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## Policing the Strait: How China's Policing of the Taiwan Strait Violates the U.N. Convention on the Law of the Sea

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# **POLICING THE STRAIT: HOW CHINA’S POLICING OF THE TAIWAN STRAIT VIOLATES THE U.N. CONVENTION ON THE LAW OF THE SEA**

ELIZABETH C. PARKER

*As tensions continue to grow across the Taiwan Strait, China is using domestic maritime law to justify an expansion of police power in the international waters of the Taiwan Strait in violation of international law. This Comment will argue that the People’s Republic of China has violated the UN Convention on the Law of the Sea (“UNCLOS”) by implementing non-resource-related police power in waters meant only for resource exploration and management. In comparing the language of China’s domestic maritime law with that of UNCLOS, this Comment will show that the People’s Republic of China has used domestic law to reinterpret and obfuscate its obligations under UNCLOS. As a result, the freedom of navigation granted by UNCLOS to all States has been restricted by China’s policing. To prevent China from using its domestic law to assert increasing control over the Strait, the Tribunal of the Law of the Sea should issue an advisory opinion clarifying the purpose of Exclusive Economic Zones and denouncing China’s noncompliance with UNCLOS. Additionally, foreign States should continue to exercise freedom of navigation through the Taiwan Strait and push China to limit its police activity of the Strait.*

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## I. INTRODUCTION

The United Nations Convention on the Law of the Sea (“UNCLOS”) is the governing maritime treaty across the globe.<sup>1</sup> Ratified by 169 nations, UNCLOS divides the world’s oceans into recognizable zones, secures navigational rights and freedoms for all countries, grants coastal States sovereign rights over resources, provides for marine scientific research and conservation, and sets a regime for distribution of seabed resources.<sup>2</sup> Since its enactment, UNCLOS has held the freedom-of-the-seas doctrine as a key tenet in the rights of all States.<sup>3</sup> In pursuit of making this doctrine a reality,

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1. See Brian Wilson, *An Avoidable Maritime Conflict: Disputes Regarding Military Activities in the Exclusive Economic Zone*, 41 J. MAR. L. & COM. 421, 421 (2010) (arguing that the UNCLOS is the most comprehensive treaty with the greatest amount of support on the international stage in maritime law).

2. See *Status of the UN Convention on the Law of the Sea*, U.N. TREATY COLLECTION DEPOSITORY (last visited Mar. 21, 2024), [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en) (listing the current 169 parties to the UNCLOS); see also United Nations Convention on the Law of the Sea pmb., Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (outlining the purposes of the treaty, including the establishment of “a legal order for the seas and oceans in which will facilitate international communication,” and the development of rules governing distribution of ocean resources).

3. See PHILIP JONES ET AL., LAW OF THE SEA: A POLICY PRIMER 6 (John

UNCLOS provides for the right of freedom of navigation and overflight and limits coastal State jurisdiction over waters adjacent to a coastal State's territory (i.e., the contiguous zone and exclusive economic zone ("EEZ")).<sup>4</sup>

This Comment will first give background on the major provisions of UNCLOS, including the setting of territorial seas via baselines, the zoning of the oceans, and the rights and responsibilities of States within each zone. Specific attention will be paid to the creation of EEZs and their relevance to the Taiwan Strait. This Comment will also discuss China's participation in UNCLOS and its subsequent attempts to reinterpret the treaty to promote its national interests. This Comment will explain in detail the *South China Sea Arbitration*, in which an international arbitral tribunal considered issues concerning China's maritime claims in the South China Sea ("SCS").

In the third section, this Comment will analyze how China has violated the provisions of UNCLOS by preventing ships from exercising high seas freedoms of navigation beyond its territorial sea by asserting police power within the EEZ, including the Taiwan Strait.<sup>5</sup> Through China's implementation of the revised Maritime Traffic Safety Law ("MTSL") and the Maritime Police Law ("MPL"), China has created domestic authority for the Chinese Coast Guard (CCG) to exercise control over foreign vessels exercising freedom of navigation through the Taiwan Strait.<sup>6</sup> China has used these laws to

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Burgess et al. eds., 2017) (quoting Hugo Grotius) (explaining that the freedom of-the-seas doctrine was established in the 17<sup>th</sup> century to limit a State's jurisdiction to a narrow belt of water extending from the coastlines in order to ensure that the seas "were free to all nations but belonged to none of them").

4. See *The United Nations Convention on the Law of the Sea: A Historical Perspective*, U.N. DIV. FOR OCEAN AFFS. & L. OF THE SEA (1998), [https://www.un.org/Depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](https://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm) [hereinafter *UNCLOS: A Historical Perspective*] (affirming that UNCLOS codified the freedom of-the-seas doctrine that had long been part of customary international law); see also UNCLOS, *supra* note 2, at 404, arts. 17–18 (declaring that every state has the right to exercise innocent passage throughout another state's territorial waters and throughout the exclusive economic zones and high seas of the world).

5. See discussion *infra* Part III.

6. See Maritime Traffic Safety Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., April 29, 2021, effective Sept. 1, 2021) arts. 1–2, 2021 CHINESE NATIONAL NETWORK (revised to

attempt to illegally expand its police power to foreign vessels in waters that are not under Chinese sovereignty according to international law.

## II. BACKGROUND

### A. HISTORY OF THE UN CONVENTION ON THE LAW OF THE SEA

Deemed by the United Nations (“UN”) Secretary-General as “[p]ossibly the most significant legal instrument of [the] century,” UNCLOS set an unprecedented maritime regime for the law of the seas.<sup>7</sup> It accomplished uniform and fair boundaries for a State’s territorial sea that all coastal States could agree to.<sup>8</sup> The breadth of a State’s territorial sea is determined in relation to a coastal State’s baselines.<sup>9</sup> There are two types of baselines in international law: normal baselines and straight baselines.<sup>10</sup> Normal baselines are set by the coastal State’s low-water line; straight baselines may be used in localities where the coastal State’s coastline is deeply indented and cut in to, or if there is a fringe of islands immediately off its coast.<sup>11</sup> All States have a right to claim a twelve nautical mile (nm) strip of territorial sea extending from their baselines.<sup>12</sup>

Another major provision of UNCLOS is the separation of the world’s oceans into eight different categories: territorial seas, internal

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apply maritime traffic policies to “waters under the jurisdiction of the People’s Republic of China.”); *see also* Maritime Police Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Jan. 22, 2021) arts. 1–2, 5, 2021 XINHUA NEWS AGENCY (expanding Coast Guard duties to include the “preserv[ation] of national sovereignty, security, and maritime rights and interests”).

7. *See UNCLOS: A Historical Perspective*, *supra* note 4 (arguing that the Convention was an “unprecedented attempt by the international community to regulate all aspects of the resources of the sea and uses of the ocean, and thus bring a stable order to mankind’s very source of life”).

8. *See* Office of the Staff Judge Advocate, *General Principles of the Law of the Sea*, 97 INT’L L. STUD. 27, 28, 30 (2021) (defining the extent of territorial seas as established by UNCLOS).

9. UNCLOS, *supra* note 2, at 400, art. 3 (stating that the breadth of the territorial sea is “measured from baselines determined in accordance with this Convention”).

10. *See id.* at 400–01, arts. 5, 7 (defining normal and straight baselines).

11. *Id.*

12. *Id.* at 400, art. 3.

waters, archipelagic waters, contiguous zones, EEZs, continental shelves, high seas, and the Area.<sup>13</sup> Internal waters refer to all waterways landward of a State's baseline, including lakes, rivers, harbors, and canals.<sup>14</sup> Archipelagic waters refer to the waters included within archipelagic baselines drawn by a State that is wholly constituted of one or more islands, such as the Philippines.<sup>15</sup> Territorial seas fall within the 12-nm strip from a coastal State's baseline.<sup>16</sup> Coastal States have full sovereignty over both territorial seas and internal waters, as well as the airspace above those waters.<sup>17</sup> Contiguous zones refer to a 24-nm strip measured from the baseline in which a coastal State "may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations omitted within its territory or territorial sea."<sup>18</sup> The next zone is the EEZ, which extends 200-nm from a coastal State's baseline.<sup>19</sup> The particular characteristics of this zone will be discussed in greater detail below. Beyond the 200-nm line lies the high seas.<sup>20</sup>

The provisions for the high seas under UNCLOS codify the customary rule of the freedom-of-the-sea doctrine developed in the

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13. *See id.* at 400–01, 409, 414–15, 418–19, 428, 432, 446, arts. 2, 3, 8, 33, 47, 55, 57, 76, 86, 136 (describing the legal status and treatment of various geographical masses under the treaty).

