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China's Maritime Law Enforcement Activities in the South China Sea

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I. SITUATION

China, one of the territorial and maritime claimants of the South China Sea, declared in April 2020 that it had created two new administrative districts in the South China Sea:

Xisha district, covering the Paracel Islands and Macclesfield Bank, and Nansha district covering the Spartyly [sic] Islands The new administrative districts are to be under the authority of the local government in Sansha, a city located on Woody Island which is administratively part of Hainan province. The Xisha district will be based in Sansha while the Nansha district will operate from Fiery Cross Reef in the Spratlys.¹

Sansha City was “established on July 24, 2012 to administer the Xisha, Zhongsha, and Nansha Islands and their surrounding waters in the South China Sea.”² Sansha City administers nearly two million square kilometers, but this area currently includes only around 20 square kilometers of land.³ As part of this process, China also named over eighty islands and other geographical features in the South China Sea, with the Chinese Foreign Ministry quoted as saying that the Spratly Islands and Paracel Islands are “innate territories.”⁴

As part of its administration of the area, China gives its Coast Guard responsibility “for a wide range of missions under the umbrella of maritime rights protection, including enforcement of China’s sovereignty claims, surveillance, protection of fisheries’ resources, anti-smuggling, and general law enforcement.”⁵ Between 2010 and the time of this writing, approximately

1. Huong Le Thu, *Fishing While the Water is Muddy: China’s Newly Announced Administrative Districts in the South China Sea*, ASIA MARITIME TRANSPARENCY INITIATIVE (May 6, 2020), <https://amti.csis.org/fishing-while-the-water-is-muddy-chinas-newly-announced-administrative-districts-in-the-south-china-sea/>.

2. Wang Xinjuan, *China’s Sansha City Establishes Xisha, Nansha Districts in Major Administrative Move*, MINISTRY OF NATIONAL DEFENSE OF THE PEOPLE’S REPUBLIC OF CHINA (Apr. 18, 2020), http://eng.mod.gov.cn/news/2020-04/18/content_4863772.htm.

3. *Id.*

4. *Beijing Names Islands in Disputed South China Sea*, BARRON’S (Apr. 21, 2020), <https://www.barrons.com/news/beijing-names-islands-in-disputed-south-china-sea-01587466205>.

5. OFFICE OF THE SECRETARY OF DEFENSE, U.S. DEPARTMENT OF DEFENSE, ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE’S REPUBLIC OF CHINA 53 (2019); see also Andrew S. Erickson, Joshua Hickey &

seventy major incidents occurred in the South China Sea, with “at least one Chinese maritime law enforcement vessel . . . involved in 73 percent of incidents.”⁶ The incidents involving non-gray hulled Chinese ships include the following:

1. China Coast Guard conducted “regular patrols” into Indonesia’s exclusive economic zone off the coast of the northern islands of Natuna;⁷
2. The flanking of Malaysian state oil company Petronas’ oil exploration vessel by Chinese vessels, including those from the Coast Guard;⁸
3. China Coast Guard vessels rammed Philippine fishing boats⁹ and frequently seized Filipino fishermen’s catch¹⁰ off Scarborough Shoal;
4. China Coast Guard vessels blocked the passage of three Philippine civilian vessels on a resupply mission to Second Thomas (Ayungin) Shoal;¹¹
5. China’s maritime militia and Coast Guard intermittently swarmed Philippine-occupied Thitu (Pag-asa) Island;¹² and
6. The collision with and sinking of a Vietnam fishing vessel by a Chinese patrol vessel in the vicinity of the Paracel Islands, reportedly due to the

Henry Holst, *Surgin Second Sea Force: China’s Maritime Law Enforcement Forces, Capabilities, and Future in the Gray Zone and Beyond*, 72 NAVAL WAR COLLEGE REVIEW, Spring 2019, at 11.

6. *Are Maritime Law Enforcement Forces Destabilizing Asia?*, CHINAPOWER (Aug. 18, 2016), <https://chinapower.csis.org/maritime-forces-destabilizing-asia/> (last updated Apr. 3, 2020).

7. *Indonesia Protests to China over Border Intrusion Near South China Sea*, REUTERS, Dec. 30, 2019, <https://www.reuters.com/article/us-indonesia-china-southchinasea/indonesia-protests-to-china-over-border-intrusion-near-south-china-sea-idUSKBN1YY0ZW>.

