, “The Story of the Tanmen Fishermen”.

³⁶³ *Ibid.*, para. 4.

³⁶⁴ Permanent Court of Arbitration, “Award in the Matter of the South China Sea Arbitration”, p. 384.

³⁶⁵ Stratfor, “Fish: The Overlooked Destabilizer in the South China Sea”, February 12, 2016, <https://www.stratfor.com/analysis/fish-overlooked-destabilizer-south-china-sea>.

Sea declined by over 50%³⁶⁶ while reported fishery catches skyrocketed, growing from less than 1 million metric ton landed annually in the 1950s to 10.5 million metric tons in 2010.³⁶⁷ In 2013, China landed nearly 60 times as much fish as it did in 1950.³⁶⁸ As China's coastal waters become depleted, an ever-greater share of this catch is landed in the contested areas of the South China Sea. Reliable statistics are difficult to obtain as the governments bordering the South China Sea are reluctant or unable to provide accurate information; nevertheless, an analysis of stock assessments in the South China Sea area in 2012 found that the majority of assessed species were overfished or fully fished.³⁶⁹ Furthermore, as it is difficult to accurately measure the volume fished by subsistence and small-scale fisheries, the amount of fish removed from the South China Sea annually is likely much higher than is reported in official statistics.³⁷⁰ Studies suggest that total unreported catches averaged about 8.1 million metric tons annually from 2000 to 2010.³⁷¹

As a result, the waters near the Sea's coasts are critically overfished, and ever-greater numbers of fishermen are traveling farther from shore and further into the contested areas of the South China Sea, where they enter into fierce competition with other fishing vessels for the remaining fish. Clashes between coast guard ships and foreign fishing vessels are common. With overlapping maritime claims, there is no consensus on where to establish jurisdiction for the various national maritime enforcement agencies that are tasked with preventing illegal fishing, and steps taken to jointly manage the South China Sea fishery have been limited. Indeed, proposed solutions to reduce overfishing in the South China Sea have been used to further the political goals of the states involved.

China's seasonal fishing ban is one such example. Since 1999, China has unilaterally imposed a ten-week ban each year from mid-May to early August. The ban covers disputed areas in the South China Sea north of the Spratly Islands, including the Paracels, Scarborough Shoal, and part of the Gulf of Tonkin.³⁷² The China Coast Guard uses the ban as an opportunity to apprehend and expel foreign fishing vessels that continue to fish in waters claimed by China. At the same time, excluding the Spratlys from the ban is a deliberate political move as it encourages Chinese fishing vessels to travel to the disputed area to fish while the ban is in place. In fact, excursions of flotillas of Chinese fishing vessels to the Spratlys are often organized with the help of the Chinese government,³⁷³ and the government offers subsidies of US\$30,000 to owners of

³⁶⁶ Villy Christensen et al., "Fisheries Impact on the South China Sea Large Marine Ecosystem: A Preliminary Analysis using Spatially-Explicit Methodology". In G. Silvestre et al. (eds.), *Assessment, Management and Future Directions for Coastal Fisheries in Asian Countries*, WorldFishCentreConference Proceedings 67 (2003), p. 54.

³⁶⁷ Allison Witter et al., "Taking Stock and Projecting the Future of South China Sea Fisheries", Working Paper #2015-99, University of British Columbia Fisheries Centre (2015) http://oceancanada.org/wp-content/uploads/2015/03/FCWP_2015_99_Witter.pdf, p. 12.

³⁶⁸ Stratfor, "Fish: The Overlooked Destabilizer", para. 9.

³⁶⁹ S. Funge-Smith, M. Briggs, and W. Miao, *Regional Overview of Fisheries and Aquaculture in Asia and the Pacific 2012 (RAP Publication 2012/26)* (Bangkok, Thailand: Asia-Pacific Fishery Commission, FAO Regional Office for Asia and the Pacific, 2012).

³⁷⁰ Allison Witter et al., "Taking Stock", p. 15.

³⁷¹ Ibid., p. 16.

³⁷² *Radio Free Asia*, "China's Fishing Ban Adds an Entanglement for Vietnam in the South China Sea", May 16, 2016, <http://www.rfa.org/english/news/vietnam/chinas-fishing-ban-05162016170509.html>, para. 14.

³⁷³ Bill Hayton, *The South China Sea*, p. 242.

fishing vessels that travel to disputed areas.³⁷⁴ When other states protest the incursion of Chinese ships into their waters, the reply is that the boats are operating in “China’s traditional fishing grounds”.³⁷⁵

The other states in the region are wary of working with China to implement a more comprehensive fishing ban out of concern that doing so will be interpreted as recognition of China’s jurisdiction in the region and thus implicitly validate its sovereignty claims. For example, Vietnam strongly opposes China’s ban and claims that it violates both international law and Vietnamese sovereignty, while the Vietnam Association of Fisheries encourages fishermen to flout the Chinese ban and calls for greater protection from the Vietnamese government.³⁷⁶ Similar preoccupations with sovereignty and jurisdiction have scuppered previous attempts to develop a multilateral solution. From 2002 to 2008, the South China Sea claimants agreed to participate in a project led by the United Nations Environment Programme aimed at reversing the environmental degradation in the South China Sea and the Gulf of Thailand. However, the success of the initiative was decidedly mixed, as cooperation was hindered by the unsettled maritime boundaries in the South China Sea. It was apparently difficult for the project to study issues involving more than one country at a time.³⁷⁷ In addition, China did not participate in the coral reefs and fisheries components of the South China Sea aspect of the project.³⁷⁸ Unless the disputes are resolved or the claimants agree to cooperate on joint fisheries management, the environmental degradation of the South China Sea is likely to continue.

Economic Impacts

The South China Sea disputes have already had an economic impact on the countries of the region. While the United States government and American companies remain the largest investors in the region, China dispenses the most aid and has a history of offering generous soft loan packages in exchange for political and economic concessions. China’s growing trade power in the region gives it economic leverage that it has used to enforce its claims in the South China Sea. For example, the Chinese government issued a travel advisory for the Philippines during the Scarborough Shoal standoff in 2012 and imposed a ban on banana imports from the Philippines, citing health concerns. At the time, bananas were the second-biggest agricultural export in the Philippines; one quarter of all bananas exported by the Philippines were sold to China and

³⁷⁴ Keith Johnson and Dan De Luce, “Fishing Disputes Could Spark a South China Sea Crisis”, *Foreign Policy*, April 7, 2016, <http://foreignpolicy.com/2016/04/07/fishing-disputes-could-spark-a-south-china-sea-crisis/>, para. 20.

³⁷⁵ Joe Cochrane, “Indonesia Confirms Seizing Fishing Boat in South China Sea, Defying Beijing”, *The New York Times*, June 20, 2016, <http://www.nytimes.com/2016/06/21/world/asia/indonesia-south-china-sea-fishing.html>, para. 5.

³⁷⁶ *Reuters*, “Vietnam Opposes Chinese Fishing Ban in Disputed Sea”, May 18, 2015, <http://www.reuters.com/article/us-vietnam-china-fish-idUSKBN0O20PF20150518>, paras. 3, 9–10.

³⁷⁷ Bill Hayton, *The South China Sea*, p. 244.

³⁷⁸ United Nations Environment Programme, “Reversing Environmental Degradation Trends in the South China Sea and the Gulf of Thailand: Terminal Evaluation”, May 22, 2009, <http://www.unep.org/eou/Portals/52/Reports/South%20China%20Sea%20Report.pdf>, p. 23.

demand was growing rapidly.³⁷⁹ As of February 2016 Chinese import suspensions remained in place against five Philippine companies.³⁸⁰

At times, the disputes have also inflamed tensions and sparked riots that damage foreign businesses, while the nationalist pressures stoked by the disputes can hinder intraregional trade. The anti-China riots that swept Vietnam and resulted in the vandalism and destruction of several Taiwanese and Chinese factories during the *Haiyang Shiyou 981* incident in 2014 are just one example of this. The jurisdictional overlap and administrative confusion that the disputes create also limit each claimant's ability to exploit the economic resources of the South China Sea. Progress on regional initiatives such as fisheries management or joint underwater surveying projects has been limited or nonexistent. Despite the fact that the region contains significant proved or probable hydrocarbon reserves totalling 11 billion barrels of oil and 190 trillion cubic feet of natural gas,³⁸¹ oil and gas exploration and development has been limited. When the rights to explore for oil and gas are allocated in contested areas, rival claimants often lodge diplomatic complaints and otherwise harass the survey vessels and oil rigs. Joint development that does take place, such as the Joint Marine Seismic Undertaking from 2005 to 2008 between China, Vietnam and the Philippines, is often criticized in participating countries by opponents wary of ceding sovereignty. As such, despite the growing energy needs of the Sea's littoral states and the potential reserves of oil and natural gas located just offshore, the political situation has discouraged international investment.

As a linchpin of the global economic system, the South China Sea has a significant impact on international trade. Over half of the world's annual merchant fleet tonnage and one third of all global maritime traffic travels through the Malacca, Sunda, and Lombok straits,³⁸² and US\$5.3 trillion in trade passes through the area each year. It is in the interest of each South China Sea state, including China, to facilitate the freedom of navigation and overflight of commercial traffic. Should a serious confrontation occur that would threaten the region's sea lines of communication, the disruption to supply chains and trade flows would be disastrous to the global economy.

In addition, it is possible that the South China Sea disputes have affected international trade agreements, most notably the Trans-Pacific Partnership (TPP) and the Regional Comprehensive Economic Partnership (RCEP). The TPP was signed in February 2016 between 12 Asia-Pacific countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. The TPP represents the economic dimension of the United States' vaunted "rebalance to Asia". As such, the TPP is in direct competition with the RCEP that China hopes to negotiate with the members of ASEAN and Australia, India, Japan, New Zealand, and South Korea. If tensions continue to escalate, it is possible that the RCEP negotiations will stall and more Asia-Pacific states will join the TPP.

³⁷⁹ Andrew Higgins, "In Philippines, Banana Growers Feel Effect of South China Sea Dispute", *Washington Post*, June 10, 2012, https://www.washingtonpost.com/world/asia_pacific/in-philippines-banana-growers-feel-effect-of-south-china-sea-dispute/2012/06/10/gJQA47WTV_story.html.

³⁸⁰ *Sun.Star Davao*, "Talks to Lift Ban on Banana Exports 'Underway'", February 16, 2016, <http://www.sunstar.com.ph/davao/business/2016/02/16/talks-lift-ban-banana-exports-underway-457654>.

³⁸¹ U.S. Energy Information Administration, "Contested Areas of South China Sea Likely Have Few Conventional Oil and Gas Resources", April 3, 2013, <http://www.eia.gov/todayinenergy/detail.cfm?id=10651>, para. 3.

³⁸² Robert D. Kaplan, "The South China Sea Will Be the Battleground of the Future", *Business Insider*, February 6, 2016, <http://www.businessinsider.com/why-the-south-china-sea-is-so-crucial-2015-2>, para. 4.

Section F: Canadian Policy

In the past, Canada has echoed its allies and partners in supporting the application of international law, including UNCLOS, to the disputes. Canada has also called for all parties concerned to respect the freedom of navigation. For example, Foreign Affairs Minister John Baird released a statement on May 19, 2014, during a period of tensions between China and Vietnam sparked by the deployment of the *Haiyang Shiyou 981* oil rig. The statement noted with concern the rising tensions and encouraged both parties to resolve their disputes in accordance with international law. The statement also expressed concern at actions that would threaten the freedom of navigation in and maritime security of the region and called for ASEAN members and China to develop a code of conduct.³⁸³ Similar general sentiments have been routinely expressed by the United States, the European Union, and members of ASEAN.

This policy has continued under the Trudeau government. Indeed, a joint statement released on February 12, 2016 by Canadian Minister of Foreign Affairs Dion and Japanese Minister for Foreign Affairs Kishida highlighted their shared commitments to UNCLOS, to the peaceful resolution of disputes, and to upholding the free and unimpeded use of the seas. The statement also noted their shared opposition to “the use of intimidation, coercion or force, as well as any unilateral actions that seek to change the status quo in the Asia-Pacific region”.³⁸⁴ Another statement released by Prime Minister Trudeau’s communications director in May 2016 reiterated that “we believe in the rule of law and discourage any unilateral actions”.³⁸⁵ However, during a press conference during Trudeau’s visit to Japan in advance of a G7 meeting on May 24, 2016, the prime minister was reluctant to speak on the matter, preferring to speak to a shared commitment with Japan to fight AIDS, tuberculosis, and malaria.³⁸⁶ Furthermore, while Prime Minister Trudeau raised the South China Sea disputes during a meeting with Chinese Premier Li Keqiang while in China ahead of a G20 summit in September 2016, neither he nor Minister Dion has raised the issue publicly.³⁸⁷

In a positive sign, Minister Dion released a strongly-worded statement on July 21, 2016 in support of the decision rendered by the Arbitral Tribunal. Through the statement, Canada called on all parties to view the ruling as a step towards the peaceful resolution of the disputes, “whether one agrees [with the ruling] or not”.³⁸⁸ While the statement reiterated previous calls for self-restraint, the protection of the freedom of navigation, and the implementation of the Declaration on Conduct, it also went further, expressing deep concern at regional tensions “that

³⁸³ Foreign Affairs, Trade and Development Canada, “Tensions in the South China Sea”, *News Release*, May 19, 2014, <http://news.gc.ca/web/article-en.do?nid=848999>.