14. *Id.* at 401, art. 8 ("Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.").

15. *See id.* at 414–15, art. 47 (describing the legal status and treatment of archipelagic baselines under the treaty).

16. *See id.* at 400, art. 3 (declaring the right of every State to establish the breadth of its territorial sea up to 12 nautical miles from baselines).

17. *Id.* at 400, art. 2 (mandating that the "[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters to an adjacent belt of sea, described as the territorial sea" and that this sovereignty extends to the airspace above those waters in order for countries to regulate air vessels as well as water vessels approaching its territory).

18. *Id.* at 409, art. 33.

19. *Id.* at 418–19, arts. 55, 57.

20. *See id.* at 432, art. 86 (establishing that the provisions of the treaty relating to the high seas apply to all parts of the seas that are not included in the exclusive economic zone, territorial sea, internal waters of a State, or archipelagic waters of an archipelagic State).

seventeenth century.<sup>21</sup> Under this doctrine, all seas beyond a narrow belt surrounding a state's coastline (now recognized as the territorial sea) were "free to all and belonging to none."<sup>22</sup> Following this doctrine, UNCLOS provides for an open-sea concept in which all States, both coastal and land-locked, have a right to freedom of navigation, overflight, fishing, and scientific research, as well as freedom to lay submarine cables and pipelines, and to construct artificial islands and installations.<sup>23</sup>

The zones relevant to the Taiwan Strait are territorial seas and the EEZ.<sup>24</sup> Of these two zones, the EEZ is the most controversial zone in the Taiwan Strait.<sup>25</sup>

## B. EXCLUSIVE ECONOMIC ZONES AND THE TAIWAN STRAIT

Introduced during the Third United Nations Conference on the Law of the Sea, EEZs were meant to address the question of the extent of a state's access to resources within its surrounding waters.<sup>26</sup> Early in the convention, Kenya recommended the EEZ address this question.<sup>27</sup> The challenge then became balancing a coastal State's right to resources within the EEZ with a foreign State's rights to freedom of navigation.<sup>28</sup>

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21. See *UNCLOS: A Historical Perspective*, *supra* note 4 (explaining the freedom-of-the-seas doctrine and its codification in the UNCLOS through the articles on innocent passage, right to freedom of navigation, and access to natural resources and research).

22. *Id.*

23. UNCLOS, *supra* note 2, at 432–433, art. 87.

24. See Jill Goldenziel, *China Claims to Own the Taiwan Strait. That's Illegal*, FORBES (June 28, 2022), <https://www.forbes.com/sites/jillgoldenziel/2022/06/28/china-claims-to-own-the-taiwan-strait-thats-illegal/?sh=71eb52669ba2> (explaining that China claimed a 12-nm strip of territorial waters, a contiguous zone, and an Exclusive Economic Zone after signing onto UNCLOS).

25. See *id.* (noting the contention between China and other States on the boundaries and classification of the EEZ in the Taiwan Strait).

26. See Wilson, *supra* note 1, at 423 (arguing that a crucial issue at the Convention was the distribution and right to resources in the world's oceans and that the exclusive economic zone served as an answer to this issue by providing for rights to resources without specifying security or territorial zones within the EEZ).

27. See *id.* at 422 n.7 (explaining Kenya and other developing nations with substantial economic interests in the resources in their adjacent waters supported the EEZ proposal).

28. *Id.* at 423; see also Raul Pedrozo, *Preserving Navigational Rights and*

To solve this problem, UNCLOS purposefully defined EEZs as a 200-nm zone from the coastal country's baseline in which only the coastal State has rights to exploitation and conservation of natural resources, ability to establish and use artificial islands and structures, and draw production of energy from the water, currents, and winds.<sup>29</sup> Article 56 of the UNCLOS establishes that in the exclusive economic zone, the coastal States has: (a) sovereign rights over exploring and exploiting, conserving, and managing natural resources; and, (b) jurisdiction over the establishment and use of artificial islands and structures, marine research, and preservation of the marine environment.<sup>30</sup> Article 56 also requires that the coastal State have "due regard" for the rights and duties of other States.<sup>31</sup> The rest of the sections addressing the EEZs focus on control and conservation of animals, plants, minerals, and other natural resources, making it clear that the EEZ was created to protect the coastal State's right to resources, not the right to police the area.<sup>32</sup> In addition to having the rights to resources within its EEZ, the coastal State also has the duty to respect the rights of other countries, such as the right to freedom of navigation.<sup>33</sup>

China ("PRC") participated in the Convention throughout the entire negotiating and drafting process, and became one of the original signatories in 1982.<sup>34</sup> This treaty was the first multilateral agreement the PRC participated in after its admittance to the United Nations in

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*Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone*, 9 CHINESE J. INT'L L. 9, 9 (2010) [hereinafter *Preserving Navigational Rights and Freedoms*] (arguing that the balance between a state's use of the EEZ for resources versus its use for security has been, and continues to be, a problem among nations).

29. UNCLOS, *supra* note 2, at 418, art. 56.

30. *Id.*

31. *Id.*

32. *See generally id.* at 23–31, arts. 60–70 (establishing the exclusive rights and limits of coastal States in the use of exclusive economic zones).

33. *See id.* at 418–19, arts. 56, 58 (declaring States must have due regard to the rights and duties of coastal States in using exclusive economic zones and vice versa).

34. *See* Zheng Wang, *China and UNCLOS: An Inconvenient History*, THE DIPLOMAT (July 11, 2016), <https://thediplomat.com/2016/07/china-and-unclos-an-inconvenient-history> (reporting China took part in negotiating UNCLOS from 1973 to 1982 and intends to abide by the convention).



1971.<sup>35</sup> During the negotiations, Chinese representatives to the Conference focused on protecting national interests by limiting U.S. and USSR expansion in international waters.<sup>36</sup> With this goal in mind, China agreed to the creation of the EEZ to gain control and sovereign rights over coastal resources.<sup>37</sup>

However, agreeing to the 200-nm EEZ has caused problems for China in recent years.<sup>38</sup> While China officially stands by its agreement to UNCLOS, its political interests often conflict with the treaty.<sup>39</sup> The oceans adjacent to China – the Bohai Sea, the Yellow Sea, the East China Sea, and the SCS – are all bordered by other States leading to an overlapping of EEZs and territorial waters.<sup>40</sup>

### C. CONFLICT IN THE SOUTH CHINA SEA

Since the end of WWII, the SCS has been a contested area for China, Vietnam, the Philippines, Brunei, Malaysia, and Taiwan.<sup>41</sup> The

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35. *Id.* (arguing that this treaty was important to the People's Republic of China as it was one of its first opportunities to advance its international goals); *see also* Shān Xù (山旭), *Zhōngguó cānyù liánhéguó hǎiyáng fǎ gōngyuē tánpàn shǐmò* (中国参与联合国海洋法公约谈判始末) [*China's Participation in the Negotiations of the United Nations Convention on the Law of the Sea*], *ORIENTAL OUTLOOK* (Dec. 10, 2012) (in Chinese) (noting that UNCLOS was the first multi-national treaty that the PRC participated in).

36. *See* Wang, *supra* note 34 (explaining through interviews and memoirs from China's representatives to the UNCLOS that China's position during negotiations was to support third-world countries, prevent the U.S. and the USSR from gaining more power, and to protect national interests).