8. A. Ananthakshmi & Rozanna Latiff, *Chinese and Malaysian Ships in South China Sea Standoff: Sources*, REUTERS, Apr. 17, 2020, <https://www.reuters.com/article/us-malaysia-china-southchinasea/chinese-and-malaysian-ships-in-south-china-sea-standoff-sources-idUSKBN21Z1TN>.

9. *Philippines Says Chinese Ship Rammed Fishing Boats in Scarborough Shoal*, REUTERS, Feb. 4, 2015, <https://www.reuters.com/article/us-philippines-china/philippines-says-chinese-ship-rammed-fishing-boats-in-scarborough-shoal-idUSKBN0L81IM20150204>.

10. Carmela Fonbuena, *Video Captures China Coast Guard Taking PH Fishermen’s Catch*, RAPPLER (June 7, 2018), <https://www.rappler.com/nation/204383-china-coast-guard-taking-filipino-fishermen-catch-scarborough-shoal-video>.

11. Frances Mangosing, *DND: China Coast Guard Blocked PH Vessels in Ayungin Shoal*, INQUIRER (Sept. 19, 2019), <https://globalnation.inquirer.net/180004/dnd-china-coast-guard-blocked-ph-vessels-in-ayungin-shoal>.

12. *Defense Chief Confirms ‘Intermittent’ Presence of Chinese Ships Near Pag-Asa Island*, CNN PHILIPPINES (Feb. 20, 2020), <https://cnnphilippines.com/news/2020/2/20/Delfin-Lorenzana-Chinese-ships-Pag-asa-Island.html>.

fishing vessel's "illegal entry" and refusal to leave after being ordered to do so by China's Coast Guard.¹³

China announced in 2011 that "actions taken by China's competent authorities are regular maritime law enforcement and surveillance activities in the waters under the jurisdiction of China."¹⁴ However, on July 12, 2016, the Annex VII U.N. Convention on the Law of the Sea Arbitral Tribunal of the Permanent Court of Arbitration ruled in favor of the Philippines in the *South China Sea Arbitration* case the Philippines had brought against China.¹⁵ Among other dispositive findings, the arbitral tribunal declared that China's maritime law enforcement actions directed towards Philippine vessels and Filipino fishermen, including marine surveillance of Philippine ships, enforcement of fisheries jurisdiction over Filipino fishermen, lack of oversight or actual investigation of marine environmental violations by individual Chinese mariners, Chinese dredgers, and other Chinese vessels, and large-scale reclamation and construction of artificial islands all breached China's international legal obligations under the U.N. Law of the Sea Convention (UNCLOS),¹⁶ the Convention on the International Regulations for Preventing Collisions at Sea,¹⁷ and general international law.¹⁸

On July 12, the day the award was announced, China's Foreign Ministry issued an official statement, declaring, *inter alia*, that

China's territorial sovereignty and maritime rights and interests in the South China Sea shall under no circumstances be affected by those awards [the 12 July 2016 Award on the Merits and the 29 October 2015 Award on

13. Khanh Vu, *Vietnam Protests Beijing's Sinking of South China Sea Boat*, REUTERS, Apr. 4, 2020, <https://www.reuters.com/article/us-vietnam-china-southchinasea/vietnam-protests-beijings-sinking-of-south-china-sea-boat-idUSKBN21M072>.

14. Jiang Yu, Spokesperson, Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Jiang Yu's Remarks on China's Maritime Law Enforcement and Surveillance on the South China Sea (May 28, 2011), <https://www.fmprc.gov.cn/ce/cgjb/eng/fyrth/t826601.htm>.

15. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, PCA Case Repository, Award (Perm. Ct. Arb. 2016) [hereinafter SCS Award].

16. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

17. Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, T.I.A.S. No. 8587, 1050 U.N.T.S. 16.

18. SCS Award, *supra* note 15, ¶¶ 708–12, 716, 735–57, 805–13, 939–66, 992–93, 1043, 1109, 1177–81, 1202.

Jurisdiction and Admissibility]. China opposes and will never accept any claim or action based on those awards.¹⁹

China continues to maintain that it has “indisputable sovereignty over the South China Sea Islands (the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, and the Nansha Islands) and the adjacent waters.”²⁰

This statement, coupled with the arbitration ruling, raises an important question: Are China's unilateral maritime law enforcement activities identified above permitted under UNCLOS or applicable international law?