³⁸⁴ Global Affairs Canada, “Joint Statement by Foreign Minister of Japan and Foreign Minister of Canada”, *News Release*, February 12, 2016, <http://news.gc.ca/web/article-en.do?nid=1034079>, para. 10.

³⁸⁵ Matthew Fisher, “Trudeau Sidesteps Key Issue After Meeting Japanese PM: Chinese Expansion in South China Sea”, *The National Post*, May 24, 2016, <http://news.nationalpost.com/news/canada/trudeau-sidesteps-key-issue-after-meeting-japanese-pm-chinese-expansion-in-south-china-sea>, para. 4.

³⁸⁶ *Ibid.*, paras. 3, 7.

³⁸⁷ Marie-Danielle Smith, “Does Canada’s Openness for Chinese Business, Silence on the South China Sea, Signal Shift Away from U.S.?” *The National Post*, September 1, 2016, <http://news.nationalpost.com/news/canada/canadian-politics/does-canadas-openness-for-chinese-business-silence-on-the-south-china-sea-signal-shift-away-from-u-s>, paras. 5–6.

³⁸⁸ Global Affairs Canada, “Canadian Statement on South China Sea Arbitration”, para. 4.

have been escalating for a number of years”³⁸⁹ and asserting that “Canada therefore stands ready to contribute to initiatives that build confidence and help restore trust in the region”.³⁹⁰

This last remark is encouraging and it is hoped that Canada will play a greater role in support of international maritime law in the South China Sea in the future. As a maritime nation with a growing interest in the Asia-Pacific region, it is in Canada’s national interest to ensure that all states abide by the law of the sea. Beyond that, the South China Sea disputes in particular may affect Canada more directly. The situation playing out in the South China Sea is, in some respects, analogous to the current state of affairs in the Arctic Ocean. Both form the backdrop for unresolved maritime boundaries between several coastal states, with the control of lucrative resources and national prestige at stake. In both cases, the claimant with the largest naval presence in the region also possesses the most expansive claims, an assertive foreign policy, and has disregarded international law in the past in pursuit of said policy. Thus far, claimants in the Arctic Ocean have consistently abided by the UN Convention, collecting scientific data to advance their claims and submitting information to the Commission on the Limits of the Continental Shelf for assessment. However, it is imperative that Canada counter any eventuality that could set a negative precedent. As such, the Canadian government cannot turn a blind eye to Chinese behaviour in the South China Sea. To that end, a motion was put forward in the Senate to raise the government’s awareness of the disputes and urge the government to work towards a peaceful solution. The text of that motion and transcripts of the debate can be found in Appendix C.

Although it does not yet have an official Arctic strategy, China’s interest in the Arctic has been growing in recent years, as demonstrated by its push to be granted observer status on the Arctic Council in 2013. Statements by Chinese academics and policymakers reveal that the Chinese government considers the Arctic to be an area of global concern, and therefore requires that the interests of non-Arctic states be taken into account. To wit, statements from Chinese sources have surfaced that label China a “near-Arctic state” and an “Arctic stakeholder”. China is also interested in the economic potential of the region, with Qu Tanzhou, Director of the Chinese Arctic and Antarctic Administration stating that “Arctic resources, in my opinion, will be allocated according to the needs of the world, not only owned by certain countries... We cannot simply say that this is yours and this is mine”.³⁹¹ Furthermore, in April 2016 the China Maritime Safety Organization published a detailed shipping guidebook to the Northwest Passage,³⁹² heralding increased Chinese shipping traffic in the region in the near future.

Canada played an instrumental role in the creation of the United Nations Convention on the Law of the Sea. The *Arctic Waters Pollution Prevention Act* (AWPPA) of 1970, passed in the wake of the transit of the Northwest Passage by the oil tanker SS *Manhattan* in 1969, asserted the government’s right and responsibility to regulate marine traffic up to 100 nautical miles from the coastline. This action defied customary international law, which at the time limited territorial

³⁸⁹ Ibid., para. 5.

³⁹⁰ Ibid., para. 9.

³⁹¹ Canadian Security Intelligence Service, “Brittle Might? Testing China’s Success (Highlights from the CSIS Conference)”, December 2015, https://www.csis.gc.ca/pblctns/wrldwtch/2015/CHINA_2015_REPORT_ENGLISH.pdf, p. 122.

³⁹² Nathan Vanderklippe, “China Reveals Plans to Ship Cargo Across Canada’s Northwest Passage”, *The Globe and Mail*, April 20, 2016, <http://www.theglobeandmail.com/news/world/china-reveals-plans-to-ship-cargo-across-canadas-northwest-passag/article29691054/>.

seas to 12 nautical miles. The AWPPA was later legitimized through Article 234 of the Convention, which allowed coastal states to apply laws designed to prevent marine pollution in ice-covered waters within the limits of the EEZ,³⁹³ effectively doubling the range of the AWPPA. Furthermore, a Canadian diplomat, Alan Beesley, was heavily involved in the negotiation of the Convention. From 1967 to 1983, Beesley served as Canada's ambassador to the Law of the Sea Conference and as the chair of the Conference's Drafting Committee.³⁹⁴

Canada played an active role in supporting track-two diplomatic efforts in the Asia-Pacific region in the 1990s. Canadian support played a key role in organizing a series of South China Sea workshops from 1990 to 2000. These workshops were set up when it was agreed that informal confidence-building meetings between officials, diplomats, academics, and naval personnel from ASEAN member states could serve to preserve regional stability and increase cooperation.³⁹⁵ The Canadian International Development Agency (CIDA) agreed to finance the workshops and cover the travel expenses of the participants.³⁹⁶ Canada's willingness to sponsor these meetings sprang from Canada's foreign policy of supporting peace through multilateralism and of promoting dialogue through its own good offices.³⁹⁷ Another reason behind Canada's support of the workshops offered in 1998 by Gary Smith, then Canada's ambassador to Indonesia, was that Canada's geography predisposed it to consider ocean management and the law of the sea to be in the national interest.³⁹⁸ During the workshops, attendees agreed to pursue peaceful and diplomatic solutions to the disputes. Members also agreed that a comprehensive settlement to the disputes was not a necessary prerequisite for further cooperation and that South China Sea states could work together while such a solution was being worked out.

While the workshops did not lead to a diplomatic settlement, the ties they fostered helped prevent the disputes from worsening.³⁹⁹ As the University of British Columbia's Professor Ian Townsend-Gault stated in 1998, simply bringing all the parties to the table was an accomplishment,⁴⁰⁰ an achievement that ASEAN, in its effort to hammer out a binding code of conduct, is finding difficult to surpass. Furthermore, the peaceful ideals discussed informally during these meetings would later surface in more formal settings, giving rise to the 1992 ASEAN Declaration on the South China Sea and discussions of a code of conduct between China and ASEAN. To date, the South China Sea workshop process is among the longest-running of the Asia-Pacific dialogue mechanisms, and the only forum with regular participation from all six South China Sea claimant states, including China and Taiwan.⁴⁰¹

Canada's involvement in the track-two efforts was the result of a particular confluence of support within academic, political, and bureaucratic circles. Over time, as priorities shifted,

³⁹³ *Convention on the Law of the Sea*, Article 234.

³⁹⁴ Tracey Krause, Jamie Sanford and Emma Wendel, "J. Allan Beesley—fonds", *University of British Columbia Archives*, last revised June 2012, http://www.library.ubc.ca/archives/u_arch/beesley_j_alan.pdf, p. 3.

³⁹⁵ Yann-Huei Song, *Managing Potential Conflicts in the South China Sea: Taiwan's Perspective* (Singapore: East Asian Institute, 1999), p. 21.

³⁹⁶ Yann-huei Song, "The South China Sea Workshop Process and Taiwan's Participation", *Ocean Development & International Law* 41, no. 3 (2010), p. 257.

³⁹⁷ Yann-Huei Song, *Managing Potential Conflicts*, p. 22.

³⁹⁸ *Ibid.*, p. 23.

³⁹⁹ *Ibid.*, p. 29.

⁴⁰⁰ Yann-huei Song, "The South China Sea Workshop Process", p. 260.

⁴⁰¹ *Ibid.*, p. 257.

Canada's commitment to the process waned, as did Canada's role in promoting peace in the South China Sea.⁴⁰² CIDA's funding for the workshops ceased in 2001. While the workshops continued, the scope of the activities covered was reduced.⁴⁰³ It has been pointed out that Canada's relative financial contribution to track-two diplomacy in the Asia-Pacific was relatively modest to begin with and decreased over time as the number of countries participating grew,⁴⁰⁴ which calls the impact that Canada had on the region into question. Nevertheless, the fact remains that "the constant refrain in virtually every track-two channel is 'where is Canada?'"⁴⁰⁵

Conclusion and Recommendations

The South China Sea disputes present an intractable dilemma for the claimants and the international community at large. The conflicts have jeopardized regional cooperation efforts and pitted the states of Southeast Asia against one another. The escalating militarization of the South China Sea is undermining the peace and stability of the region. The economic impact of the disputes, already felt at the regional level, will spread globally as tensions rise and the possibility of a disruption of trade grows. As island construction intensifies and overfishing increases, the South China Sea's vulnerable reefs will be further stressed and the region's entire ecosystem will suffer extensive damage, threatening the livelihoods of millions of people.

Each of the claimants is partially responsible for the failure to resolve the disputes. With the exception of Brunei, each claimant has established a military presence in the disputed area and occupies at least one maritime feature. However, China is clearly the greatest contributor to the region's instability by almost every measure, and should be held chiefly responsible for the continued escalation of the conflict. China's military spending dwarfs the combined defence budgets of the other claimants, and the China Coast Guard vastly outnumbers its regional counterparts. Although its land reclamation activities were begun relatively recently, Chinese activity is responsible for the vast majority—95%—of all land reclaimed in the South China Sea over the past 40 years. Constructing military-grade airstrips, hangar facilities, and radar stations on these artificial islands has prompted other claimants to increase their own defences in response and has undermined regional trust and confidence. China's maritime claims as outlined by the nine-dash line are the most expansive of all the South China Sea claimants, rely on tenuous historical claims, are deliberately vague and imprecise, and were not established in accordance with the UN Convention on the Law of the Sea. Lastly, its self-interested behaviour, including its reluctance to negotiate a binding code of conduct with the members of ASEAN, its unwillingness to contribute meaningfully to multilateral solutions to shared problems, and its refusal to participate in and accept the results of international arbitration severely hinders the prospects of a durable settlement that is acceptable to all parties.

In the current climate, negotiating a comprehensive settlement that would definitively resolve the disputes—one that allocates territorial sovereignty over the disputed maritime features, delimits maritime boundaries in accordance with the UN Convention, and contains provisions to reduce tensions caused by the militarization of the region—is exceedingly

⁴⁰² Paul Evans, "Canada and Asia Pacific's Track-Two Diplomacy", *International Journal* (Autumn 2009), 1034.

⁴⁰³ Yann-huei Song, "The South China Sea Workshop Process", p. 257.

⁴⁰⁴ Paul Evans, "Canada and Asia Pacific", p. 1034.

⁴⁰⁵ *Ibid.*, p. 1036.

improbable, if not outright impossible. Despite this, the claimant states can take steps now to make such a settlement more likely in the future. Other South China Sea claimants should follow the example of the Philippines and initiate arbitration proceedings contesting Chinese claims and challenging its illegal behaviour. Such proceedings would reinforce the Award issued to the Philippines and increase pressure on China to comply with the Convention. Arbitration under UNCLOS alone will not result in a permanent settlement. Ultimately, the disputes will not be resolved unless and until the issue of sovereignty over the contested maritime features is addressed.

The optimal solution would be for the disputes to be referred to an impartial and objective third party such as the International Court of Justice (ICJ) in The Hague, which is empowered to issue a binding ruling on matters of sovereignty between states. Unfortunately, the ICJ may only rule on disputes between states if both claimants have accepted its jurisdiction in the case.⁴⁰⁶ It is unlikely that China would voluntarily agree to submit the disputes to the ICJ. This behaviour is not unique to China; every claimant government has staked its political capital upon maximizing their position in the disputes. After years of exploiting the disputes for political gain, any government that compromises and does not receive what its public believes to be a “fair share” risks losing domestic political support. In this case, maintaining the status quo might well be preferable to a settlement that requires state parties to relinquish some of their claims and that does not meet the public’s heightened expectations. Furthermore, even if territorial sovereignty over the contested features were determined, either by arbitration or by negotiation, and even if such a settlement were accepted by all parties, maritime boundaries must then be delimited. This would likely require another lengthy round of negotiations between the claimants. It is also possible that additional submissions would have to be made to the Commission on the Limits of the Continental Shelf, which will only issue recommendations on a border dispute if all parties involved have agreed to accept the Commission’s findings.

Given the vast body of historical evidence that could be used by each party to justify its claims to the disputed islands and waters, arbitrating the disputes will be a long and highly complex process. During such an arbitration process, the states involved would be strongly incentivized to forestall an unsatisfactory ruling by changing the facts on the ground to their advantage. As an example, it took the Arbitral Tribunal three and a half years to issue its Award in the arbitration process between China and the Philippines. During this time, Chinese land reclamation activity continued unabated, including near maritime features that the Tribunal had been tasked with evaluating. The Tribunal was forced to recognize that

Many of the features in the South China Sea have been subjected to substantial human modification as large islands with installations and airstrips have been constructed on top of the coral reefs. In some cases, it would likely no longer be possible to directly observe the original status of the feature, as the contours of the reef platform have been entirely buried by millions of tons of landfill and concrete.⁴⁰⁷

This issue was of critical importance, as the Philippines had specifically asked the Tribunal to assess whether certain features were islands, low-tide elevations, or rocks. With the physical evidence tampered with, the Tribunal had to instead base its decision on historical records,

⁴⁰⁶ Further complicating the process is the fact that only UN members may submit cases to the ICJ; as Taiwan is not a UN member, the ICJ is not empowered to rule on Taiwan’s sovereignty claims in the South China Sea.