37. *See* Xù, *supra* note 35 (reporting that Ling Qing, a representative of China at UNCLOS negotiations, stated in his memoirs "that support for 200 nautical miles of maritime rights was associated with counter-hegemony").

38. *See id.* (reporting the concerns of diplomat Ling Qing that the EEZ as codified in UNCLOS presented difficult geographic concerns for China); *see also* Wang, *supra* note 34 (arguing that China's interests have changed due to the geographical limits to China's EEZ created by sovereign islands in the South China Sea).

39. *See* Wang, *supra* note 34 (reporting that, though China claims it intends to uphold UNCLOS, background discussions of withdrawing from the treaty are growing more frequent).

40. *Id.*

41. *See* Eiichi Usuki, *China's Three Distinctive Assertions under the 'Nine-dash-line' Claims and the Annex VII Arbitral Tribunal's Interpretation of Article 121 Regarding an Island and Rocks under the 1982 UN Convention on the Law of*

SCS covers an area of about 3.5 million square kilometers of sea and includes island groups, reefs, shoals, and fisheries.<sup>42</sup> The island groups that are most contested include: the Paracel Islands; the Dongsha, or Prata, Islands; the Zhongsha Islands; and the Nansha, or Spratly, Islands.<sup>43</sup>

At the end of WWII, Taiwan, China, Japan, and Brunei all had different claims to the islands stemming from their colonial backgrounds.<sup>44</sup> With Japan's surrender, several international agreements, including the Cairo Declaration, the Treaty of Peace with Japan, and the Potsdam Declaration, created more confusion and complications with these sovereignty claims. Each treaty established different claims for the Paracel and Spratly islands and leading countries to argue legitimate claims based on multiple conflicting treaties.<sup>45</sup>

Tensions became violent when China engaged South Vietnam in the Battle of the Paracel Islands in 1974.<sup>46</sup> Then, in 1988, China occupied some of the Spratly Islands and took control of Johnson Reef from Vietnam.<sup>47</sup> In 2002, tensions died down when China worked with the Association of Southeast Asian Nations (ASEAN) and agreed to a

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*the Sea*, 21 ASIAN Y.B. INT'L L. 141, 142 (2015) (arguing that the surrender of Japanese Forces to the Allied Powers at the end of WWII left the islands in the SCS open to new occupation).

42. See Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AM. J. INT'L L. 98, 99 (2013) (describing the geography of the South China Sea).

43. See *id.* at 99–100 (noting the proximity of rich fisheries in the SCS is the source of disputes for regional control and influence).

44. See Nguyen Thi Lan Anh, *Origins of the South China Sea Dispute*, in TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: NAVIGATING ROUGH WATERS 15, 18–19 (Jing Huang & Andrew Billo eds., 2015) (arguing prior discoveries and occupations are used unsuccessfully to justify sovereignty over the Paracels and Spratlys).

45. *Id.*

46. See Jeff W. Benson, *South China Sea: A History of Armed Conflict*, USNI NEWS (June 20, 2012), <https://news.usni.org/2012/06/20/south-china-sea-history-armed-conflict> (describing the 1974 conflict in which China's navy killed 36 and injured 110 people).

47. See *id.* (noting “China occupied several islands and reefs resulting in more than 100 deaths and several Vietnam ships being either sunk or damaged beyond repair” during the SCS conflict).

Declaration on the Conduct of Parties in the SCS.<sup>48</sup> The parties agreed to exercise self-restraint in the SCS and to handle disputes through diplomacy rather than warfare.<sup>49</sup> In 2009, tensions arose again when Malaysia and Vietnam submitted an application to the Commission on the Limits of Continental Shelf claiming extended continental shelves.<sup>50</sup> In opposition to this extension, the PRC submitted a map to the UN Secretary General containing the 'nine-dash' line.<sup>51</sup> This line, which encompasses much of the SCS, is used by the PRC to claim all reefs, shoals, and islands and adjacent waters within the line.<sup>52</sup>

Additionally, China claimed that these waters fell within China's territorial waters and that China enjoys sovereign rights and jurisdiction over the waters, the seabed, and the subsoil.<sup>53</sup> The nine-dash line makes a large 'U' shape, starting down the coast of Vietnam, to the coast of Malaysia and Brunei, and back up along the western

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48. See JONES ET AL., *supra* note 3, at 74 (explaining the Declaration of the Conduct of Parties and including text from the agreement).

49. See *id.* (quoting DECLARATION ON THE CONDUCT OF PARTIES IN THE SOUTH CHINA SEA, Nov. 4, 2002 (promulgated by the Association of Southeast Asian Nations)) ("In this declaration, the parties promised 'to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.'").

50. See *id.* (explaining China submitted a controversial map to the UN in response to Malaysia and Vietnam's joint application).

51. The South China Sea Arbitration (Phil. v. China), Case No. 2013–19, Award, 73 n.158 (Perm. Ct. Arb. 2016), <https://docs.pca-cpa.org/2016/07/PH-CN-20160712-Award.pdf> (quoting Ministry of Foreign Affairs, People's Republic of China, FOREIGN MINISTRY SPOKESPERSON HONG LEI'S REMARKS ON VIETNAM'S STATEMENT ON THE CHINESE GOVERNMENT'S POSITION PAPER ON REJECTING THE JURISDICTION OF THE ARBITRAL TRIBUNAL ESTABLISHED AT THE REQUEST OF THE PHILIPPINES FOR THE SOUTH CHINA SEA ARBITRATION (30 October 2015)) (including arguments from the Chinese government that, "[a]s early as 1948, the Chinese government published an official map which displayed 'the dotted line' in the South China Sea. China's sovereignty over the South China Sea and its claims to the relevant rights have been formed over a long course of history. They are solidly grounded in international law and have been consistently upheld by successive Chinese governments.").

52. See *id.* at 72 (noting China's claim of sovereignty in its 2009 *notes verbales* to the U.N. Secretary-General).

53. *Id.*; see also Usuki, *supra* note 41, at 144–45 (noting China's claims of sovereignty over the islands in the SCS to the U.N. Secretary-General).

coast of the Philippines.<sup>54</sup>

#### D. THE SOUTH CHINA SEA ARBITRATION

In 2014, China's interpretation of UNCLOS arose in the *South China Sea Arbitration (Philippines vs. China)* in which the Philippines accused China of (inter alia) violating its EEZ by asserting jurisdiction over the waters within the "nine-dash" line.<sup>55</sup> The Philippines, also a party to the UNCLOS, brought action before an arbitral tribunal arguing (in part) that China's claims of jurisdiction and actions within the SCS violated UNCLOS.<sup>56</sup> The Philippines argued that China's "nine-dash" line was an overreach of maritime claims because it violated the Philippine's EEZ as established by UNCLOS.<sup>57</sup> Additionally, the Philippines accused the CCG of taking illegal action against Filipino ships.<sup>58</sup> These actions included CCG vessels ramming into Philippine fishing boats and seizing Filipino fisherman's catch, blocking passage of Filipino ships from islands in the SCS, and colliding with and sinking Vietnamese fishing vessels.<sup>59</sup>

In response to these arguments by the Philippines, China argued that: (1) the Court did not have jurisdiction over this case since the parties had agreed to settle disputes in the SCS through bilateral negotiations and not legal proceedings; (2) China had full sovereignty over the SCS due to its historic claims and control of the SCS; and, (3) UNCLOS protected China's sovereign rights in the SCS.<sup>60</sup> China put forward these arguments through a position paper to the Court, but stated that they did not believe that the Court's decision would not be legally binding on the PRC.<sup>61</sup>

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54. See *The South China Sea Arbitration*, Case No. 2013–19, at 75, 77 (including the original map of the nine-dash line in the SCS submitted by the PRC to the UN and an updated map); see also JONES ET AL., *supra* note 3, at 74 (including an updated map of the nine-dash line).

55. See Press Release, Permanent Court of Arbitration, *The Tribunal Renders its Award in The South China Sea Arbitration*, 1–2 (July 12, 2016).