II. SOLUTION

In short, the Chinese maritime law enforcement activities identified above do not comply with UNCLOS and applicable international law.

The applicable international law includes the 2016 *South China Sea* arbitral award, which is legally binding and requires China to comply with its *dispositif*.²¹ As a decision of an arbitral tribunal of the Permanent Court of Arbitration, the award is also a subsidiary source of international law.²² Among its dispositions, the award explicitly declares that:

(1) [A]s between the Philippines and China, [UNCLOS] defines the scope of maritime entitlements in the South China Sea, which may not extend beyond the limits imposed therein;

19. Ministry of Foreign Affairs of the People's Republic of China, Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea (July 7, 2016), https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379493.shtml.

20. 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, ¶ 4 (Dec. 7, 2014), https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm.

21. UNCLOS, *supra* note 16, annex VII, art. 11; *see also* Lucy Reed & Kenneth Wong, *Marine Entitlements in the South China Sea: The Arbitration between the Philippines and China*, 110 AMERICAN JOURNAL OF INTERNATIONAL LAW 746 (2016); Diane A. Desierto, *Enforcement Options and Paths to Compliance: Disputants and Global Stakeholders in Philippines v. China*, 8 ASIAN JOURNAL OF INTERNATIONAL LAW 1, 64–75 (2018).

22. Statute of the International Court of Justice art. 38(d), June 26, 1945, 33 U.N.T.S. 993, 59 Stat. 1055; *see also* HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 136–37 (2d ed. 2019).

(2) [A]s between the Philippines and China, China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the 'nine-dash line' are contrary to [UNCLOS] and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under [UNCLOS]; . . . [UNCLOS] superseded any historic rights, or other sovereign rights or jurisdiction, in excess of the limits imposed therein.²³

Accordingly, because it is bound by UNCLOS and the 2016 arbitral award, China cannot rely on claimed historic rights or the exercise of sovereign control or jurisdiction under its nine-dash line map to justify continuing unilateral maritime law enforcement activities against Indonesia, the Philippines, Malaysia, and Vietnam for the type of incidents described above.

As of this writing, China has remained opaque on the specific legal grounds supporting its conduct of maritime law enforcement activities in the South China Sea, but there are public indications that China continues to reject the applicability of UNCLOS to the South China Sea disputes, and, likewise, maintains its territorial and maritime claims over the entirety of the area within the nine-dash line, again based on claimed historic rights.²⁴ With respect to Chinese Coast Guard vessels entering Indonesia's exclusive economic zone off the coast of the northern Natuna Islands, China's Foreign Ministry spokesperson Geng Shuang stated in December 2019 that:

China has sovereignty over the Nansha Islands and has sovereign rights and jurisdiction over relevant waters near the Nansha Islands. In the meantime, China has historical rights in the South China Sea. Chinese fishermen have long been engaging in fishery activities in relevant waters near the Nansha Islands, which has all along been legal and legitimate. The China Coast Guard were performing their duty by carrying out routine patrol to maintain maritime order and protect our people's legitimate rights and interests in the relevant waters. Our ambassador to Indonesia reiterated China's consistent position to the Indonesian side.²⁵

23. SCS Award, *supra* note 15, ¶¶ 1203(B)(1)–(B)(2).

24. See Robert Vergara, *China Rejects PH Arbitral Victory on South China Sea Anew*, CNN PHILIPPINES (Aug. 30, 2019), <https://www.cnnphilippines.com/news/2019/8/30/president-rodrigo-duterte-xi-jinping-bilateral-meeting-hague-ruling-south-china-sea.html>.

25. Geng Shuang, Spokesperson, Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Geng Shuang's Regular Press Conference on December 31, 2019 (Dec. 31, 2019), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1729013.shtml.