⁴⁰⁷ Permanent Court of Arbitration, “Award in the Matter of the South China Sea Arbitration”, pp. 131–132.

charts, and satellite imagery rather than direct observation. It is possible that arbitration attempts to determine sovereignty over the disputed maritime features in the future could touch off a scramble by the states involved to create faits accomplis in advance of the ruling. Chinese intransigence after the Tribunal issued its Award also demonstrates that states are incentivized to ignore the ruling if their positions are not supported. In a sense, then, the dispute resolution process could very well worsen tensions and further hinder regional cooperation.

Recommendations for South China Sea Claimants

Rather than making improved relations conditional upon resolving the question of sovereignty, another avenue of approach would focus on confidence-building measures and multilateral problem-solving to lower the temperature of the disputes, address shared concerns, and build up the political capital and diplomatic goodwill that will be necessary to then negotiate and enforce a final settlement in the future. Several areas exist where the interests of all the claimants would be better served by setting the sovereignty disputes aside and cooperating with their neighbours in spite of the unresolved claims.

This paper recommends that the South China Sea claimants adopt this latter approach, and suggests that they consider the following recommendations:

- 1. Initiate arbitration proceedings contesting illegal Chinese activity, and pressure China to respect the recent decision rendered by the Arbitral Tribunal and respect the UN Convention on the Law of the Sea, of which it is a party;**

China's rejection of the arbitration Award is untenable. China's arguments against the arbitration process were carefully considered by the Tribunal and soundly rejected. For China to continue to ignore the provisions of the Award is a repudiation of international law. This sets a dangerous precedent and should be a matter of grave concern for the other South China Sea claimants and the international community. It is imperative that diplomatic pressure be placed upon China until it accepts the ruling. The other claimants should lead by example in unequivocally supporting the Award and respecting its provisions.

- 2. Strengthen efforts to significantly reduce the environmental impacts of the disputes upon the ecosystem of the South China Sea;**

Constructing artificial islands does irreparable harm to nearby coral reefs. Overfishing caused by growing numbers of fishing vessels in the region has severe impacts upon the biodiversity of the South China Sea. Illegal fishing practices such as the poaching of giant clams have further damaged the area's reefs. At best, coastal states have been unable to develop a coordinated response to these illicit activities. At worst, governments are tacitly encouraging this behaviour to support their sovereignty claims.

- 3. Take steps to jointly manage declining fish stocks;**

While commendable in theory, the Chinese seasonal ban on fishing in the region has backfired. The China Coast Guard has used the ban as a means of exerting greater control over the region by harassing foreign ships, while other claimants have been hesitant to join in enforcing the ban, recognizing that doing so would legitimize China's presence in the region and undermine their own claims. Without a concerted attempt to manage fishing activity, improve

conservation efforts, and enact a moratorium on further land reclamation, the South China Sea's environment will remain threatened, with devastating effects for every coastal state.

4. Enhance the coordination of search and rescue, anti-smuggling, and anti-piracy policies;

With its multitude of reefs and shoals, the South China Sea can be a hazardous environment for navigators. Enhanced cooperation between the region's various coast guard agencies has heretofore been limited, as they have been used to enforce the maritime claims of each state, the China Coast Guard in particular. The Arctic may provide a cooperative model is relevant to the South China Sea. In 2011, the members of the Arctic Council—Canada, Denmark, Finland, Iceland, Norway, Russia, and the United States—signed the *Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic*. This binding agreement divides the Arctic Ocean into search and rescue regions for which each Arctic state is then responsible, despite the fact that final maritime boundaries have not been established and that the claims of several Arctic states overlap. The Arctic states neatly sidestepped this problem by simply stating that “The delimitation of search and rescue regions is not related to and shall not prejudice the delimitation of any boundary between States or their sovereignty, sovereign rights or jurisdiction.”⁴⁰⁸ Such cooperation was possible due to decades of cooperation between the Arctic states as equal partners on shared issues and a joint commitment made in 2008 by the coastal states to settle any maritime boundary disputes in accordance with the UN Convention.⁴⁰⁹ A similar framework may be applicable to the South China Sea.

5. Cease all activities that would complicate or escalate the disputes, such as land reclamation and further militarization of the region;

To counter growing Chinese assertiveness, the other claimants should continue to bolster their ability to monitor and patrol their claimed areas without occupying any new maritime features or behaving in a threatening manner. Claimants should also take steps to defuse tensions by maintaining hotlines and open channels of communication between maritime agencies and navies in the region and by adhering to the Code for Unplanned Encounters at Sea.

6. Commit to the successful conclusion of a binding code of conduct in the South China Sea;

China and the members of ASEAN agreed to work towards a code of conduct that would govern their activities in the South China Sea years ago. Progress on this initiative remains slow, partly due to Chinese reluctance to address the disputes through multilateral agreements, and partly due to the difficulty in attaining consensus among ASEAN members. Should ASEAN remain divided on the issue, its South China Sea members must remain committed to preserving ASEAN's united front but should also consider pursuing closer cooperation on a code of conduct among themselves outside of the ASEAN structure. To prevent ASEAN from fragmenting, it is

⁴⁰⁸ Arctic Council, 2011. *Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic*. Arctic Council Secretariat, Tromsø: Norway, available from <https://oaarchive.arctic-council.org/handle/11374/531>, Article 3(2).

⁴⁰⁹ Ministry of Foreign Affairs of Denmark, “Ilulissat Declaration”, May 28, 2008, http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf, p. 1.

important that such discussions be conducted not as an alternative to ASEAN but as a complement to it.

7. Recognize and uphold the rights of freedom of navigation and overflight as enshrined in the UN Convention on the Law of the Sea.

Claimants should promote the freedom of navigation by partnering with the United States Navy during its freedom of navigation operations and by conducting its own operations independently. One common Chinese criticism of American freedom of navigation operations is that they are a means for the United States Navy, uninvited, to unilaterally make its presence felt in the region. Involvement in the planning and conduct of these operations from other nations would broadcast their support for the freedom of navigation and lend greater support to the American argument that the operations are conducted in accordance with international law.

Recommendations for Canada

Canada must adopt a principled foreign policy towards the region that defends and sustains freedom. Canadian policy-makers have a role to play in maintaining peace and stability in the South China Sea and in promoting a diplomatic resolution to the disputes. This paper recommends that Canada:

1. Strongly defend the United Nations Convention on the Law of the Sea at every opportunity and support steps to de-escalate tensions;

Canada played a vital role in shaping the 1982 UN Convention. As a maritime nation and a supporter of the rules-based international order, ensuring that the law of the sea is upheld by all parties internationally is in Canada's national interest. The Government of Canada must categorically defend the principles enshrined in the Convention by supporting those that abide by the Convention and condemning those that do not.

2. Participate more actively in regional diplomatic and security organizations to re-engage with the South China Sea and the Asia-Pacific;

Canada has a rich history of engagement with Asia-Pacific nations, a clear long term commitment to the region, and has supported confidence-building activities in the South China Sea in the past. Consistent and committed participation in bodies such as the ASEAN Regional Forum and the Western Pacific Naval Symposium and a renewed interest in promoting confidence-building measures such as the South China Sea workshops would signal our willingness to re-engage in the region. Canada should also intensify efforts to join deeper regional initiatives such as the ASEAN Defence Ministers Meeting Plus 8 and the East Asia Summit, two important regional organizations in which Canada is currently not participating.

3. Ratify the Trans-Pacific Partnership agreement, and consider the impact of the disputes upon the Canadian economy.

Expanding trade with the South China Sea claimants will increase Canada's presence in the region and help diversify regional economies, many of which risk being dominated by trade with China. The Government of Canada should also assess the impact of the dispute on its other trade relationships and previous agreements. Similarly, it should consider preparing contingency

plans for Canadian businesses who operate in the Asia-Pacific region should the conflict continue to escalate.

4. Improve the capabilities of the Canadian Armed Forces and acquire surveillance assets to conduct those operations necessary to ensure maritime safety and uphold the freedom of navigation;

The loss of the Royal Canadian Navy's destroyer fleet and supply ships⁴¹⁰ has critically impaired Canada's ability to provide naval support in the South China Sea, leaving our ability to support our allies and partners or to conduct freedom of navigation operations dependent upon allied assistance. The Government of Canada must do its utmost to accelerate the naval procurement process and commit to expanding and modernizing its naval, aerial, and surveillance capabilities such as drones and aerial reconnaissance.

5. Partner with allies, ASEAN and regional Commonwealth partners to bolster their militaries as needed and offer technical, tactical, and intelligence-gathering assistance;

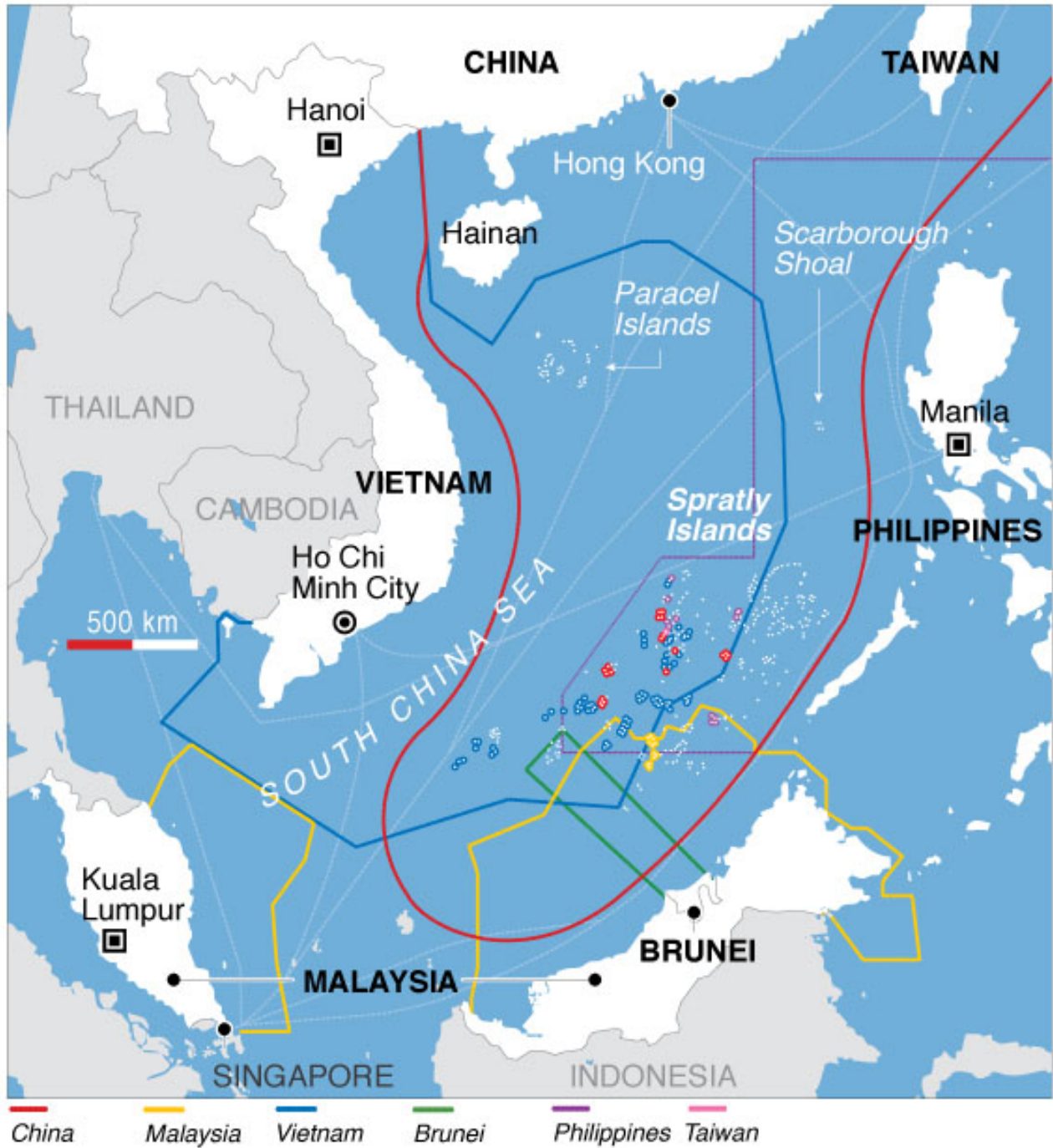
The Government of Canada should assist its partners and allies operating in the region. Providing assistance and demonstrating the capability to deploy forces to the South China Sea would foster deeper partnerships with our allies in the Asia-Pacific region in order to prepare for any eventuality.

6. Increase our commitment to conflict prevention, mediation and peacebuilding efforts globally and in the Asia-Pacific region specifically.

Canada has shown a strong commitment to multilateralism as an avenue of peace. The government's recent announcement of its Peace and Stabilization Operations Program could bolster that commitment. Canada should continue to take strong action to prevent and respond to increasing provocation. In turn, this would allow Canada to take a leading example in the region, looking beyond trade with China and considering the complex impact of the disputes upon the broader region.

⁴¹⁰ Scott Gilmore, "The Sinking of the Canadian Navy", *Maclean's*, August 4, 2015, <http://www.macleans.ca/news/canada/the-sinking-of-the-canadian-navy/>, paras. 6, 12–14.