56. See *The South China Sea Arbitration*, Case No. 2013–19, at 11.

57. *Id.*

58. *Id.* at 13.

59. Diane A. Desierto, *China's Maritime Law Enforcement Activities in the South China Sea*, 96 INT'L L. STUD. 257, 259–60 (2020).

60. See *The South China Sea Arbitration*, Case No. 2013–19, at 12.

61. *Id.* at 14.

On July 12, 2016, the tribunal issued its decision in favor of the Philippines.<sup>62</sup> The tribunal ruled that China had no legal basis to extend its territorial sea or EEZ beyond what was permitted by UNCLOS.<sup>63</sup> Specifically, the Court concluded that there was no legal basis for China to claim historic rights to resources or jurisdiction beyond what is provided in UNCLOS.<sup>64</sup> It noted that the issue of preserving historic rights to resources was carefully considered during UNCLOS negotiations, but was rejected and specifically left out of the final agreement.<sup>65</sup> As a result, the tribunal ruled that there was no legal basis for China to claim historic rights to resources that extended beyond the rights given by UNCLOS.<sup>66</sup>

Additionally, the tribunal ruled that the features in the SCS did not constitute islands for the purposes of establishing EEZs.<sup>67</sup> The tribunal stated that under sections 13 and 121 of the convention, “features that are above water at high tide generate an entitlement to at least a 12 nautical mile territorial sea, whereas features that are submerged at high tide generate no entitlement to maritime zones.”<sup>68</sup> The Court declared that the Convention “classifies features on the basis of their natural condition.”<sup>69</sup> To determine the natural condition of the features, the Court looked at the historical use of the islands and determined that the Spratly Islands and other features had been traditionally used for fishing, not habitation, and therefore constituted “rocks which cannot sustain human habitation or economic life of their own” and, therefore, “have no exclusive economic zone or continental shelf.”<sup>70</sup>

On the matter of China’s actions against Filipino ships, the Court

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62. See Press Release, *supra* note 55, at 1.

63. *Id.* at 1–2.

64. *Id.*

65. *Id.* at 1; see also *The South China Sea Arbitration*, Case No. 2013–19, at 96–97 (stating that “historic rights” are “nowhere mentioned in the Convention, and the Tribunal sees nothing to suggest that Article 298(1)(a)(i) was intended to also exclude jurisdiction over a broad and unspecified category of possible claims to historic rights falling short of sovereignty”).

66. See *The South China Sea Arbitration*, Case No. 2013–19, at 96–97.

67. See Press Release, *supra* note 55, at 2.

68. *Id.*

69. *Id.*

70. *Id.* (quoting UNCLOS, *supra* note 2, at 442, art. 121).

ruled that China's maritime law enforcement actions, including the CCG's collisions with Filipino and Vietnamese fishing vessels and China's blocking of Filipino ships from islands in the SCS, were all in direct violation of UNCLOS because these actions violated the Philippines's rights to resources within its EEZ.<sup>71</sup>

In this case, China used its own interpretations of UNCLOS to declare jurisdiction over most of the waters included within the "nine-dash" line in the SCS.<sup>72</sup> Though China is a party to UNCLOS, and therefore subject to the compulsory dispute settlement provisions of the Convention, the country refused to submit to the jurisdiction of the tribunal and did not participate in any of its proceedings.<sup>73</sup> Although it is legally bound by the decision, China has refused to comply with the tribunal's award and continues to assert jurisdiction in the SCS.<sup>74</sup>

#### E. DEVELOPMENTS FOLLOWING THE SOUTH CHINA SEA CASE

Since the *South China Sea Arbitration Case*, the PRC has continued to assert jurisdiction and police power in its domestic maritime laws.<sup>75</sup> In April 2021, the National People's Congress revised China's 1983

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71. See *The South China Sea Arbitration*, Case No. 2013–19, at 297.

72. *Id.* at 72–74 (including arguments made by Chinese government officials that multiple islands within the SCS belonged to China and that China therefore had sovereign rights over waters surrounding those islands under UNCLOS).

73. *Id.* at 57 (summarizing China's response to the Tribunal's jurisdiction and noting China's declaration that the Tribunal's decision would have no binding effect on China).

74. See Liu Zhen, *China Insists It Has Sovereign Rights Over Taiwan Strait*, S. CHINA MORNING POST (June 13, 2022), <https://www.scmp.com/news/china/diplomacy/article/3181554/china-insists-it-has-full-sovereign-rights-over-taiwan-strait> (reporting statements from Foreign Ministry spokesman Wang Wenbin that "China enjoys sovereign rights and jurisdiction over the Taiwan Strait, while respecting the legitimate rights of other countries in the relevant maritime areas"); see also Goldenziel, *supra* note 24 (reporting that China continues to advance claims of sovereignty over both the South China Sea and the Taiwan Strait after the decision of the South China Sea Case).

75. See Goldenziel, *supra* note 24 (arguing that "China has enacted a revised Maritime Traffic Safety Law and Coast Guard Law asserting 'jurisdiction' over waters beyond UNCLOS-prescribed boundaries, authorizing its Coast Guard to use force there, and illegally obstructing passage of foreign vessels there."); see also Maritime Traffic Safety Law of the People's Republic of China, *supra* note 6, art. 2; Maritime Police Law of the People's Republic of China, *supra* note 6, art. 3.

MTSL.<sup>76</sup> The law expanded China's maritime jurisdiction from "coastal waters" to "sea areas under the jurisdiction of the People's Republic of China."<sup>77</sup> In addition to expanding jurisdiction, the revised MTSL also requires all foreign vessels entering "sea areas under the jurisdiction of the People's Republic of China" to notify maritime authorities, carry PRC-issued permits, and submit to inspection by the CCG.<sup>78</sup> In addition to expanding police powers through this revision, the National People's Congress passed the MPL, giving the CCG authority to guard key islands and reefs, manage maritime boundaries, stop and eliminate threats to China's national sovereignty, carry out security of maritime objectives on China's continental shelf and in its EEZ, and carry out "maritime security management, investigating and dealing with violations of public security management and entry and exit control at sea. . . ."<sup>79</sup>

Contrary to the requirements of UNCLOS, China has used the MPL and the revised MTSL to exercise unlawful jurisdiction over the Taiwan Strait. The MPL grants the CCG the power to carry out patrols and vigilance in waters under China's jurisdiction, guard key islands and reefs, manage and protect maritime boundaries, and prevent and eliminate acts that endanger national sovereignty, security, and

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76. See generally Maritime Traffic Safety Law of the People's Republic of China, *supra* note 6 (codifying the People's Republic of China's maritime traffic safety laws).

77. *Id.* art. 2 (reflecting a change in language from "coastal waters" to "the sea areas under the jurisdiction of the People's Republic of China"); see also Raul Pedrozo, *China's Revised Maritime Traffic Safety Law*, 97 INT'L L. STUD. 956, 957 (2021) [hereinafter *China's Revised Maritime Traffic Safety Law*] (arguing that this language change allows the PRC "to alter its position on the applicability of the law based on the circumstances at the time").

78. See Maritime Traffic Safety Law of the People's Republic of China, *supra* note 6, arts. 9, 41–43; see also Nguyen Thanh Trung & Le Ngoc Khanh Ngan, *Codifying Waters and Reshaping Orders: China's Strategy for Dominating the South China Sea*, ASIA MAR. TRANSPARENCY INITIATIVE (Sept. 27, 2021), <https://amti.csis.org/codifying-waters-and-reshaping-orders-chinas-strategy-for-dominating-the-south-china-sea> (specifying the requirements of foreign vessels entering Chinese territorial waters); *China's Revised Maritime Traffic Safety Law*, *supra* note 77, at 961 (describing the "construction, design, equipment, or manning requirements on foreign flag vessels engaged in innocent passage").