The same spokesperson later alluded to the position that “China had sovereignty over the Spratly Islands and their waters and both China and Indonesia have ‘normal’ fishing activities there.”²⁶ He ambiguously stated:

China has sovereignty over the Nansha Islands and sovereign rights and jurisdiction over the relevant waters. Our position is in accordance with international law. In the meantime, I'd like to stress that China and Indonesia don't have disputes over territorial sovereignty, though we have overlapping claims of maritime rights and interests in some areas in the South China Sea.²⁷

China has taken similar positions relative to its recent maritime surveillance and law enforcement activities in Malaysia's exclusive economic zone, alleging these are “normal activities.”²⁸ China also based its maritime law enforcement activities involving Vietnam on Chinese sovereignty, stating in April 2020 that it was simply curbing “illegal activities in Chinese waters” when a Vietnamese fishing vessel “rammed into [China Coast Guard ship 4301] and sunk” off the disputed Paracel Islands.²⁹ Vietnam rejected China's version of events, promptly producing a video of a large Chinese vessel chasing and ramming the wooden fishing boat.³⁰

Most recently, China's Foreign Ministry spokesperson Zhao Lijian declared that China was not discounting the possibility of establishing an air defense identification zone (ADIZ) over the South China Sea, noting “[i]n

26. *Indonesia Boosts Patrols after Chinese Boat ‘Trespasses’ in Its Waters*, REUTERS, Jan. 3, 2020, <https://www.reuters.com/article/us-indonesia-china-southchinasea/indonesia-boosts-patrols-after-chinese-boat-trespasses-in-its-waters-idUSKBN1Z217I>.

27. Geng Shuang, Spokesperson, Ministry of Foreign Affairs of the People's Republic of China, Press Conference Foreign Ministry Spokesperson Geng Shuang's Regular Press Conference on January 8, 2020 (Jan. 8, 2020), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1730335.shtml.

28. Rozanna Latiff, *Chinese Ship Leaves Malaysian Waters after Month-Long South China Sea Standoff*, REUTERS, May 15, 2020, <https://www.reuters.com/article/us-china-security-malaysia/chinese-ship-leaves-malaysian-waters-after-month-long-south-china-sea-standoff-idUSKBN22R1SN>.

29. Mimi Lau, *China Says Vietnamese Fishing Boat Rammed Coastguard Ship Before Sinking*, SOUTH CHINA MORNING POST (Apr. 4, 2020), <https://www.scmp.com/news/china/military/article/3078452/china-says-vietnamese-fishing-boat-rammed-coastguard-ship>.

30. *Vietnam Airs Video of Chinese Ship Sinking Fishing Boat in South China Sea*, SOUTH CHINA MORNING POST, <https://www.scmp.com/news/china/article/1526701/vietnam-air-video-chinese-ship-sinking-fishing-boat-south-china-sea> (last visited Aug. 6, 2020).

the light of the air security threats China faces above relevant waters of the South China Sea, China will carefully and prudently study the issue taking into account all factors.”³¹ This statement suggests that China anchors its legal authority to conduct maritime law enforcement activities on its claim to all the maritime and territorial areas covered under its nine-dash line map. Such a claim openly contravenes China’s obligations under the 2016 arbitral award not to draw any maritime entitlements from the map,³² as well as, by implication, not to conduct maritime law enforcement activities premised on maritime entitlements that are (in the tribunal’s words) “without lawful effect”³³ and thus violate UNCLOS.

Moreover, China’s *unilateral* conduct of alleged maritime law enforcement activities in disputed areas in the South China Sea also thwarts its binding legal commitments to cooperate under the 2002 Declaration on the Conduct of Parties in the South China Sea,³⁴ which specifically requires that all claimants cooperate on enforcement activities relating to marine environmental protection, marine scientific research, safety of navigation and communication at sea, search and rescue operations, and combatting transnational crimes such as drug trafficking, piracy, arms trafficking, and armed robbery at sea.³⁵ The same Declaration states that parties to the disputes would “undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability.”³⁶ Pending the negotiated delimitation of overlapping exclusive economic zones and continental shelves, China also has the legal duty under UNCLOS to cooperate with all parties “to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement.”³⁷

Maritime law enforcement activities conducted outside the UNCLOS legal framework hamper efforts to reach final maritime delimitation agreements between the several claimant States to the South China Sea. This is precisely why at the 36th Association of Southeast Asian Nations (ASEAN)

31. *US Watching if Beijing Declares Air Defense Zone in South China Sea*, RADIO FREE ASIA (June 24, 2020), <https://www.rfa.org/english/news/china/usa-adiz-06242020155414.html>.