Appendix A: Maps



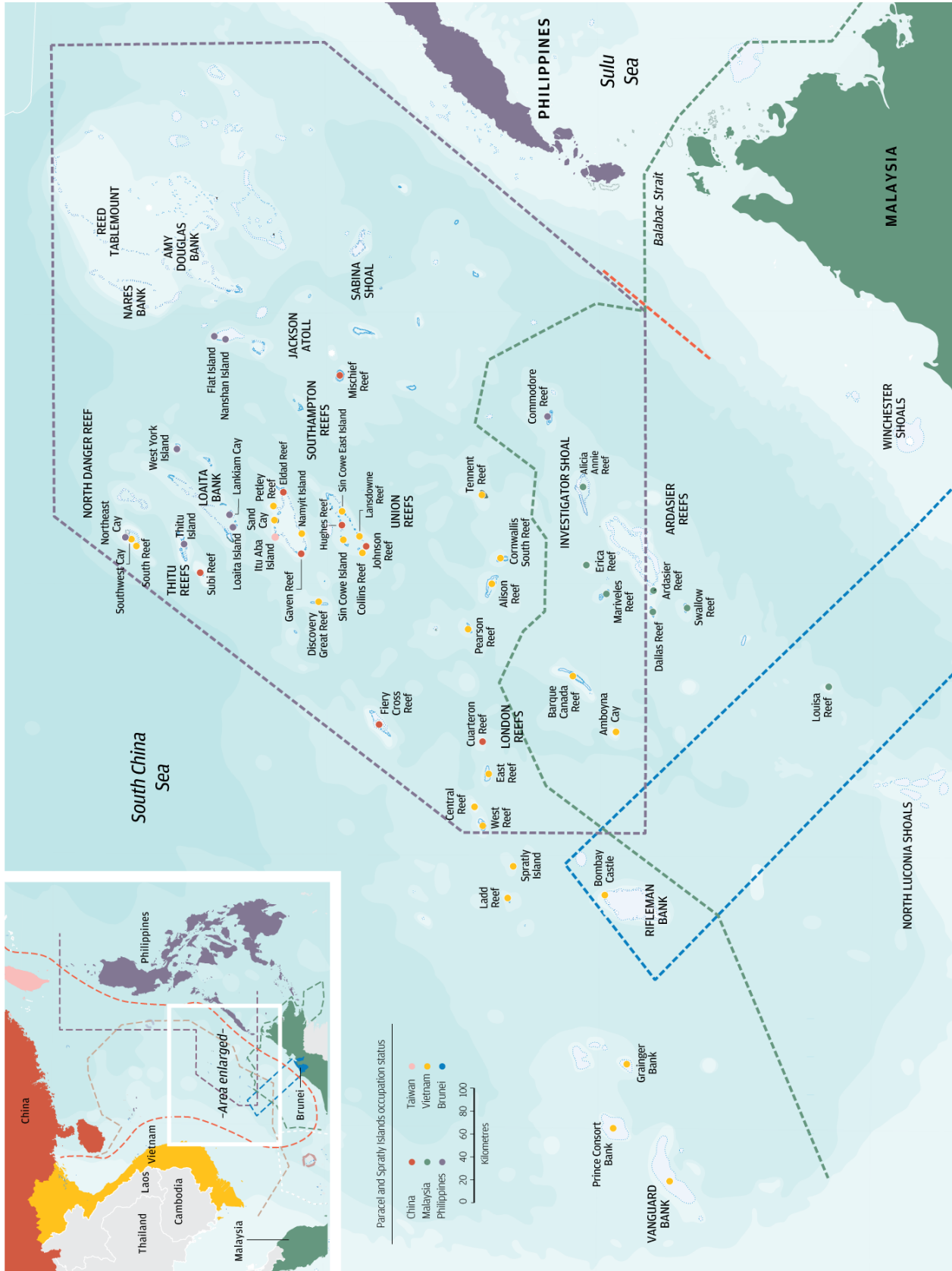
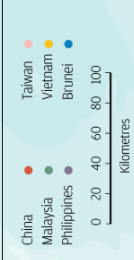
Source: Voice of America

Approximate maritime claims in the South China Sea

Note: China's nine-dash line is shown here as if the dashes were joined in a continuous line.



Parcel and Spratly Islands occupation status



Sources: Asia Maritime Transparency Initiative, US Energy Information Administration, Global Security, Middlebury College.

SCMP Graphic: Kaliz Lee, Simon Scarr

Source: *South China Morning Post*, scmp.com

Occupied maritime features in the Spratly Islands

Appendix B: Land Reclamation in the South China Sea

Several South China Sea claimants have engaged in land reclamation and the construction of artificial islands in the Spratly Islands. These satellite images provide examples of the extent to which land reclamation is altering the contested maritime features of the South China Sea. Although land reclamation does not alter a maritime feature's status under the UN Convention on the Law of the Sea, it complicates the work of third parties tasked with determining the status of these features.

China began land reclamation at its outposts in the Spratly Islands in December 2013. In the short time since then, China has reclaimed over 3,200 acres of land. This accounts for over 95% of all land reclaimed by every South China Sea claimant over the past 40 years.⁴¹¹ While other claimants such as Vietnam and Taiwan generally use limited land reclamation to enlarge pre-existing rocks and high-tide maritime features, Chinese land reclamation activity creates artificial islands atop coral reefs and other maritime features that are often only above water at low tide. In addition, Chinese reclamation efforts have created islands that are generally much larger in area than the maritime features occupied by other claimants.

According to the claimant governments, their occupation of the maritime features of the South China Sea is for civilian purposes. As an example, the majority of the people currently stationed on Itu Aba Island are employed by the Taiwanese Coast Guard Administration rather than the military. Similarly, China characterizes land reclamation as “maintenance and construction work” that is necessary in order to better perform “China’s international responsibility and obligation in maritime search and rescue, disaster prevention and mitigation, marine science and research, meteorological observation, environmental protection, navigation safety, [and] fishery production”.⁴¹² Despite a statement made by President Xi in September 2015 that China had “no intention to militarize”,⁴¹³ the region, recently anti-aircraft and anti-missile weapons systems have been installed on several Chinese outposts in the Spratlys to bolster the radar stations and aircraft hangars already present on several artificial islands. China has also described the installation of military assets on its outposts in the Spratlys as necessary measures taken to safeguard the artificial islands—which it views as being sovereign territory—from attack and not directed against any other country. Close-up images of these defenses are provided below.

In addition to land reclamation in the Spratlys, China continues to militarize and build up its outposts in the Paracel Islands with radar stations, helipads, surveillance facilities, surface-to-air missiles, and harbours capable of accommodating military vessels. In addition, China has also made efforts to “civilize” its presence in the Paracels by framing the islands as a tourist destination and by offering cruise ship vacations to the islands to Chinese citizens. The administration on Woody Island also plans to increase the number of permanent residents there, open up the airstrip to civilian air traffic, and attract private investment. These projects serve to

⁴¹¹ United States Congressional Research Service, “Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress” (R42784, December 22, 2015), by Ronald O’Rourke, p. 28.

⁴¹² Ministry of Foreign Affairs of the People’s Republic of China, “Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference on April 9, 2015”, April 9, 2015, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1253488.shtml, paras. 2–3.

⁴¹³ David Brunnstrom and Michael Martina, “Xi Denies China Turning Artificial Islands into Military Bases”, para. 8.

further entrench and legitimize China's presence in the South China Sea while providing the outposts with an additional layer of protection from attack.⁴¹⁴ Despite the ongoing militarization, all the outposts built by South China Sea claimants remain vulnerable to military attack and would likely play only a marginal role in large-scale combat operations. Bolstering the civilian presence on these outposts adds a "civilian shield" that blurs the distinction between military base and civilian population and would dissuade a small-scale military operation of the kind used by China to take control of the Paracels in 1974 and Johnson South Reef in 1988.

This appendix is not exhaustive and does not cover all maritime features where land reclamation has occurred. The examples included here are just a fraction of all the South China Sea outposts, but the activity these images show is representative of most infrastructure that is being built on other maritime features. All images are attributed to the Center for Strategic and International Studies, the Asia Maritime Transparency Initiative, and DigitalGlobe, and are reproduced here with permission. More detailed images of the South China Sea may be found on the Asia Maritime Transparency Initiative's website at <http://amti.csis.org/>.

Itu Aba Island (in the Spratlys; occupied by Taiwan)



This image from May 20, 2016 shows the extent of land reclamation on Itu Aba Island, the only feature in the Spratly Islands occupied by Taiwan. Taiwan has completed minimal land reclamation here, primarily related to the construction of the island's wharf. The island also features a helipad and a runway capable of accommodating C-130 Hercules transport aircraft.

The Taiwanese government maintains that Itu Aba is an island capable of supporting human and economic life and has attempted to preserve the surrounding coral reef as an example of its desire to conserve the environment in the disputed waters. 8 acres (0.03 km²) of land has been reclaimed here.

⁴¹⁴ Zhibu Qiu. "The 'Civilization' of China's Military Presence in the South China Sea", *The Diplomat*, January 21, 2017, <http://thediplomat.com/2017/01/the-civilization-of-chinas-military-presence-in-the-south-china-sea/>.

Spratly Island (in the Spratlys; occupied by Vietnam)



January 11, 2014



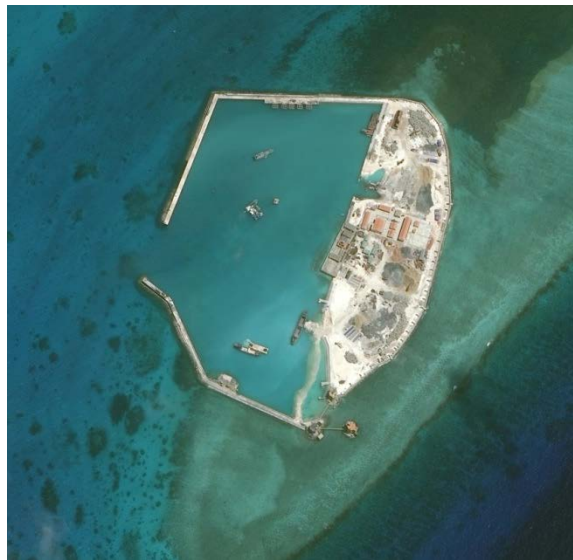
November 7, 2016

Spratly Island is the fourth-largest naturally-formed maritime feature in the Spratly Islands, and the largest feature occupied by Vietnam. Vietnamese forces took control of the island in 1975. Spratly Island hosts Vietnam's sole runway in the Spratlys. 37.19 acres (0.1505 km²) of land has been reclaimed here. Recent reclamation work has focused on lengthening the island's runway. The island also hosts a concrete jetty, helipad, and several aircraft hangars. The runway is currently being extended, and will eventually be doubled in length to 1,200 metres.

West Reef (in the Spratlys; occupied by Vietnam)



January 3, 2010



April 1, 2016

Vietnamese forces have maintained control of West Reef since 1975. A lighthouse was built on the reef in 1994. 70.5 acres (0.285 km²) of land has been reclaimed here. In addition, several structures have been constructed atop nearby rocks.

Sin Cowe Island (in the Spratlys; occupied by Vietnam)



February 16, 2006



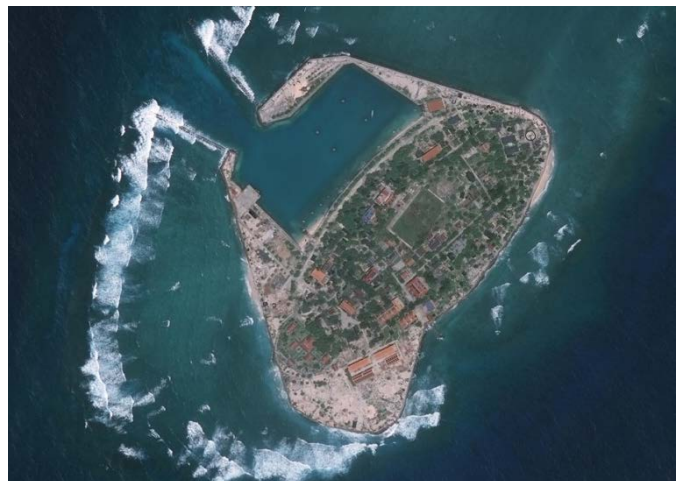
September 24, 2016

Occupied by Vietnamese forces since 1975, 26.07 acres (0.1055 km²) of land has been reclaimed here, creating an artificial harbour.

Southwest Cay (in the Spratlys; occupied by Vietnam)



January 26, 2005



August 4, 2016

Southwest Cay was occupied by Philippine forces until 1975, when it was seized by forces from the Republic of Vietnam, followed by forces from the Socialist Republic of Vietnam on April 13. 7.45 acres (0.0301 km²) of land has been reclaimed here. Reclamation has allowed for the construction of a radar station, lighthouse, and artificial harbour.

Fiery Cross Reef (in the Spratlys; occupied by China)



January 22, 2006



November 5, 2014



February 14, 2015



June 3, 2016

Fiery Cross Reef was occupied by Chinese forces in January 1988. 677 acres (2.74 km²) of land have been reclaimed here. Fiery Cross Reef is the site of China's first airstrip in the Spratly Islands. At an estimated 3,000 metres in length, this runway is among the longest in the Spratlys and is theoretically capable of accommodating heavy bombers. Civilian jetliners landed there in January 2016, and a military transport aircraft landed there in April. Over the summer of 2016, reinforced aircraft hangars capable of accommodating a full regiment of 24 fighter jets and 3 or 4 larger cargo and surveillance aircraft, anti-aircraft gun emplacements, and short-range anti-missile weapons systems were constructed on the reef.