79. See Maritime Police Law of the People's Republic of China, *supra* note 6, art. 12.

maritime rights and interests.<sup>80</sup> This, in combination with its claim to assert expanded jurisdiction in the EEZ, advances China's unlawful policing activities within the Strait.<sup>81</sup>

### III. ANALYSIS

In applying the MPL and revised MTSL to its EEZ, China has violated the rights and freedoms of EEZs set forth in Articles 56-58 of the UNCLOS. Specifically, China has: (1) violated the freedom of the high seas guaranteed in Articles 56 and 58 by conditioning passage on obtaining permission and permits from the PRC; and (2) violated the purpose of the EEZ as a resource zone by expanding its jurisdiction in the EEZ to non-resource-related activities and using its domestic law to justify policing the Taiwan Strait.<sup>82</sup>

This section will first analyze the basis of high seas freedoms of navigation and overflight and explore how China's law enforcement policies and actions in the Taiwan Strait violate these rights. The Taiwan Strait contains a corridor of international waters and airspace.<sup>83</sup> The freedoms of the high seas, as established under Article 87 of UNCLOS, apply to this corridor of international waters as well as the parts of China's EEZ within the Strait.<sup>84</sup>

Lastly, this section will discuss how Chinese claims of sovereignty over the EEZ allow China to advance legal arguments for police action over foreign vessels that contradict the UNCLOS.

#### A. VIOLATION OF HIGH SEAS FREEDOMS OF NAVIGATION

The freedoms of navigation and overflight exist to keep the world's

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80. *Id.*

81. See Goldenziel, *supra* note 24 (reporting that China's Foreign Ministry spokesperson, Wang Wenbin, stated, "China enjoys sovereign rights and jurisdiction over the Taiwan Strait, while respecting the legitimate rights of other countries in the relevant maritime areas."); see also Zhen, *supra* note 74.

82. See UNCLOS, *supra* note 2, at 418-19, art. 56, 58 (providing for innocent passage without the requirement of prior authorization and establishing EEZs as zones in which the coastal State has sovereign rights to resources and limited jurisdiction).

83. See Goldenziel, *supra* note 24 (defining the seas within the Taiwan Strait).

84. See UNCLOS, *supra* note 2, at 419, 432-33, arts. 58, 86-87 (applying the freedoms referred to in Article 87 to EEZs and all international waters).



ocean open and fair for all and has long been an established rule of customary international law.<sup>85</sup> Article 87 of UNCLOS guarantees that the “high seas are open to all States, whether coastal or land-locked,” by providing for freedom of navigation, overflight, laying of submarine cables, construction of artificial islands, fishing, and scientific research.<sup>86</sup> The only constraint placed on navigation for the high seas is that the high seas must be “reserved for peaceful purposes.”<sup>87</sup> States are required to “refrain from any threat or use of force against the territorial integrity or political independence of any State.”<sup>88</sup>

Due to this language, the “determination of whether an activity is ‘peaceful’ is made under Article 2(4) of the UN Charter, and the ‘peaceful purposes’ provisions must be read in conjunction with the general body of international law, including the inherent right [of] self-defense reflected in Article 51 of the UN Charter.”<sup>89</sup> Therefore, peaceful purposes do not exclude all military activities.<sup>90</sup>

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85. See *UNCLOS: A Historical Perspective*, *supra* note 4 (stating that under the freedom-of-the-seas doctrine, all seas beyond a narrow belt surrounding a state’s coastline (now recognized as the territorial sea) were “free to all and belonging to none”); see also Raul Pedrozo, *China’s Legacy Maritime Claims*, *LAWFARE* (July 15, 2016), <https://www.lawfaremedia.org/article/chinas-legacy-maritime-claims> [hereinafter *China’s Legacy Maritime Claims*] (arguing that “UNCLOS Articles 55, 56, 58, and 86 accommodate the various competing interests of coastal and user states in the EEZ, maximizing coastal state control over natural resources without diminishing freedom of navigation and other internationally lawful uses of the sea”).

86. UNCLOS, *supra* note 2, at 432–33, art. 87.

87. *Id.* at 433, art. 88.

88. *Id.* at 516, art. 301.

89. Raul Pedrozo, *Maintaining Freedom of Navigation and Overflight in the Exclusive Economic Zone and on the High Seas*, 17 *INDONES. J. INT’L L.* 477, 490 (2020) [hereinafter *Maintaining Freedom of Navigation and Overflight in the Exclusive Economic Zone and on the High Seas*].

90. *Id.* at 491 (quoting III UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, 88–89 (Satya N. Nandan and Shabtai Rosenne eds., 1995)) (arguing that “[t]o accept that all military activities are, but their nature, inconsistent with the ‘peaceful purposes’ provisions would be contrary to the decisions of the UN Security Council, which indicate that ‘military activities consistent with the principles of international law embodied in [Article 2(4) and Article 51 of] the Charter of the United Nations . . . are not prohibited by the Convention on the Law of the Sea.’); see also Horace B. Robertson, Jr., *Navigation in the Exclusive Economic Zone*, 24 *VA. J. INT’L L.* 865, 886 (1984) (“There is no

Under Article 58 of UNCLOS, all States enjoy the rights listed in Article 87 (above) and “other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircrafts and submarine cables and pipelines” within an EEZ.<sup>91</sup> Internationally lawful uses include are limited to activities regularly conducted on the sea, such as intelligence, military operations, and scientific research.<sup>92</sup>

Additionally, these activities “may be undertaken without coastal State notice or consent. . . .”<sup>93</sup> The right to conduct military exercises is subject only to the obligation “to have due regard for the rights of other States exercising their freedom of the high seas.”<sup>94</sup>

In direct violation of these rules, China has created domestic legal authority for impairing freedoms of navigation and overflight.<sup>95</sup> In 2021, China revised its MTSL to require all foreign vessels that China deems as “possibly unsafe,” to give notice to the PRC before entering

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question that such high seas freedoms include the right to conduct military maneuvers and exercises, subject only to the obligation to have due regard for the rights of other States exercising their freedom of the high seas.”).

91. See UNCLOS, *supra* note 2, at 419, art. 58 (establishing that in “the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms . . . “).

92. *Maintaining Freedom of Navigation and Overflight in the Exclusive Economic Zone and on the High Seas*, *supra* note 89, at 479–80 (defining “internationally lawful uses” as: “[I]ntelligence, surveillance and reconnaissance (ISR) operations; military marine data collection and naval oceanographic surveys; war games and military exercises; bunkering and underway replenishment; testing and use of weapons; aircraft carrier flight operations and submarine operations; acoustic sonar operations; naval control and protection of shipping; establishment and maintenance of military-related artificial installations; ballistic missile defense operations and ballistic missile test support; maritime interdiction operations (e.g., visit, board, search and seizure); conventional and ballistic missile testing; belligerent rights in naval warfare (e.g., right of visit and search); strategic arms control verification; maritime security operations (e.g., counter-terrorism and counter-proliferation); and sea control.”).

93. *Id.*

94. See Robertson, *supra* note 90, at 886.

95. See Maritime Traffic Safety Law of the People’s Republic of China, *supra* note 6, arts. 54–55.

China's territorial sea and EEZ.<sup>96</sup> Unlike the requirements set forward in this revised law, UNCLOS does not make the exercise of freedom of navigation conditional upon the notification of a coastal state.<sup>97</sup> This is because notification requirements give the coastal state a way to control who enters and exits open seas rather than allowing for free navigation.<sup>98</sup>

In further violation of the principle of freedom of navigation, China has acted under the MTSL and MPL to physically impede the free movement of foreign vessels.<sup>99</sup> Through the MPL, China declared that the CCG "has the right to order foreign vessels that illegally enter China's territorial waters and the waters within them to leave immediately, or to take measures such as detention, compulsory expulsion or forced towing."<sup>100</sup> Additionally, the coast guard has the right to intercept, board, and inspect ships, surveil and stop foreign military or government vessels, and pursue and intercept any vessels that refuse to stop.<sup>101</sup>

In April of 2023, China's Fujian Maritime Safety Administration acted on this law by announcing on WeChat, a popular Chinese

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96. *See id.* ("No vessels of foreign nationality may enter the internal waters of the People's Republic of China unless they have obtained permission to enter the port in accordance with the provisions of this Law."); *see also* Kayleigh Madjar, *New Chinese Maritime Law Could be 'Time Bomb'*, TAIPEI TIMES (Aug. 31, 2021), <https://www.taipeitimes.com/News/front/archives/2021/08/31/2003763523> (reporting that the Chinese Maritime Safety Administration released a statement saying the new notification requirement would apply to any foreign vessel deemed to "endanger the maritime safety of China").