32. SCS Award, *supra* note 15, ¶ 278.

33. *Id.*

34. Declaration on the Conduct of Parties in the South China Sea, Brunei-Cambodia-China-Indon.-Laos-Malay.-Myan.-Phil.-Sing.-Thai.-Viet., Nov. 4, 2002, https://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2.

35. *Id.* ¶ 6.

36. *Id.* ¶ 5.

37. UNCLOS, *supra* note 16, arts. 74(3), 83(3).

Summit on June 26, 2020, all ten member States declared that UNCLOS is the basis for determining maritime entitlements, sovereign rights, jurisdiction, and legitimate interests over maritime zones:

We reaffirmed the importance of maintaining and promoting peace, security, stability, safety and freedom of navigation in and over-flight above the South China Sea and recognized the benefits of having the South China Sea as a sea of peace, stability, and prosperity. We underscored the importance of the full and effective implementation of the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC) in its entirety. We were encouraged by the progress of the substantive negotiations towards the early conclusion of an effective and substantive Code of Conduct in the South China Sea (COC) consistent with international law, including the 1982 UNCLOS. We welcomed the completion of the first reading of the Single Draft COC Negotiating Text. We emphasized the need to maintain and promote an environment conducive to the COC negotiations, and thus welcomed practical measures that could reduce tensions and the risk of accidents, misunderstandings and miscalculation. We stressed the importance of undertaking confidence building and preventive measures to enhance, among others, trust and confidence amongst parties; and we reaffirmed the importance of upholding international law, including the 1982 UNCLOS.

We discussed the situation in the South China Sea, during which concerns were expressed on the land reclamations, recent developments, activities and serious incidents, which have eroded trust and confidence, increased tensions and may undermine peace, security and stability in the region. We reaffirmed the need to enhance mutual trust and confidence, exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability and avoid actions that may further complicate the situation, and pursue peaceful resolution of disputes in accordance with universally recognized principles of international law, including the 1982 UNCLOS. *We reaffirmed that the 1982 UNCLOS is the basis for determining maritime entitlements, sovereign rights, jurisdiction and legitimate interests over maritime zones, and the 1982 UNCLOS sets out the legal framework within which all activities in the oceans and seas must be carried out.* We emphasized the importance of non-militarization and self-restraint in the conduct of all activities by claimants and all other states, including those mentioned in the

DOC that could further complicate the situation and escalate tensions in the South China Sea.³⁸

China's recent assertions of supposed maritime law enforcement activities taken by its Coast Guard, as well as other components of its maritime militia,³⁹ against ships, vessels, and crew from Malaysia, the Philippines, Indonesia, and Vietnam should therefore be evaluated under UNCLOS's provisions, as well as the principle of good faith in the settlement of disputes under general international law.⁴⁰ The Manila Declaration on the Peaceful Settlement of Disputes requires States parties to international disputes to

refrain from any action whatsoever which may aggravate the situation so as to endanger the maintenance of international peace and security and make more difficult or impede the peaceful settlement of the dispute, and shall act in this respect in accordance with the purposes and principles of the United Nations.⁴¹

China and all other South China Sea claimants currently in the process of negotiating the Code of Conduct in the South China Sea share the duty to negotiate in good faith:

The principle of good faith requires the parties to start the process of negotiations . . . with sincerity, to conduct the discussions meaningfully; not to prematurely abandon the process; in case of an objective failure of the process to attempt to resolve the dispute with another mode – and requires parties to implement the judgment in good faith.⁴²

38. Chairman's Statement of the 36th ASEAN Summit ¶¶ 64–65, June 26, 2020, <https://asean.org/storage/2020/06/Chairman-Statement-of-the-36th-ASEAN-Summit-FINAL.pdf> (emphasis added).

39. *Id.* ¶ 65; see also Jonathan G. Odom, *Where Gray Zone Meets Black Letter: China's Paranaul Strategy and International Law*, in CHINA'S MARITIME GRAY ZONE OPERATIONS (Andrew S. Erickson & Ryan D. Martinson eds., 2019).

40. Andreas R. Ziegler & Jorun Baumgartner, *Good Faith as a General Principle of (International) Law*, in GOOD FAITH AND INTERNATIONAL ECONOMIC LAW 10 (Andrew D. Mitchell, M. Sornarajah & Tania Voon eds., 2015).