Subi Reef (in the Spratlys; occupied by China)



July 27, 2012



June 24, 2016



November 17, 2016

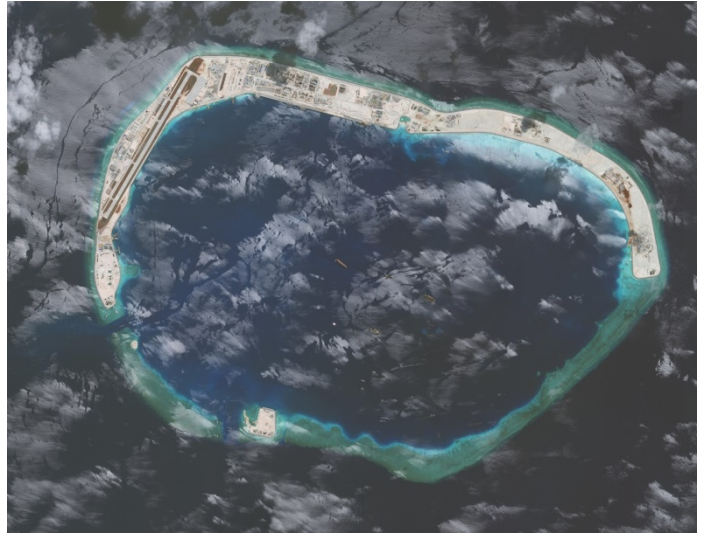


Subi Reef was occupied by Chinese forces in April 1988. 976 acres (3.95 km²) of land have been reclaimed at Subi Reef, and it is the site of China's second airstrip in the Spratly Islands, roughly equal in length to the runway on Fiery Cross Reef, and capable of supporting the same number of aircraft. A civilian jetliner landed there in July 2016. That same month, the construction of anti-aircraft and anti-missile defenses became apparent (pictured, inset).

Mischief Reef (in the Spratlys; occupied by China)



January 24, 2012



July 22, 2016

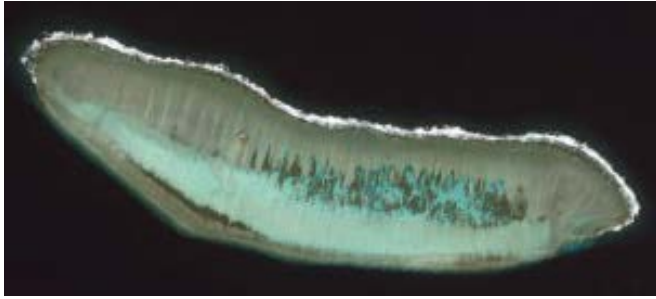


November 15, 2016

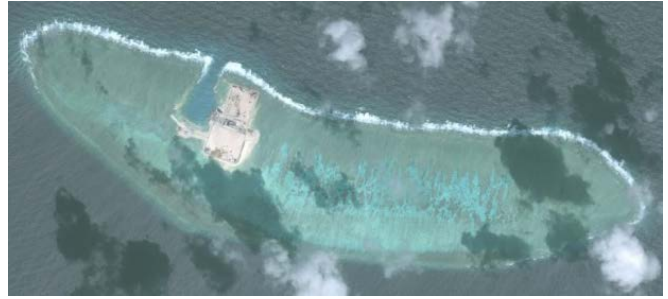


Mischief Reef was occupied by Chinese forces in January 1995. 1,379 acres (5.581 km²) of land have been reclaimed here, and it is the site of China's third airstrip in the Spratly Islands. An estimated 2,700 metres long, it is shorter than China's other runways in the archipelago, although it is still longer than any airstrip in the Spratlys controlled by another country. Like the artificial islands at Fiery Cross and Subi reefs, Mischief Reef hosts anti-air defenses (pictured, inset) and is capable of accommodating a full regiment of fighter jets. A civilian jetliner landed there in July 2016.

Cuarteron Reef (in the Spratlys; occupied by China)



February 21, 2014



January 24, 2016



November 11, 2016



Cuarteron Reef is the southernmost outpost occupied by China in the Spratly Islands, and 56 acres (0.23 km²) of land has been reclaimed here. It features a lighthouse, helipad, and high-frequency radar that serves to gather intelligence on the southern portion of the Sea. As of November 2016, anti-aircraft guns and close-in weapons systems (pictured, inset) have also been constructed.

Johnson South Reef (in the Spratlys; occupied by China)



January 18, 2012



March 4, 2015



February 9, 2016



November 29, 2016



On March 14, 1988, Chinese forces intercepted a Vietnamese landing party attempting to take control of the reef. The ensuing skirmish resulted in 64 Vietnamese casualties and left Chinese forces in control of the reef. Since then, 27 acres (0.11 km²) of land have been reclaimed. Currently, a lighthouse, helipad, quay, radar tower, and anti-air weapons systems (pictured, inset) have been constructed on the artificial island.

Woody Island (in the Paracels; occupied by China)



December 14, 2012



January 28, 2017



The largest of the Paracel Islands, Woody Island has been under Chinese control since 1956, when it occupied after the Taiwanese garrison returned to Taiwan. It is home to the main Chinese military base in the Paracels and is the administrative capital of the islands claimed by China in the South China Sea. The island hosts a runway built in 1990 that is capable of accommodating heavy bombers and civilian airliners, aircraft hangers to house 16 fighter jets and 4 larger aircraft, helipads, a radar station, 2 sheltered harbours, and surface-to-air missiles. In March 2016, it was revealed that anti-ship cruise missiles had also been deployed on Woody Island, although it is unclear whether they remain on the island.

Palm/Duncan Island (in the Paracels; occupied by China)



December 27, 2013



August 7, 2016

Palm Island and Duncan Island have been occupied by Chinese forces since 1974, when Vietnamese forces in the Paracels were forced out. The two maritime features have been joined by a land bridge, and a harbour has been dredged between the two. The base here includes helicopter hangars and 8 helipads.

Tree Island (in the Paracels; occupied by China)



December 14, 2012



November 11, 2016



January 28, 2017

Occupied by Chinese forces since 1974, dredging activity in the past year has created a new harbour. The base also hosts a radar station and structures that may be a prelude to anti-aircraft weapons systems present on Chinese outposts elsewhere in the South China Sea.

Appendix C: Senate Inquiry and Motion

On February 24, 2016, the Honourable Senator Ngo gave notice that he intended to introduce an inquiry with the aim calling the attention of the Senate to the hostile behavior of the People's Republic of China in the escalating territorial claim dispute in the South China Sea. He spoke to the inquiry on March 8.⁴¹⁵ A transcript of his speech is included below. His colleague, the Honourable Senator Enverga, spoke on April 14.⁴¹⁶

Tuesday, March 8, 2016

Hon. Thanh Hai Ngo: Honourable senators, I rise today to call your attention to an issue of grave importance to the peace and security of Canada, and of the Asia-Pacific region: the South China Sea and the East China Sea.

Several states have claimed the islands and waters of both seas, including Brunei, China, Malaysia, South Korea, the Philippines, Japan, Taiwan and Vietnam. The overlapping maritime and territorial claims in the South China Sea are mainly focused on two archipelagos: the Paracel Islands and the Spratly Islands. Control of the Spratly Islands to the southeast is contested by every coastal state, and every state apart from Brunei has established a military presence there.

The South China Sea is an area of vital concern for Canada and for the world. The region plays an important role in the global economy, as approximately US\$5.3 trillion in trade passes through the region each year. Canada has a growing interest in this region and our eyes should look to Asia-Pacific closely, especially as we prepare to ratify the Trans-Pacific Partnership.

Indeed, the South China Sea also contains significant energy resources. In 2012, the U.S. Energy Information Administration estimated that the sea bed holds 11 billion barrels of oil and over 300 billion cubic metres of natural gas.

[Translation]

Each of the states concerned bases its claims on historical information. Fishermen

from China, Vietnam and the Philippines in particular have had a presence in the Paracel and Spratly Islands for centuries. Nonetheless, these islands are largely uninhabitable and it wasn't until World War II that a permanent presence was established.

When Japan relinquished control of the islands in the South China Sea in 1951, the coastal countries began exerting their sovereignty over the islands through military occupation. The militarization of the conflict exacerbated tensions and fighting broke out among several countries over the years. However, China was the most forceful in making its claim.

In 1974, in violation of the Paris Peace Accords, to which it was a signatory, China seized control of the Paracel Islands after attacking the Republic of Vietnam naval forces that were stationed there.

Tensions mounted in 1987 when China's armed forces took control of the Fiery Cross Reef in the Spratly Islands region. The dispute escalated into a naval confrontation between China and Vietnam in 1988, in which over 70 members of the Vietnamese navy lost their lives. Many minor conflicts have occurred since then.

[English]

Over the last years, China's land reclamation efforts have intensified. The artificial islands that China occupies and builds have grown significantly for a single purpose:

⁴¹⁵ Canada. Parliament. Senate. *Debates*, 42nd Parliament, 1st Session, vol. 150, number 19, March 8, 2016, http://www.parl.gc.ca/Content/Sen/Chamber/421/Debates/019db_2016-03-08-e.htm, pp. 337–339.

⁴¹⁶ Canada. Parliament. Senate. *Debates*, 42nd Parliament, 1st Session, vol. 150, number 27, April 14, 2016, http://www.parl.gc.ca/Content/Sen/Chamber/421/Debates/027db_2016-04-14-e.htm, pp. 486–488.

to expand its military purpose and to assert its contested claims. The speed and scale of China's building spree in the South China Sea last year alarmed other countries with interest in the region. Since announcing in June that the process of building seven new islands by moving sediment from the sea floor to reefs was almost done, China has focused its effort on building ports, three airstrips, radar facilities and other military buildings on the islands.

Honourable senators, China is not alone in militarizing the South China Sea; nearly every state has done so to some extent. But the scale of China's assertive actions in the region far outpaces everyone else, and island reclamation is just one example of this.

According to a report by the U.S. Congress released in September, as of June 2015, China has reclaimed over 2,900 acres of land at its outpost in the Spratly Islands alone since the reclamation began in December 2013. To put that in perspective, China has reclaimed 17 times more land in a year and a half than Vietnam, Malaysia, Taiwan, Korea, Japan, Brunei and the Philippines have over the past 40 years combined. Chinese land reclamation activities represent 95 per cent of all land reclamation performed in the South China Sea.

The Chinese government claims that its intentions are peaceful and that it remains committed to resolving the dispute diplomatically.

Here are just some examples of the assertive actions that Chinese forces have carried out in the past year alone: Last June, the Chinese oil rig *Haiyang Shiyou 981* was deployed off the Vietnamese coast in an area claimed by Vietnam. The same oil rig was deployed in the same area in 2014, and that incident led to the worst breakdown in relations between Vietnam and China since their war in 1979.

On January 2 this year, a civilian aircraft landed on the airstrip at Fiery Cross Reef in the Spratly Islands. Two passenger airliners followed on January 7, 2016. This airstrip is the longest in the region and the only one capable of supporting long-range bombers.

As of February 12, satellite imagery has shown that the Chinese military has constructed radar stations at Johnson South Reef, Gaven Reef, Hughes Reef and Cuarteron Reef, while several helipads and a high-frequency radar station have been built on Duncan Island, which places Chinese helicopters well within range of Vietnam's waters.

On February 17, it was confirmed that surface-to-air missiles with a range of 200 kilometres had been placed on Woody Island. This sends an ominous signal that gives falsehood to Chinese claims that its infrastructure development in the region is primarily for civilian purposes.

It is difficult to square China's peaceful intentions with the fact that it is aggressively changing the facts on the ground in defiance of international law and the international community. By doing so, China is undermining the claims of other states.

The Chinese government has continually and emphatically stated its desire to resolve the maritime disputes peacefully, but it has also consistently undermined attempts to reach a diplomatic solution. Unfortunately, a diplomatic solution seems further away than ever before.

In 2002, China and the 10 members of the Association of South East Asian Nations signed a non-binding Declaration on the Conduct of Parties in the South China Sea, affirming their shared commitment to the principles of international law, the freedom of navigation and to resolve disputes peacefully. Negotiations on a more stringent code of conduct for the South China Sea were unsuccessful after China published its claims to the islands and asserted its "indisputable" sovereignty over the South China Sea.

In 2009, the Chinese government published the infamous nine-dash line map outlining its claim to the South China Sea, which includes all the islands and roughly 90 per cent of the sea. The nine-dash line is invalid as a maritime boundary according to the United Nations Convention on the Law of the Sea, but China continues to overstep the bounds of the convention by exercising its sovereignty in

contested waters, even if it ratified United Nations convention in 1996.

The International Court of Justice issued a ruling on sovereignty, but the consent of all parties would be required before it could examine the case. China, however, rejects international legal arbitration as a means to resolve its territorial, border or maritime boundary disputes. In Beijing's view, the disputes can only be resolved bilaterally, between China and each of the claimants a one-on-one basis. However, even if the tribunal rules that the nine-dash line is incompatible with the United Nations Convention on the Law of the Sea, Beijing will likely ignore the ruling, leaving the problem unsolved.

In January 2013, having exhausted all diplomatic channels, the Philippines launched an international arbitration process against Chinese conduct in the South China Sea to invalidate China's nine-dash line and to uphold the rights of the Philippines under the United Nations convention. It also wanted to clarify the status under international law of the islands and reefs claimed by both China and the Philippines. Rather than participate, China rejected the Philippines' argument and reasserted China's "indisputable" sovereignty over the islands and claimed that the islands controlled by the Philippines were illegal occupations of Chinese territory. While the Philippine government reportedly submitted 4,000 pages of legal evidence and analysis to support its position, the Chinese government boycotted the arbitration process.