97. *Compare* Maritime Traffic Safety Law of the People's Republic of China, *supra* note 6, art. 2 (including language giving CCG power to regulate entry into Taiwan Strait through requirements of notification and permits), *with* UNCLOS, *supra* note 2, at 404–05, arts. 17, 19 (excluding language giving coastal states police power over a foreign vessel's innocent movement through any ocean zone).

98. *See China's Revised Maritime Traffic Safety Law*, *supra* note 77, at 958–59 (explaining that requirements that have the practical effect of denying or impairing the right of free passage go against the UNCLOS).

99. *See* Maritime Police Law of the People's Republic of China, *supra* note 6, arts. 17–18.

100. *Id.* art. 17.

101. *See id.* art. 18 ("Coast Guard bodies carrying out maritime security and protection tasks may lawfully board and inspect ships navigating, berthing, or operating in waters under the jurisdiction of our country.").

messaging service, that it was launching a three-day special joint patrol and inspection operation in the central and northern parts of the Taiwan Strait.<sup>102</sup> Part of this operation included “on-site inspections” on cargo ships and construction vessels “to ensure the safety of vessel navigation and ensure the safe and orderly operation of key projects on water.”<sup>103</sup> These actions taken in accordance with China’s MPL and revised MTSL violate the right of innocent passage by creating legal authority for the CCG to impede freedom of navigation.

When the regulations put forth in the MPL and the MTSL are enforced, they have the practical effect of impairing or completely denying a foreign vessel’s rights of freedom of navigation. As such, these laws, and the actions taken under them, are in direct violation of Articles 58 and 87 of UNCLOS.<sup>104</sup>

## B. VIOLATION IN POLICING THE EEZ

When UNCLOS created the EEZ it ensured that coastal States would have sovereign rights over resources, but not sovereignty over its waters.<sup>105</sup> As expressed by some of the representatives at the Convention, this distinction was critical in maintaining freedom of navigation for all.<sup>106</sup> Delegates feared that if coastal States were to have control over entry and exit to EEZs, it “could effectively terminate world maritime commerce, especially if the coastal [S]tates

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102. See Liz Lee & Ben Blanchard, *China to Inspect Ships in Taiwan Strait, Taiwan Says Won’t Cooperate*, REUTERS (Apr. 5, 2023), <https://www.reuters.com/world/asia-pacific/china-inspect-ships-taiwan-strait-taiwan-says-wont-cooperate-2023-04-06> (stating that China’s three-day maritime operation includes moves to board ships in the central and northern parts of the Strait).

103. *Id.* (quoting China’s Fujian Maritime Safety Administration on WeChat).

104. See generally UNCLOS, *supra* note 2 at 419, 432–33 art. 58, 87 (noting Article 58 affirms that all states enjoy the freedoms of navigation and overflight and other internationally lawful uses of the seas related to these freedoms; Article 87 provides a non-exhaustive list of freedoms, including freedom of navigation and overflight, available to States).

105. See Wilson, *supra* note 1, at 423 (“The EEZ limited a coastal state to sovereign rights (not territorial sovereignty, which exists on land and in the territorial sea) for the limited purposes of exploitation and conservation of both living and non-living resources, thus representing a resource and fishing, but not security, zone.”).

106. See *id.* at 431 (stating that the delegates intentionally selected coastal states’ “sovereign rights over natural resource” instead of a broader “sovereignty and exclusive jurisdiction” in the EEZ).

of the world enforced widely different sets of rules. . . .”<sup>107</sup> As a result, the Convention purposely refused to include language giving coastal States sovereignty over the EEZ.<sup>108</sup> In the EEZ,

“the coastal State has: (a) sovereign rights or the purpose of exploring and exploiting, conserving and managing natural resources [] of the waters superjacent to the seabed and of the seabed [itself] and the subsoil . . . ; (b) jurisdiction [] with regard to: (i) the establishment and use of artificial islands, installations, and structures; (ii) marine scientific research; [and,] (iii) the protection and preservation of the marine environment.”<sup>109</sup>

UNCLOS does not grant coastal States the right to prohibit or limit freedom of navigation or overflight in the EEZ.<sup>110</sup> One of the greatest challenges to the EEZ regime is delimiting them in disputed areas.<sup>111</sup>

The most significant international judicial decision on the legal characteristics of EEZs in disputed areas is the *South China Sea Arbitration*.<sup>112</sup> There are four major holdings that are relevant to the EEZ: (1) whether China’s rights and entitlements in the SCS are based on historic rights or the Convention; (2) whether China has entitlements to maritime zones (territorial seas and EEZs) around Scarborough Shoal and the Spratly Islands; (3) whether China’s actions in the SCS, including CCG efforts to block Filipino fishing boats and Chinese efforts to block Philippine’s creation of man-made

107. *Id.* (quoting ROBERT L. FRIEDHEIM, *NEGOTIATING THE NEW OCEAN REGIME* 193 (1993)).

108. *Id.* (citing to representatives from the United States and the Soviet Union who affirmed that the term “sovereign rights” was purposely used to give the coastal states rights to resources and not jurisdiction over EEZs).

109. UNCLOS, *supra* note 2, at 418, art. 56.

110. *See* Wilson, *supra* note 1, at 423 (stating that the EEZ limits a coastal state to sovereignty rights, not territorial sovereignty, for the limited purposes of exploitation and conservation of resources such as fishing); *see also* JONES ET AL., *supra* note 3, at 13 (clarifying that unless very limited exceptions apply, coastal states do not have the right to prohibit freedom of navigation or overflight in the EEZ).

111. *See* Lawrence Juda, *The Exclusive Economic Zone: Compatibility of National Claims and the UN Convention on the Law of the Sea*, 16 *OCEAN DEV. & INT’L L.* 1, 8–11 (1986) (describing the conflicts among countries in defining EEZs).

112. *See* Press Release, *supra* note 55, at 1 (“[The South China Sea] arbitration concerned the role of historic rights and the source of maritime entitlements in the South China Sea”).

maritime installations, were lawful; and (4) whether China aggravated and extended the disputes between the Parties during the arbitration by blocking Philippine's access to Second Thomas Shoal and engaging in large-scale construction of artificial islands and land reclamation at various features in the Spratly islands.<sup>113</sup>

### 1. *The First Issue: Legitimacy of Historic Claims*

On the first issue, the tribunal concluded that there was no legal basis for China to claim historic rights to resources or jurisdiction beyond what is recognized in UNCLOS.<sup>114</sup> The tribunal noted that the issue of preserving historic claims and rights to resources was carefully considered during UNCLOS negotiations but was rejected and specifically left out of the final agreement.<sup>115</sup> Additionally, the Tribunal concluded that “there was no evidence that China had historically exercised exclusive control over the waters of the [SCS],” and any historic actions taken by China in the SCS were examples of the country's use of high seas freedoms and not historic rights.<sup>116</sup> As a result, the Court ruled that there was no legal basis for China to claim historic rights to resources based on the “nine-dash” line that extended beyond the right given by UNCLOS.<sup>117</sup>

### 2. *Second Issue: EEZs and Man-Made Islands*

On the second issue, the tribunal held that the test for whether a man-made feature is entitled to a territorial sea depends on the feature's sea level at high tide: if the feature rises above sea level at high tide, it is entitled to a territorial sea; if it is below sea level at high

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113. *Id.*

114. *See id.* at 1–2 (finding that China's historic rights to the waters of the South China Sea were incompatible with the exclusive zones provided for in the Convention).