41. G.A. Res. 37/10, annex, Manila Declaration on the Peaceful Settlement of International Disputes, ¶ 8 (Nov. 5, 1982).

42. KAREL WELLENS, NEGOTIATIONS IN THE CASE LAW OF THE INTERNATIONAL COURT OF JUSTICE 29 (2014).

Unilaterally conducted maritime law enforcement activities, when done outside the cooperative duties and jurisdictional limits provided for under the UNCLOS framework, undermine the requirements of good faith in negotiations over the South China Sea disputes.

Whether China asserts its legal authority to engage in maritime law enforcement activities against other South China Sea claimants' ships, vessels, or mariners through China's capacity as a coastal State, port State, or flag State, UNCLOS should remain the legal instrument for China's legal justifications, rather than unilateral assertions of sovereignty to conduct such activities. While UNCLOS does not contain an explicit definition of the scope of maritime law enforcement activities,⁴³ many of its provisions apply to different law enforcement situations and maritime security threats at sea.⁴⁴ Ships and other vessels on the high seas are subject to the exclusive jurisdiction of their respective flag States,⁴⁵ with flag States bearing specific duties to "effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag";⁴⁶ to "take such measures for ships flying its flag as are necessary to ensure safety at sea";⁴⁷ as well as to enforce "applicable international rules and standards."⁴⁸ A coastal State can exercise its law enforcement jurisdiction over ships in its ports⁴⁹ and internal waters,⁵⁰ only for matters that are *not* essentially internal to the ship, which remain under the jurisdiction of the flag State, or for matters that affect its interests as a port State.⁵¹ Port States can subject vessels that are voluntarily in port to investigations, and, if warranted by the evidence, "institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation

43. See Brian Wilson, *Human Rights and Maritime Law Enforcement*, 52 STANFORD JOURNAL OF INTERNATIONAL LAW 243, 244 n.4 (2016).

44. NATALIE KLEIN, MARITIME SECURITY AND LAW OF THE SEA 62–63 (2011).

45. UNCLOS, *supra* note 16, art. 92(1).

46. *Id.* art. 94(1).

47. *Id.* art. 94(3).

48. *Id.* art. 217(1)–(4).

49. *Id.* art. 11.

50. *Id.* art. 8.

51. See, e.g., Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing arts. 11–15, 18, *opened for signature* Nov. 22, 2009, 129 Stat. 664, 55 INTERNATIONAL LEGAL MATERIALS 1157, 1159 (2016) (entered into force June 5, 2016) (describing various law enforcement actions that the port State can undertake to address IUU fishing activities).

of applicable international rules and standards established through the competent international organization or general diplomatic conference.”⁵² Beyond a State’s ports and internal waters, special jurisdictional rules in UNCLOS apply to law enforcement activities within the maritime zones of the territorial sea,⁵³ contiguous zone,⁵⁴ and exclusive economic zone.⁵⁵ Where maritime law enforcement involves some degree of interference with foreign vessels, McLaughlin rightly argues that certain preconditions extant from UNCLOS must be met:

(a) the coastal State has enacted a law that applies to the conduct which the [maritime law enforcement] agent is using as the basis for their actions in relation to a particular suspect vessel; (b) the coastal State has authority to regulate that conduct in the maritime zone where the suspect vessel is located; (c) the [maritime law enforcement] agent is authorized under their coastal State’s law to take maritime action against that suspect vessel, in relation to that suspected breach, in that maritime zone; and (d) there is no legal limitation . . . to the application of the coastal State’s law to the vessel and people that are the target of the coastal State’s [maritime law enforcement] action.⁵⁶

Applying UNCLOS and relevant international law to the six situations identified above where China asserted its sovereignty and jurisdiction to conduct maritime law enforcement activities against ships, vessels, or mariners of Indonesia, Malaysia, the Philippines, and Vietnam, the following points must be considered in further evaluating China’s maritime law enforcement activities.

First, China has not clarified whether it has any overlapping exclusive economic zones with Indonesia, although one of the dashes in the nine-dash line “slices through waters north of the Natunas. . . . While Beijing recognizes Indonesian sovereignty over the Natunas themselves, the Chinese Foreign Ministry describes the nearby sea as China’s ‘traditional fishing grounds.’”⁵⁷

52. UNCLOS, *supra* note 16, art. 218(1).

53. *Id.* arts. 2, 21, 24, 25, 27, 220(2)–(6); *see also* KLEIN, *supra* note 44, at 74–84.