On October 29 of last year, the Permanent Court of Arbitration in The Hague ruled that it has jurisdiction over the case. The court will issue a legally binding verdict sometime this year. The ruling is widely expected to support the Philippines' position. China has already announced that they will not recognize the ruling.

Honourable senators, rather than commit to a diplomatic solution based upon international law and focused upon reaching a peaceful solution, China has instead begun to change the facts on the ground through its extensive land reclamation and militarization policies,

undermining the claims of other states to the disputed islands and ultimately creating instability in the Asian Pacific.

China's commitment to existing international legal regimes is indeed questionable. In China's new order of priority, history comes before the law.

According to the Chinese government, the greatest threat to peace in the region is the United States. Honourable senators, I have brought this inquiry forward as I feel this ongoing territorial and maritime dispute is escalating to a level that Canada cannot continue to ignore. A serious diplomatic and military crisis caused by an accidental clash at sea is a distinct possibility, especially in the absence of clear agreements.

Canada can drive diplomatic talks to be more oriented towards outcomes rather than oriented towards process, as is presently the case. I believe our territorial claim dispute in the Arctic could stand as a model to help those involved in Asia-Pacific issues. Stakeholders in the South China Sea have much to learn from how Arctic states are managing their disputes and working to resolve them.

As a driving force behind the 1982 United Nations Convention on the Law of the Sea, Canada can play an important diplomatic role, upholding the same convention we rely on to claim our northern territory. If the South China Sea dispute is to be resolved, Beijing must bring its claims in line with international law.

Finally, as a dialogue partner of the Association of Southeast Asian Nations, I believe Canada can use this summit as a crucial springboard to promote talks on the South China Sea issue.

Honourable colleagues, I hope that this will be an opportunity for us to explore this complex and escalating issue that deserves our attention and your input.

[Translation]

I hope that I have drawn your attention to an issue of great importance to peace and security in Canada and the Asia-Pacific region, namely the situation in the South China Sea and the East China Sea.

Senate Motion on the South China Sea

Recognizing the urgent nature of the disputes, the Honourable Senator Ngo gave notice on May 12, 2016 that he intended to introduce the following motion.⁴¹⁷ He first spoke to the motion on May 17. A transcript of his speech⁴¹⁸ is included below. He was joined in debate by the Honourable Senators Martin,⁴¹⁹ MacDonald,⁴²⁰ Munson,⁴²¹ Cools,⁴²² Harder,⁴²³ Oh,⁴²⁴ and Woo.⁴²⁵

NOTICE OF MOTION

By the Honourable Senator Ngo:

Honourable senators, I give notice that at the next sitting of the Senate I shall move:

That the Senate note with concern the escalating and hostile behaviour exhibited by the People's Republic of China in the South China Sea and consequently urge the Government of Canada to encourage all parties involved, and in particular the People's Republic of China, to:

- a) recognize and uphold the rights of freedom of navigation and overflight as enshrined in customary international law and in the United Nations Convention on the Law of the Sea;
- b) cease all activities that would complicate or escalate the disputes, such as the construction of artificial islands, land reclamation, and

PRÉAVIS DE MOTION

Par l'honorable sénateur Ngo :

Honorables sénateurs, je donne préavis qu'à la prochaine séance du Sénat je proposerai :

Que le Sénat observe avec inquiétude le comportement de plus en plus hostile de la République populaire de Chine dans la mer de Chine méridionale et exhorte par conséquent le gouvernement du Canada à encourager toutes les parties en cause, et en particulier la République populaire de Chine, à :

- a) reconnaître et maintenir la liberté de navigation et de survol garantie par le droit international coutumier et la Convention des Nations Unies sur le droit de la mer;
- b) cesser toutes les activités qui pourraient compliquer ou aggraver les différends, notamment la construction d'îles artificielles,

⁴¹⁷ Canada. Parliament. Senate. *Debates*, 42nd Parliament, 1st Session, vol. 150, number 36, May 12, 2016, http://www.parl.gc.ca/Content/Sen/Chamber/421/Debates/036db_2016-05-12-e.htm, p. 668.

⁴¹⁸ Canada. Parliament. Senate. *Debates*, 42nd Parliament, 1st Session, vol. 150, number 37, May 17, 2016, http://www.parl.gc.ca/Content/Sen/Chamber/421/Debates/037db_2016-05-17-e.htm pp. 692–695.

⁴¹⁹ Canada. Parliament. Senate. *Debates*, 42nd Parliament, 1st Session, vol. 150, number 44, June 7, 2016, http://www.parl.gc.ca/Content/Sen/Chamber/421/Debates/044db_2016-06-07-e.htm, pp. 908–911.

⁴²⁰ Canada. Parliament. Senate. *Debates*, 42nd Parliament, 1st Session, vol. 150, number 54, June 21, 2016, http://www.parl.gc.ca/Content/Sen/Chamber/421/Debates/054db_2016-06-21-e.htm, pp. 1320–1322.

⁴²¹ Canada. Parliament. Senate. *Debates*, 42nd Parliament, 1st Session, vol. 150, number 60, October 5, 2016, http://www.parl.gc.ca/Content/Sen/Chamber/421/Debates/060db_2016-10-05-e.htm, pp. 1457–1459.

⁴²² Canada. Parliament. Senate. *Debates*, 42nd Parliament, 1st Session, vol. 150, number 73, November 17, 2016, http://www.parl.gc.ca/Content/Sen/Chamber/421/Debates/073db_2016-11-17-e.htm, pp. 1756–1759.

⁴²³ Ibid., pp. 1759–1760.

⁴²⁴ Canada. Parliament. Senate. *Debates*, 42nd Parliament, 1st Session, vol. 150, number 76, November 24, 2016, http://www.parl.gc.ca/Content/Sen/Chamber/421/Debates/076db_2016-11-24-e.htm, pp. 1824–1825.

⁴²⁵ Ibid., pp. 1825–1827.

further militarization of the region;

- c) abide by all previous multilateral efforts to resolve the disputes and commit to the successful implementation of a binding Code of Conduct in the South China Sea;
- d) commit to finding a peaceful and diplomatic solution to the disputes in line with the provisions of the UN Convention on the Law of the Sea and respect the settlements reached through international arbitration; and
- e) strengthen efforts to significantly reduce the environmental impacts of the disputes upon the fragile ecosystem of the South China Sea;

That the Senate also urge the Government of Canada to support its regional partners and allies and to take additional steps necessary to de-escalate tensions and restore the peace and stability of the region; and

That a message be sent to the House of Commons to acquaint it with the foregoing.

l'extension du territoire terrestre en mer et l'accroissement de la militarisation de la région;

- c) respecter tous les efforts multilatéraux antérieurs visant à régler les différends et s'engager à mettre en œuvre un code de conduite contraignant dans la mer de Chine méridionale;
- d) s'engager à trouver une solution pacifique et diplomatique aux différends qui est conforme aux dispositions de la Convention des Nations Unies sur le droit de la mer et respecter les ententes de règlement conclues par la voie de l'arbitrage international;
- e) renforcer les efforts visant à réduire considérablement les impacts environnementaux des différends sur le fragile écosystème de la mer de Chine méridionale;

Que, de plus, le Sénat exhorte le gouvernement du Canada à appuyer ses partenaires et ses alliés régionaux et de prendre les mesures additionnelles qui s'imposent pour désamorcer les tensions et rétablir la paix et la stabilité dans la région;

Qu'un message soit transmis à la Chambre des communes pour l'en informer.

Tuesday, May 17, 2016

Hon. Thanh Hai Ngo:

[Translation]

Honourable senators, I rise today to call the attention of the Senate to China's aggressive behaviour in the South China Sea.

I introduced an inquiry on this subject in the Senate chamber two months ago to illustrate the fact that the South China Sea is strategically very important to the Southeast Asian island countries that border it, but especially to China,

which has for some time been exhibiting hostile behaviour to assert its particular vision of territorial ownership.

I want to begin by thanking all those senators who expressed an interest in this issue, and I encourage all senators to take part in future debates. As part of the inquiry, we discussed the situation in the South China Sea, where six separate nations are claiming territorial ownership.

We also saw that those claims have led to increased tensions and the military occupation of several islands. We also discussed the United Nations Convention on the Law of the Sea and how it applies to the situation in the South China Sea.

We also looked at a number of aggressive actions taken by China. Over the past two weeks, tensions have increased even further, to the point where a stronger response is now required. It is therefore appropriate to submit this motion, which has two main objectives. The first objective is to draw the attention of the Senate to this matter. The second is to call on the government to take more action on this file.

In January, China began landing aircraft on the airstrip at Fiery Cross Reef, which is what prompted me to raise this issue. This reef, which is claimed by China, Taiwan and the Philippines, was built as an artificial island. The landing strip on the island is the longest in the region and the only one capable of supporting long-range bombers. In February, Chinese authorities placed surface-to-air missiles on Woody Island, a first in the region. Since that time, Chinese militarization in the South China Sea has intensified considerably.

On March 21, it was reported that anti-ship cruise missiles were also deployed on Woody Island. Fighter jets were stationed there on April 6. On April 26, it was reported that Chinese forces were preparing the site for an airfield and a permanent garrison on Scarborough Shoal.

Scarborough Shoal is just slightly more than 200 kilometres from the Philippines' largest island. Filipino fishermen depend on access to this shoal for their livelihood. Chinese forces seized the shoal in 2012 after a naval standoff and have barred access to fishermen since then.

On April 12, the Chinese army conducted a test of its newest intercontinental ballistic missile. This missile can strike anywhere in the United States. This test coincided with the visit of a high-ranking Chinese general to Chinese outposts in the South China Sea.

[English]

All of these aggressive events are underscored by the constant presence of the China Coast Guard. With over 200 vessels, the China Coast Guard includes the largest coast guard ships in the world. By patrolling China's extensive maritime claims and harassing other ships in the area, China is asserting its control over the region and providing cover for Chinese fishing vessels to intrude into the waters of other nations.

Faced with this rampant aggression, other nations in the region have reciprocated and strengthened their militaries in turn. In March, the Philippines and the United States signed a defence agreement that allows the United States to use several Philippine military bases within range of the disputed region. Both countries announced plans for joint patrols of the South China Sea in April.

Even nations that have traditionally stayed neutral in the South China Sea disputes have been forced to take action. Singapore's military budget, already the largest in Southeast Asia by share of GDP, is expected to increase further due to what Singapore's defence minister has called "rising nationalism" in the region.

After facing incursions in its waters by up to 100 Chinese fishing and coast guard vessels in March, the Malaysian defence minister has called for a "pushback" against China, and the foreign minister has claimed that Malaysia can no longer remain neutral on the issue.

Honourable senators, these are a few of the events that outline a worrying trend. I plan to release a detailed position paper to describe the maritime dispute, summarize the overlapping claims, list all the developing hostile activities, and describe the impacts this conflict has on Canada and the international community. That is why this motion aims to make it clear that the People's Republic of China's escalatory behaviour is jeopardizing the peace and stability of the region and undermining international maritime law.

Canada must add its voice to those calling for China and the other states involved to take the following actions set out in the motion:

[Translation]

(a) recognize and uphold the rights of freedom of navigation and overflight as enshrined in customary international law and in the United Nations Convention on the Law of the Sea.

The free movement of vessels and aircraft is vital for the global economy. Freedom of navigation is one of the fundamental principles of maritime law and Canada needs to uphold it internationally. China is violating the principles of freedom of navigation in two ways. First, it requires that foreign warships that wish to travel through its territorial waters under the right of innocent passage must ask for prior permission, which is contrary to the United Nations Convention on the Law of the Sea. Second, China is deliberately vague about the legal status of its expansionist maritime claims. The ensuing confusion undermines the protection of freedom of navigation in the region.

(b) Cease all activities that would complicate or escalate the disputes, such as the construction of artificial islands, land reclamation, and further militarization of the region.

China is not the only country to have contributed to the militarization of the region. Most of the claimants have occupied islands and reefs in the South China Sea and have built artificial islands to strengthen their positions. However, China's actions have gone well beyond those of all the other claimants. China's activities in the past two and a half years alone account for 95 per cent of all reclaimed land in the Spratly Islands over the past 40 years.

Moreover, China is the only country to have deployed military assets to the region that have no civilian use. There is a big difference between building lighthouses and ports for military and civilian purposes and deploying anti-aircraft and anti-ship missiles in the region. Other countries are contributing to the militarization in the South China Sea simply in response to China's behaviour.

(c) Abide by all previous multilateral efforts to resolve the disputes and commit to the successful implementation of a binding Code of Conduct in the South China Sea.

In 2002, China and members of the Association of Southeast Asian Nations signed the Declaration on the Conduct of Parties in the South China Sea. The signatories agreed to respect the UN Convention, respect the freedom of navigation and overflight, and to exercise self-restraint in the conduct of activities that would complicate or escalate disputes. Although China has blatantly and systematically disregarded these provisions, the 2002 Declaration remains the most comprehensive multilateral initiative for resolving disputes. Voluntary compliance with its provisions is an essential prerequisite to a lasting diplomatic solution.

The 2002 Convention committed its signatories to working on implementing a legally binding code of conduct. Since 2002, the Association of Southeast Asian Nations and the international community have repeatedly called for this code of conduct to be negotiated, including at the G7 meeting last month. Each time, China expressed a rhetorical interest in establishing a code of conduct, but it refused to participate seriously in the process and used its weight within the Association to undermine the negotiations.