115. *Id.* at 1; *see also* The South China Sea Arbitration, Case No. 2013–19, at 96–97 (stating that “historic rights” are “nowhere mentioned in the Convention, and the Tribunal sees nothing to suggest that Article 298(1)(a)(i) was intended to also exclude jurisdiction over a broad and unspecified category of possible claims to historic rights falling short of sovereignty.”).

116. *See* Press Release, *supra* note 55, at 9 (concluding that there was no legal basis for China to claim historic rights to resources).

117. *Id.*

tide, it is not entitled to a territorial sea.<sup>118</sup> Additionally, the tribunal declared that the Convention “classifies features on the basis of their natural condition.”<sup>119</sup> Many of the disputed reefs in the SCS had been heavily modified with construction and land reclamation and cannot be considered natural features above high tide.<sup>120</sup> The high-tide features include the Scarborough Shoal, the Johnson Reef, the Cuarteron Reef, and the Fiery Cross Reef.<sup>121</sup> However, while these high-tide installments could claim a territorial waters zone, they could not claim an EEZ.<sup>122</sup> The tribunal ruled that the features in the SCS did not constitute islands for the purposes of establishing EEZs, but rather constituted rocks that could only claim a territorial sea.<sup>123</sup>

### 3. *Third Issue: China’s Actions against Filipino Vessels*

On the third issue, the tribunal ruled that China’s maritime law enforcement actions, including the CCG’s collisions with Filipino and Vietnamese fishing vessels and China’s blocking of Filipino ships from features in the SCS were all in direct violation of UNCLOS because these actions violated the Philippines’s rights to resources within its EEZ.<sup>124</sup> Because the reefs and shoals discussed in the issue above were not capable of claiming their own EEZs, China could not claim any EEZs around those features that would overlap with the

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118. *See id.* (stating on July 12, 2016, the Tribunal considered what China could potentially claim pursuant to the Convention).

119. *Id.*

120. *See id.* (stating that the Tribunal relied on an expert hydrographer, the Philippines’ technical evidence, archival materials, and historical hydrographic surveys in evaluating the features).

121. *Id.*

122. *See id.* at 9–10 (stating that under Article 121 of the Convention, islands generate an entitlement to an exclusive economic zone of 200 nautical miles and to a continental shelf, but “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf”).

123. *See id.* (finding that the Tribunal concluded that all of the high-tide features in the Spratly Islands are legally “rocks” that do not generate an exclusive economic zone or continental shelf).

124. *See* Desierto, *supra* note 59, at 260 (stating that the arbitral tribunal declared that China’s maritime law enforcement actions breached China’s international legal obligations under UNCLOS, the Convention on the International Regulations for Preventing Collisions at Sea, and general international law).

Philippine's EEZ.<sup>125</sup> Therefore, China has no rights to resources in those areas while the Philippines has sovereign rights.<sup>126</sup> The Tribunal found that:

China had (a) interfered with Philippine petroleum exploration at Reed Bank, (b) purported to prohibit fishing by Philippine vessels within the Philippines exclusive economic zone, (c) sea protected and failed to prevent Chinese fishermen from fishing then the Philippines exclusive economic zone at mischief reef and second Thomas Shoal, and (d) constructed installations and artificial islands at mischief reef without the authorization of the Philippines. The tribunal therefore concluded that China had violated the Philippine's sovereign rights with respect to its exclusive economic zone and continental shelf.

By preventing the Philippines from accessing the fishing resources and oil reserves in those areas, China prevented the Philippines from enjoying its exclusive rights to the resources in the EEZ and thus violated UNCLOS.<sup>127</sup> In the SCS Arbitration, China prevented the Philippines from accessing resources. Similarly, in the Taiwan Strait, China is preventing foreign vessels' exercise of free navigation.<sup>128</sup> This right to free navigation under UNCLOS is equally established as a coastal State's sovereign rights over the resources in its EEZ.<sup>129</sup>

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125. See Press Release, *supra* note 55, at 10 (finding that Mischief Reef, Second Thomas Shoal, and Reed Banks are part of the Philippines' EEZ).

126. *Id.*

127. *Id.* (stating that the "Tribunal found as a matter of fact that China had (a) interfered with Philippine petroleum exploration at Reed Bank, (b) purported to prohibit fishing by Philippine vessels within the Philippines exclusive economic zone, (c) sea protected and failed to prevent Chinese fishermen from fishing then the Philippines exclusive economic zone at mischief reef and second Thomas Shoal, and (d) constructed installations and artificial islands at mischief reef without the authorization of the Philippines. The tribunal therefore concluded that China had violated the Philippine's sovereign rights with respect to its exclusive economic zone and continental shelf").

128. See *China's Revised Maritime Traffic Safety Law*, *supra* note 77, at 958–59 (explaining that requirements that have the practical effect of denying or impairing the right of free passage go against the UNCLOS).

129. See *id.* (stating that coastal states may not impose requirements on foreign ships that have the practical effect of denying or impairing the right of innocent passage except as provided for in UNCLOS).



#### 4. *Fourth Issue: Aggravating the Dispute*

On the fourth issue, the tribunal found that China had aggravated and extended the dispute by “(a) buil[ding] in large artificial island on mischief reef, a low tide elevation located in the exclusive economic zone of the Philippines; (b) caus[ing] permanent, irreparable harm to the coral reef ecosystem; and, (c) permanently destroy[ing] evidence of the natural condition of the features in question.”<sup>130</sup>

The PRC has repeatedly subverted the anti-sovereign nature of the EEZ by claiming sovereign jurisdiction and attempting to assert such jurisdiction through policing efforts.<sup>131</sup> In June of 2022, the PRC’s Foreign Ministry spokesperson, Wang Wenbin, claimed that the Taiwan Strait fell within China’s territorial sea and EEZ and that China therefore “enjoys sovereign rights and jurisdiction over the Taiwan Strait. . . .”<sup>132</sup>

Based on its position regarding coastal State authority in the EEZ, the PRC passed the MPL to give the CCG power to perform the “[c]arrying out of patrols and vigilance in waters under China’s jurisdiction, guarding key islands and reefs, managing and protecting maritime boundaries, and preventing, stopping and eliminating acts that endanger national sovereignty, security, and maritime rights and interests.”<sup>133</sup> While this language might appear to comply with UNCLOS’s provisions allowing coastal States to set regulations for safety, the vagueness of the language allows China to assert police actions taken in the EEZ.<sup>134</sup> By using its MPL and revised MTSL to

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130. See Press Release, *supra* note 55, at 11 (asserting that there are specific duties on parties engaged in a dispute settlement procedure).

131. See Lee & Blanchard, *supra* note 102 (reporting China’s three-day joint patrol and inspection operation conducted in the Taiwan Strait).

132. See Zhen, *supra* note 74 (reporting statements from Foreign Ministry spokesman Wang Wenbin that “China enjoys sovereign rights and jurisdiction over the Taiwan Strait, while respecting the legitimate rights of other countries in the relevant maritime areas”).

133. Maritime Police Law of the People’s Republic of China, *supra* note 6, art. 12.

134. See *China’s Revised Maritime Traffic Safety Law*, *supra* note 77, at 957 (arguing that the phrase “sea areas under the jurisdiction of the People’s Republic of China” is “purposely vague” and enacting such “ambiguous and imprecise laws allows China to alter its position on the applicability of the law based on the circumstances at the time”); see also Trung & Ngan, *supra* note 78 (arguing that this

expand its jurisdiction and engage in police surveillance over foreign ships, China has violated UNCLOS.<sup>135</sup>

First, China has effectively restricted foreign vessels' exercise of free navigation by (1) requiring those vessels to notify Chinese authorities of entry into whatever waters China deems it has control over, and (2) by authorizing the CCG to physically inhibit a vessel's navigational rights by stopping the vessel, boarding it for inspection, and possibly requiring it to leave "Chinese waters" when the CCG sees fit.<sup>136</sup> This directly contradicts the high seas freedom of navigation as provided for in Articles 58, 86, and 87 of UNCLOS.<sup>137</sup>

In a recent altercation in the Taiwan Strait, a Chinese warship came within 140 meters of a U.S. guided-missile destroyer and a Canadian frigate.<sup>138</sup> After this close encounter, Chinese Defense Minister Gen. Li Shangfu declared that China "must prevent attempts to use [] freedom of navigation [] to exercise hegemony of navigation."<sup>139</sup> By

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domestic legislation creates opportunities for China to advance territorial goals through coercive means).

135. See generally Maritime Traffic Safety Law of the People's Republic of China, *supra* note 6 (Some of the provisions within Article 9, Article 33, Article 37, Article 41, Article 42, and Article 43 violate UNCLOS); see also Trung & Ngan, *supra* note 78 (requiring all foreign vessels entering Chinese territorial waters to notify maritime authorities, carry required permits, and submit to Chinese command and supervision violate the UNCLOS); *China's Revised Maritime Traffic Safety Law*, *supra* note 77, at 961 (imposing construction, design, equipment, or manning requirements on foreign flag vessels engaged in innocent passage, as required by the MTSL, violate international law).

136. See Maritime Traffic Safety Law of the People's Republic of China, *supra* note 6, arts. 54–55 (mandating that foreign vessels are required to seek prior authorization from the PRC before entering the "waters under China's control"); see also Maritime Police Law of the People's Republic of China, *supra* note 6, art. 12 (giving the CCG the authority to intercept, board, and inspect ships).

137. See generally UNCLOS, *supra* note 2, at 404, 406–407, 418, arts. 17, 19, 24, 56 (excluding language giving coastal states police power over a foreign vessel's innocent movement through any ocean zone).

138. See David Rising, *China Defends its Actions in Warship Incident Involving U.S., Canada in Taiwan Strait*, PBS (June 4, 2023), <https://www.pbs.org/newshour/world/china-defends-its-actions-in-warship-incident-involving-u-s-canada-in-taiwan-strait> (reporting China's defense minister defended sailing a warship in the Taiwan strait, claiming that the "freedom of navigation" patrols are a provocation to China).

139. *Id.* (quoting Defense Minister Gen. Li Shangfu's statements at the Shangri-

declaring the right to take action over such an event that took place within the EEZ corridor of the Taiwan Strait, Shangfu asserted that China had the right to police two foreign ships that were navigating through the EEZ.<sup>140</sup> This declaration of control, as well as blocking the path of two foreign vessels, directly contradicts UNCLOS.<sup>141</sup> Similar to China's actions in the SCS, its actions in the Taiwan Strait violate the provisions of UNCLOS.<sup>142</sup>

As asserted above, the purpose of the EEZ is to give the coastal state the right to resources, not the right to inhibit foreign vessels or establish non-resource-related police power over foreign vessels.<sup>143</sup> By taking these actions, China is overextending the powers given to it by UNCLOS concerning its EEZ.<sup>144</sup>

#### IV. RECOMMENDATIONS

UNCLOS is an important legal regime that protects all States' rights of free navigation and provides for a safe and efficient use of the world's oceans.<sup>145</sup> To protect this regime, States cannot be allowed to

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La Dialogue).

140. *See id.* (stating that the defense minister declared that China has the right to police the "American destroyer" and the "Canadian frigate" to prevent foreign hegemony of navigation).

141. UNCLOS, *supra* note 2, at 406, art. 24 (declaring that a coastal State "shall not hamper the innocent passage of foreign ships through the territorial sea" or "impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage").

142. *See China's Revised Maritime Traffic Safety Law, supra* note 77, at 958–59 (explaining that requirements that have the practical effect of denying or impairing the right of free passage go against the UNCLOS).

143. *See* UNCLOS, *supra* note 2, at 418, art. 56 (establishing EEZs as zones in which the coastal State has sovereign rights to resources and limited jurisdiction); *see also* Wilson, *supra* note 1, at 423 (stating, "The EEZ limited a coastal state to sovereign rights (not territorial sovereignty, which exists on land and in the territorial sea) for the limited purposes of exploitation and conservation of both living and non-living resources, thus representing a resource and fishing, but not security, zone").

144. *See* Trung & Ngan, *supra* note 78 (noting that China's passage of a new law in February 2021—which authorizes the China Coast Guard (CCG) to use force on foreign vessels infringing on Chinese sovereignty—violates UNCLOS).

145. *See China's Revised Maritime Traffic Safety Law, supra* note 77, at 957 (noting that China's recent maritime laws have demonstrated its efforts to disrupt the international legal order that ensures safe and efficient use of the world's oceans for all nations without undue interference).

extend their legal powers beyond the scope of UNCLOS.<sup>146</sup>

To maintain the force and validity of UNCLOS, States should reinforce the current UNCLOS regime by continuing to exercise high seas freedom of navigation through the Taiwan Strait and to peacefully refuse to submit to unlawful acts of police power by China's Coast Guard.<sup>147</sup> Any vessel traveling through the Taiwan Strait should exercise high seas freedoms in compliance with UNCLOS and should not submit to China's pilotage or notification requirements.<sup>148</sup> States that currently practice regular passage through the Taiwan Strait to demonstrate peaceful navigation of the seas should continue to do so publicly.<sup>149</sup>

Additionally, the International Tribunal of the Law of the Sea should issue an advisory opinion solidifying the EEZ as a sovereign resource zone only. To do this, the Tribunal must distinguish between sovereign resource rights and territorial sovereignty. This decision would make it clear to all States that actions taken in the EEZ must relate to a State's resource rights and not any national security concerns.

## V. CONCLUSION

Since its enactment, UNCLOS has held the freedom-of-the-seas doctrine as a key tenant in the rights of all States. In pursuit of preserving this doctrine, UNCLOS provides for high seas freedoms of navigation and overflight through the EEZ and limits coastal State jurisdiction in the EEZ. Under Article 58 of UNCLOS, every State has the right to exercise high seas freedoms through another State's EEZ

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146. *Id.*

147. *See* UNCLOS, *supra* note 2, at 22–23, art. 56, 58 (noting that Article 56 specifies the rights, jurisdiction, and duties of coastal states in the EEZ; Article 58 specifies the rights, jurisdiction, and duties of other [non-coastal] states in the EEZ).

148. *Id.*; *see also* *China's Revised Maritime Traffic Safety Law*, *supra* note 77, at 959–60 (noting that currently Article 30 of the MTSL include highly problematic mandatory pilotage requirements on (1) foreign-flag vessels; (2) nuclear-powered ships, ships carrying radioactive materials, and ultra-large oil tankers; (3) bulk liquefied gas ships and bulk dangerous chemical ships that may endanger port safety; and (4) vessels whose length, width, and height are close to the limits of the corresponding navigable channel conditions).

149. UNCLOS, *supra* note 2, at 418–19, art. 56, 58.

and on the high seas.

In the past, China has tried to extend its sovereignty beyond its territorial sea. It has also tried to claim an EEZ around natural features that do not qualify under UNCLOS. In addressing these issues, an arbitral tribunal ruled that China could not lay claims to the SCS beyond what was established by UNCLOS. Similarly, China cannot lay claims to the EEZ corridor of the Taiwan Strait beyond what is provided by UNCLOS and cannot engage in activities or assert jurisdiction in the Taiwan Strait in ways that practically prevent foreign ships from exercising high seas freedoms.

By using its MPL and revised MTSL to expand its jurisdiction and engage in police surveillance over foreign ships, China has violated UNCLOS. First, China has effectively restricted foreign vessels' practice of free navigation by (1) requiring those vessels to notify Chinese authorities of entry into whatever waters China deems it has control over, and (2) by authorizing the CCG to physically inhibit vessels from transiting its EEZ by stopping the vessel, boarding it for inspection, and possibly requiring it to leave "Chinese waters" when the CCG sees fit. This directly contradicts high seas freedoms of navigation as provided for in articles 58, 86, and 87 of UNCLOS.