[English]

(d) Commit to a peaceful solution in line with the UNCLOS and respect settlements reached through international arbitration.

In his statement at the inquiry, Senator Enverga described in detail the arbitration process that the Philippines is currently pursuing against China. In essence, the Philippines maintains that China's South China Sea claims do not comply with the international law or the UN convention.

In response, China accused the Philippines of sabotaging attempts to reach a negotiated solution. This accusation ignores the fact that the Philippines started arbitration as the final resort only after several attempts at reaching a multilateral solution were blocked by Chinese obstructionism.

China has refused to recognize the proceedings and has announced that it is exempt from the legally binding court decision that is

expected sometime this year. In doing so, China has declared that it is not willing to abide by the UN convention, which it has itself ratified, and is not willing to respect international law when it does not agree. This is an irresponsible attitude and a complete disregard for international law that must be condemned by Canada and the international community.

(e) Strengthen efforts to significantly reduce the environmental impact of the disputes.

Not only is island construction undermining peace and stability in the region, but it is also jeopardizing the region's biodiversity. A study published by the University of Hawaii in March found that constructing an artificial island by dredging the reef does irreparable harm to the coral. The dredging process buries reefs and blankets the surrounding sea with a cloud of sediment that kills nearby aquatic life. This includes the fish that the coastal population surrounding the South China Sea depends upon. It is quite ironic that these nations are destroying the region in an attempt to control it.

The construction of artificial islands will have profound long-term consequences. The coral reefs that act as the foundation for these islands are being destroyed during the construction process. As a result, more dredging and environmental destruction will be needed just to keep the existing islands above sea level. Lastly:

(f) That the Senate urge the government to support its regional partners and allies and to take additional steps necessary to de-escalate tensions.

Honourable senators, it is in Canada's interests to ensure that all states abide by international law, including the United Nations Convention on the Law of the Sea.

With new global powers in the Asia-Pacific region, Canada's national interests are at risk. China's refusal to set maritime boundaries in line with the UN convention sets a dangerous precedent, particularly as the eyes of the world turn north toward the Arctic, another area of overlapping claims.

China's hostile behaviour is all the more disturbing as China looks to increase its presence in the Arctic. Chinese authorities have portrayed the country as a near-Arctic state since at least 2012. China has also expressed interest in playing a greater role in Arctic governance, securing its status as an observer on the Arctic Council in 2013.

China is also interested in increasing the amount of merchant shipping travelling through the Arctic, including Canada's Northwest Passage, as evidenced by a report released last month by China's Maritime Safety Administration.

If China succeeds in consolidating its position in the South China Sea through intimidation and by disregarding international law, what tells us this couldn't happen in the Arctic? It is in Canada's interest to ensure that all states abide by the UN Convention on the Law of the Sea, and it is my belief that a motion is needed to urge our government to take greater action there in the South China Sea in order to protect our claim here in the Arctic.

Honourable senators, the South China Sea may seem half a world away from our shores, but ultimately the disputes there affect us and Canada must play a larger role.

Honourable senators, it is worth noting that it was a Canadian, Alan Beesley who helped cement the Law of the Sea in international law. A dedicated diplomat and committed civil servant, Beesley served as ambassador to the Law of the Sea Conference, and was Chairman of that Conference's Drafting Committee from 1967 to 1983. His work, for which he was made an Officer of the Order of Canada, was instrumental in shaping the ground breaking convention and enshrining the Canadian values of freedom, fairness and collaboration in the law that governs our collective maritime heritage. We must now urge the government to ensure that neither China nor other states undermine this legacy.

Thank you.

Thursday, November 17, 2016

Hon. Peter Harder (Government Representative in the Senate): Honourable senators, I rise as Government Representative to speak on Motion 92, which is in Senator Ngo's name, concerning the South China Sea.

The South China Sea, as we all know, is one of the world's busiest commercial shipping arteries with more than \$5 trillion in trade passing through it annually. Much of Canada's trade with Southeast Asia, Hong Kong, India and the Middle East passes through those waters. Asia's rising economic power will increase the significance of the South China Sea as a trade route over time.

The Government of Canada is concerned by the tensions associated with territorial and maritime disputes in the South China Sea. In this context, Canada has also had an interest in promoting respect for international law and rules-based order.

The government is monitoring the situation closely and regularly consults with our allies and international partners on developments in the South China Sea.

The Government of Canada has noted the actions of some of the South China Sea claimants as having raised tensions and eroded trust. These actions include large-scale land reclamation, the construction of artificial islands in disputed areas, the construction of military facilities and deployment of military assets on previously uninhabited features, as well as the use of coercion in attempts at settling maritime or territorial disputes.

All of these recent actions are in violation of the spirit of the Declaration of Conduct of Parties in the South China Sea, which was signed between member states of the Association of Southeast Asian Nations, so-called ASEAN, and China in 2002.

Honourable senators, the Government of Canada followed closely the Philippines versus China arbitration case since it was initiated by the Philippines in early 2013.

Following the July 12, 2016, ruling, Canadian officials have conducted a careful

analysis of the judgment. Subsequently, on July 21, 2016, the Minister of Foreign Affairs issued a statement on the South China Sea arbitration.

The statement underlined several key principles, and I would like to list them: first, the importance of international law as providing the foundation upon which peaceful relations among states are built; second, the need to avoid actions that could jeopardize freedom of navigation and overflight exercised in accordance with international law, maritime security and international trade; third, that the ruling should be complied with, whether one agrees with it or not; and fourth, that all parties should seize this opportunity as a steppingstone to renewed efforts to peacefully manage and resolve their disputes in accordance with international law.

In a speech given by the Honourable Senator Martin on June 7 as part of the debate on this motion, Senator Martin suggested that Canada could urge compliance with international law in light of the important role that Canada played in building the rules-based international system.

I can report that the statement made by the Minister of Foreign Affairs indeed reiterates Canada's commitment to the maintenance of a rules-based international order and respect for international law as the basis upon which peaceful relations amongst states is built.

Honourable senators, on September 20, Canada again expressed concern about the South China Sea dispute when the Minister of Foreign Affairs joined his G7 counterparts in issuing a G7 Foreign Ministers' Statement on Recent Developments in Asia. This statement expressed a unified G7 position on threats to the rules-based international order emanating from North Korea and expressed concern about the developments in East and Southeast China seas.

The People's Republic of China has maintained its long-held decision that it would not accept the legitimacy of the international tribunal and that it would not be bound by the ruling. Since the ruling, the Prime Minister and the Minister of Foreign Affairs have both raised

the importance of the rule of law in international institutions with their Chinese counterparts.

Recently, and since this motion was first tabled, there have been a number of potentially positive developments with respect to the South China Sea. China and Philippines have mutually agreed to restart bilateral talks with respect to their maritime and territorial disputes. Two other claimants, Malaysia and Vietnam, have each engaged bilaterally with China with a view to managing their disputes peacefully. China and ASEAN have also reportedly restored positive momentum in negotiations aimed at developing a binding code of conduct in the South China Sea. Canada is supportive of bilateral dialogues in the region that contribute constructively toward a peaceful resolution.

Canada is committed to the maintenance of an international rules-based order for the oceans and seas, as well as to the peaceful management and settlement of disputes. Canada stands ready to contribute to initiatives that build confidence and help to restore trust in the region.

Throughout the 1990s and until 2006, the Government of Canada actively supported in funding Track II diplomacy, including participation by experts in informal, non-governmental and unofficial meetings on Asian security issues. For example, in the 1990s Canada co-funded and actively participated in the Indonesian-led informal process called "Managing Potential Conflicts in the South China Sea."

The Canadian Law of the Sea experts who were involved for 10 years in this process paved the way for ASEAN to initiate dialogue with China that culminated in the signing of the Declaration of Conduct between China and the

ASEAN in 2002. Despite being non-binding, this declaration constitutes an important instrument between China and the ASEAN with respect to the South China Sea. It is considered the starting point from which a future binding South China Sea code of conduct could be developed.

Canadian officials are actively exploring ways that Canada could play a constructive role in initiatives that contribute to peace and security in the South China Sea and help to restore trust in the region. As announced by the Minister of Foreign Affairs on the margins of the ASEAN-Canada Post-Ministerial Conference and the ASEAN Regional Forum, the so-called ARF, Canada will co-chair in Ottawa next year the ARF Inter-sessional Support Group Meeting on Confidence Building Measures and Preventive Diplomacy. This is yet another example of an initiative where Canada can play a leadership role in restoring eroded peace.

Honourable senators, Canada could contribute actively in regional fora in which high-level discussions on regional security issues take place. As an Asia-Pacific middle power committed to multilateralism, Canada will play a constructive role in international affairs, where our leadership can make a real difference in consultation with allies, partners and other interested states.

It is the view of the Government of Canada that international law provides the foundation upon which peaceful relations among states are built. Given the context of my remarks, I will therefore support the motion of Senator Ngo.

Hon. Senators: Hear, hear!

Addendum: Update – February 2017

Since this report's initial release in November 2016, the situation in the South China Sea has continued to evolve. Tensions remain high following the ruling of the arbitration tribunal in July, and land reclamation and militarization continues at disputed maritime features throughout the region. Several recent developments have centred on the inauguration of Donald Trump as President of the United States of America and the unveiling of his administration's foreign policy towards China and the South China Sea.

On December 15, the USNS *Bowditch*, an unarmed oceanographic vessel, was located in international waters off the Philippine coast of the South China Sea, roughly 50 nautical miles northwest of Subic Bay. The *Bowditch* was in the process of retrieving two unmanned underwater vehicles that had collected unclassified survey information on water temperature, clarity, and salinity. Before the second drone could be collected by the *Bowditch*, it was intercepted by a Chinese naval vessel instead, which absconded with the vehicle. The Chinese did not respond when the *Bowditch* opened communications, stating only that they were "returning to normal operations".⁴²⁶ This violation of international law was heavily criticized and resulted in the United States issuing a formal diplomatic protest. The two sides eventually reached an agreement to return the drone, although the American reaction was "not conducive to solving the problem smoothly", according to the Chinese defence ministry.⁴²⁷ China has since attempted to avoid questions of legality surrounding its seizure of the drone—which was clearly marked as being a sovereign immune vessel and American property—by affirming that the drone posed a navigation hazard and was not identified as belonging to the United States until after it had already been removed.⁴²⁸ Furthermore, the fact that the seizure occurred outside the bounds of the nine-dash line raises further questions regarding the jurisdiction of Chinese naval activity in the area.

On December 2, then-President-elect Trump accepted a telephone call from Taiwanese president Tsai Ing-wen. The call, the first made by an American president or president-elect since American diplomatic relations with Taiwan were ended in 1979, was seen by many analysts as provocative and certain to disrupt relations with China. China lodged a diplomatic protest in response, emphasizing the One China policy and characterizing the incident as a "petty action" by Taiwan.⁴²⁹ The following week, on December 8, a Chinese H-6K strategic bomber conducted a flight along the nine-dash line.⁴³⁰ While this flight may have been in response to the Taiwan call, it also fits with a pattern of increasing Chinese aerial activity in the South China Sea. As infrastructure on China's artificial islands becomes capable of supporting regular combat

⁴²⁶ Phil Stewart, "China Seizes U.S. Underwater Drone in South China Sea", *Reuters*, December 16, 2016, <http://www.reuters.com/article/usa-china-drone-idUSL1N1EB1PK>, para. 21.

⁴²⁷ Jane Perlez and Matthew Rosenberg, "China Agrees to Return Seized Drone, Ending Standoff, Pentagon Says", *The New York Times*, December 17, 2016, https://www.nytimes.com/2016/12/17/world/asia/china-us-drone.html?_r=0, para. 6.

⁴²⁸ Steven Shashnick, "China Creates Version of US Drone Seizure to Maintain the Status Quo", *The Diplomat*, December 23, 2016, <http://thediplomat.com/2016/12/china-creates-version-of-us-drone-seizure-to-maintain-the-status-quo/>, para. 3.

⁴²⁹ Ben Blanchard, "China Lodges Protest after Trump Call with Taiwan President", *Reuters*, December 3, 2016, <http://www.reuters.com/article/us-usa-trump-taiwan-idUSKBN13R2NT>.

⁴³⁰ Erik Slavin, "Does China Really Have a Nuclear-Capable Bomber?" *Stars and Stripes*, December 13, 2016, <http://www.stripes.com/news/does-china-really-have-a-nuclear-capable-bomber-1.444071>.

air patrols, regular Chinese military flights throughout the region will become more frequent. As a result, further near-miss incidents between American and Chinese aircraft are likely. Such an incident occurred on February 10 over Scarborough Shoal, when an American P-3 reconnaissance aircraft and a Chinese KJ-200 airborne early warning and control aircraft inadvertently strayed dangerously close to one another.⁴³¹

The airstrips on Chinese-controlled islands are not the only means through which China can exert air power in the South China Sea. A series of exercises conducted in December 2016 and January 2017 indicates that the capabilities of China's aircraft carrier *Liaoning* are growing. As part of a training mission, the carrier entered the Western Pacific for the first time on December 25⁴³² and conducted take-off and landing drills involving several fighter jets and ship-borne helicopters on January 1.⁴³³ For reasons already discussed elsewhere in this report, the *Liaoning*'s power projection abilities will remain limited. However, as work progresses on China's first indigenously-designed and -constructed aircraft carrier, the *Liaoning* will fulfill a valuable role in training personnel and naval pilots.

While China's aircraft carrier continues to conduct training missions, land reclamation continues in the Spratly Islands. On December 13, the Asia Maritime Transparency Initiative published satellite imagery of China's seven Spratly outposts revealing completed emplacements for anti-aircraft guns and close-in weapons systems on each artificial island. These point-defence fortifications are designed to protect the military installations from enemy fighter aircraft and cruise missiles⁴³⁴ as a last line of defence in the event of armed conflict. This action was seen by many analysts as a violation of President Xi's statement in September 2015 that he did not intend to pursue militarization in the Spratlys.⁴³⁵ China's foreign ministry—which maintains that construction in the Spratlys has been for civilian purposes—has thus far referred to the deployed weapons as “necessary defence facilities”, in line with its stance affirming the right to defend what it considers to be China's sovereign territory. It has also been pointed out that these anti-air weapons systems have a limited range and cannot reach the altitudes used by civilian airliners.⁴³⁶

Nevertheless, these actions have attracted criticism, including from the new American president and his cabinet. After repeatedly using rhetoric that was highly critical of China and the United States' trade relationship with China during the election campaign, President Trump has appointed Peter Navarro to lead the White House National Trade Council and to serve as director of trade and industrial policy. Dr. Navarro has long been hawkish on the topic of trade with China. In addition, during his confirmation hearing before the Senate Foreign Relations Committee Rex Tillerson, the incoming United States Secretary of State, testified that “We're

⁴³¹ Reuters, “U.S., China Military Planes Come Inadvertently Close over South China Sea”, February 10, 2017, <http://www.reuters.com/article/us-usa-china-defense-idUSKBN15O2ZJ>.

⁴³² Ankit Panda, “Power Plays across the First Island Chain: China's Lone Carrier Group Has a Busy December”, *The Diplomat*, December 27, 2016, <http://thediplomat.com/2016/12/power-plays-across-the-first-island-chain-chinas-lone-carrier-group-has-a-busy-december/>.

⁴³³ Franz-Stefan Gady, “China's Aircraft Carrier Testing Weapons in the South China Sea”, *The Diplomat*, January 5, 2017, <http://thediplomat.com/2017/01/chinas-aircraft-carrier-testing-weapons-in-south-china-sea/>.

⁴³⁴ Asia Maritime Transparency Initiative, “China's New Spratly Island Defenses”, December 13, 2016, <https://amti.csis.org/chinas-new-spratly-island-defenses/>.

⁴³⁵ David Brunnstrom and Michael Martina, “Xi Denies China Turning Artificial Islands into Military Bases”.

⁴³⁶ Steven Stashwick, “New Weapons on China's Artificial Islands Don't Violate ‘Non-Militarization’ of South China Sea”, *The Diplomat*, December 30, 2016, <http://thediplomat.com/2016/12/new-weapons-on-chinas-artificial-islands-dont-violate-non-militarization-of-south-china-sea/>, paras. 9–10.

going to have to send China a clear signal that, first, the island-building stops and, second, your access to those islands also is not going to be allowed”.⁴³⁷ He also compared China’s “declaring control of territories that are not rightfully China’s”⁴³⁸ to be “akin to Russia’s taking of Crimea”⁴³⁹ and noted that allowing China to control access to the South China Sea would be “a threat to the global economy”.⁴⁴⁰ In response, China’s foreign ministry reiterated that it would “stand firm in safeguarding our territorial sovereignty and maritime rights and interests” and urged the United States to “respect the facts and be prudent in words and actions to avoid causing disruptions”.⁴⁴¹

Since then, rhetoric from the Trump administration has been more subdued. In a written response to questions posed during his confirmation hearing, Secretary of State Tillerson moderated his previous responses on the topic of the South China Sea. While maintaining that the United States should be capable of limiting China’s access to the artificial islands “if a contingency occurs”, Tillerson also reaffirmed the previous administration’s position to uphold the freedom of navigation in the South China Sea.⁴⁴² The American Secretary of Defense James Mattis, while blaming China for “shredding the trust of nations in the region”, has also downplayed the need for military manoeuvres in the South China Sea that diverge from previous military exercises and freedom of navigation operations.⁴⁴³ As of this writing the United States Navy and Pacific Command are preparing plans detailing further FONOPs in the region for approval by President Trump.⁴⁴⁴

China’s activity in the South China Sea continues to elicit responses from other South China Sea claimants and regional actors. Vietnam has responded by beginning dredging work on Ladd Reef, a low-tide elevation that currently hosts a lighthouse and a small Vietnamese garrison.⁴⁴⁵ This dredging activity could be a precursor to land reclamation. Vietnam has also undertaken significant land reclamation activity at Spratly Island in order to extend the island’s runway. When complete, the runway will reach 1,200 metres in length and will be able to accommodate most aircraft used by the Vietnamese air force, with the exception of some transport and surveillance aircraft.⁴⁴⁶ In tandem with these developments, on January 14 Vietnam

⁴³⁷ Benjamin Haas, “‘No Access’: Rex Tillerson Sets Collision Course with Beijing in South China Sea”, *The Guardian*, January 12, 2017, <https://www.theguardian.com/world/2017/jan/12/no-access-rex-tillerson-sets-collision-course-beijing-south-china-sea>, para. 4.

⁴³⁸ *Associated Press*, “China Plays Down Tough Talk by Trump Choice for Top Diplomat”, *The Globe and Mail*, January 12, 2017, <http://www.theglobeandmail.com/news/world/china-plays-down-tough-talk-by-trump-choice-for-top-diplomat/article33593969/>, para. 8.

⁴³⁹ Benjamin Haas, “‘No Access’: Rex Tillerson Sets Collision Course”, para. 2.

⁴⁴⁰ *Associated Press*, “China Plays Down Tough Talk”, para. 10.

⁴⁴¹ Ministry of Foreign Affairs of the People’s Republic of China, “Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference on January 24, 2017”, January 24, 2017, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1433525.shtml, para. 2.

⁴⁴² Jesse Johnson, “Behind the Scenes, Tillerson Tones down Rhetoric on South China Sea”, *The Japan Times*, February 7, 2017, <http://www.japantimes.co.jp/news/2017/02/07/asia-pacific/behind-scenes-tillerson-tones-rhetoric-south-china-sea/>, para. 12.

⁴⁴³ *Reuters*, “China Welcomes Mattis’ Emphasis on South China Sea Diplomacy”, February 6, 2017, <http://www.reuters.com/article/us-usa-trump-southchinasea-china-idUSKBN15L0ZS>, para. 2.

⁴⁴⁴ David B. Larter, “The Navy Is Planning Fresh Challenges to China’s Claims in the South China Sea”, *Navy Times*, February 12, 2017, <https://www.navytimes.com/articles/navy-south-china-sea>.

⁴⁴⁵ Lincoln Feast and Greg Torode, “Risking Beijing’s Ire, Vietnam Begins Dredging on South China Sea Reef”, *Reuters*, December 9, 2016, <http://www.reuters.com/article/us-southchinasea-vietnam-idUSKBN13X0WD>.

⁴⁴⁶ Asia Maritime Transparency Initiative, “Vietnam Responds with Spratly Air Upgrades”.

and China pledged to manage their disputes and agreed to fully implement the Declaration on Conduct and to commit once again to work towards a code of conduct for the South China Sea. Two days later, Japanese Prime Minister Abe pledged to provide six new patrol boats with a total value of 38.5 billion yen (US\$338 million) to Vietnam's coast guard.⁴⁴⁷

In the Philippines, President Duterte's stance on the South China Sea continues to vacillate. The Philippines filed a diplomatic protest against China in December, after information about China's anti-aircraft and anti-missile systems in the Spratlys was published in December.⁴⁴⁸ At the same time, while Vietnam and China continue to enhance their outposts, the Philippine defence ministry confirmed in January 2017 that it would extend a moratorium on plans to upgrade facilities at its outposts in the Spratly Islands.⁴⁴⁹ The moratorium was first implemented after the Philippines initiated arbitration proceedings against China in 2013. Duterte's rhetoric on the disputes continues to downplay the disputes to prompt conciliation with China. For example, on December 17 Duterte declared that he would "set aside" the ruling and "not impose anything on China"⁴⁵⁰ while he pursued closer bilateral cooperation on trade and investment issues. Duterte seemingly reversed this position on December 29 when he declared in a media interview that he would challenge China and insist on the applying the ruling if China began extracting oil and gas from the seabed that Manila claims as its Economic Exclusive Zone.⁴⁵¹ However, in that same interview he continued to downplay concerns surrounding China's ongoing militarization and land reclamation on maritime features claimed by the Philippines, and stated that he would not pursue the Philippines' claims unless China intervened and began extracting minerals from the contested area. Duterte's more tolerant stance towards Chinese activity in the South China Sea was earned through several trade agreements signed between the two countries after Duterte's state visit to China in October 2016. It seems likely that President Duterte will continue to downplay Chinese activity in the disputed areas as long as the political popularity accrued through increased Chinese investment outweighs the potential political costs of appearing overly lenient towards China.

Lastly, on January 23, President Trump signed an executive order that formally ended the United States' participation in the Trans-Pacific Partnership trade agreement.⁴⁵² A prominent campaign promise during the election, withdrawing from the TPP is part of a broader strategy by the Trump administration to put "America First" and ensure that international trade agreements are negotiated with the interests of American workers first and foremost. In order to enter into force, the TPP required that at least six original signatories with a combined 85% of the GDP of

⁴⁴⁷ Mai Nguyen and My Pham, "Japan Pledges Boats to Vietnam as China Dispute Simmers", *Reuters*, January 16, 2017, <http://www.reuters.com/article/us-vietnam-japan-idUSKBN15015Q>.

⁴⁴⁸ *Reuters*, "Philippines Says Protested against China Arms Buildup on South China Sea Isles", January 16, 2017, <http://www.reuters.com/article/us-southchinasea-philippines-china-idUSKBN1501E4>.

⁴⁴⁹ Manuel Mogato, "Avoiding China's Wrath, Philippines Puts Off Upgrades to South China Sea Isles", *Reuters*, January 12, 2017, <http://www.reuters.com/article/us-southchinasea-philippines-idUSKBN14W1LV>.

⁴⁵⁰ *Associated Press*, "Philippines to 'Set Aside' South China Sea Tribunal Ruling to Avoid Imposing on Beijing", *The Guardian*, December 17, 2016, <https://www.theguardian.com/world/2016/dec/17/philippines-to-set-aside-south-china-sea-tribunal-ruling-to-avoid-imposing-on-beijing>, para. 2.

⁴⁵¹ Nandini Krishnamoorthy, "Duterte Says He Will Insist on International Tribunal Ruling if China Drills in South China Sea", *International Business Times*, December 29, 2016, <http://www.ibtimes.co.uk/duterte-says-he-will-insist-international-tribunal-ruling-if-china-drills-south-china-sea-1598539>.

⁴⁵² Yian Q. Mui, "President Trump Signs Order to Withdraw from Trans-Pacific Partnership", *The Washington Post*, January 23, 2017, https://www.washingtonpost.com/news/wonk/wp/2017/01/23/president-trump-signs-order-to-withdraw-from-transpacific-partnership/?tid=a_inl&utm_term=.7bf16fb4b62d.

the twelve original signatories. As such, ratification by both Japan and the United States (representing 17% and 62% of combined GDP, respectively) was required. While Japan notified other signatories of its ratification of the agreement on January 20, the American withdrawal effectively scraps the agreement.

The response from other TPP signatories and Asia-Pacific states has been confused. In the wake of the American withdrawal, both Australia and New Zealand indicated that they would be willing to preserve the agreement and invite China and other Asian states to join, on the basis that the original agreement was designed to allow other states to join over time.⁴⁵³ At the time of writing it is unclear whether a new agreement would be concluded among the original remaining signatories, whether new states would be included in the renegotiation process, and how many of the agreement's chapters on areas such as labour standards, environmental protection, and human rights—provisions that had originally been championed by the United States—would be maintained. Japan's Prime Minister, Shinzo Abe, had embraced the economic potential of the TPP and viewed it as strategically vital to set regional standards and counter China's growing economic power. While his government will continue to advocate for free trade, for Abe the future of the remaining TPP framework is uncertain, as the "TPP without the United States is meaningless and the balance of interests [will] crumble".⁴⁵⁴

For its part, China seems ready to step into the vacuum left by the United States, and has proposed accelerating negotiations on the Regional Comprehensive Economic Partnership between ASEAN and Australia, China, India, Japan, New Zealand, and South Korea. The death of the TPP also provides an opening for China to take the lead in negotiating the Free Trade Area of the Asia Pacific. As several analysts and President Obama⁴⁵⁵ have pointed out, the TPP represented an opportunity to write the ground rules for trade agreements in the 21st century. Giving up that opportunity will slow trade growth between the United States and the South China Sea states. As a result, those states will become more economically dependent on trade with China moving forward, and we may see China's neighbours encouraged to follow the Philippines' example of tolerating China's violations of international maritime law in the South China Sea in exchange for continued investment.

⁴⁵³ Charlotte Greenfield and Stanley White, "After U.S. Exit, Asian Nations Try to Save TPP Trade Deal", *Reuters*, January 24, 2017, <http://ca.reuters.com/article/businessNews/idCAKBN15800V?sp=true>, paras. 1, 18.

⁴⁵⁴ *Ibid.*, para. 24.

⁴⁵⁵ Barack Obama, "The TPP Would Let America, Not China, Lead the Way on Global Trade", *The Washington Post*, May 2, 2016, https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html?utm_term=.e61d71b85ec4.

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