54. UNCLOS, *supra* note 16, art. 33.

55. *Id.* arts. 55–75.

56. Rob McLaughlin, *Authorizations for Maritime Law Enforcement Operations*, 98 INTERNATIONAL REVIEW OF THE RED CROSS 465, 467–68 (2016).

57. Hannah Beech & Mukti Suhartono, *China Chases Indonesia’s Fishing Fleets, Staking Claims to Sea’s Riches*, NEW YORK TIMES, Mar. 31, 2020, <https://www.nytimes.com/2020/03/31/world/asia/Indonesia-south-china-sea-fishing.html>.

In this regard, one should recall the arbitral tribunal's clarification that under UNCLOS, traditional fishing rights are accorded different treatment across maritime zones:

(a) In archipelagic waters, traditional fishing rights are expressly protected, and Article 51(1) of the Convention provides that 'an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters.'

(b) In the exclusive economic zone, in contrast, *traditional fishing rights are extinguished*, except insofar as Article 62(3) specifies that 'the need to minimize economic dislocation in States whose nationals have habitually fished in the zone' shall constitute one of the factors to be taken into account by the coastal State in giving access to any surplus in the allowable catch. The Tribunal considers that the inclusion of this provision – which would be entirely unnecessary if traditional fishing rights were preserved in the exclusive economic zone – confirms that the drafters of the Convention did not intend to preserve such rights. The Convention does not, of course, preclude that States may continue to recognize traditional fishing rights in the exclusive economic zone in their legislation, in bilateral fisheries access agreements, or through regional fisheries management organizations. Such recognition would, in most instances, be commendable, but it is not required by the Convention, except to the extent specified in Article 62(3).⁵⁸

Moreover, as the tribunal held, traditional fishing rights "are not the historic rights of States . . . but private rights."⁵⁹ China's characterization of patrols in the Natuna Islands as part of its maritime law enforcement activities is thus immaterial since any such private rights to traditional fishing grounds in Indonesia's exclusive economic zone had long been extinguished under UNCLOS except to the extent provided in Article 62(3) therein. Unsurprisingly, Indonesia invoked the *South China Sea* arbitral award at the United Nations in 2020, to reiterate that "no maritime feature in the Spratly Islands is entitled to an exclusive economic zone or a continental shelf of its own."⁶⁰ Second, China is reported to have maintained a

58. SCS Award, *supra* note 15, ¶¶ 804(a)–(b) (emphasis added).

59. *Id.* ¶ 798.

60. *In Rare Move, Indonesia Raises Hague Ruling vs China*, INTELLASIA (May 29, 2020), <https://www.intellasia.net/in-rare-move-indonesia-raises-hague-ruling-vs-china-783461>.

near-constant presence at Luconia Shoals off the coast of Malaysia's Sarawak State. . . . The reefs, which are divided into the North and South Luconia Shoals, are located between the hotly contested Spratly Islands to the north and James Shoal, which China often calls its southernmost territory, to the south. Like James Shoal, the Luconia Shoals are underwater at high-tide, meaning they cannot be claimed as territory and constitute part of Malaysia's continental shelf.⁶¹

In April 2020, a Chinese government surveillance ship, the Haiyang Dizhi 8, was reportedly accompanied by Chinese Coast Guard vessels as it was "tagging" a Malaysian oil exploration vessel, the West Capella, about 324 kilometers from the Malaysian coast and within Malaysia's exclusive economic zone.⁶²

Such incidents require further investigation to determine the nature of China's asserted maritime law enforcement or maritime surveillance activity within Malaysia's exclusive economic zone, and the resultant consequences on Malaysia's enjoyment of its coastal State rights. Applying Article 58 of UNCLOS, China retains enjoyment of the freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms.⁶³ But China also must observe due regard for the rights of the coastal State. As provided in Article 58(3) of UNCLOS:

States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law insofar as they are not incompatible with this Part.⁶⁴

The obligation to give "due regard to the rights and duties of the coastal State" was interpreted in the 2015 award in the *Chagos Marine Protected Area* arbitration, in which the tribunal stressed

61. *Tracking China's Coast Guard Off Borneo*, ASIA MARITIME TRANSPARENCY INITIATIVE (Apr. 5, 2017), <https://amti.csis.org/tracking-chinas-coast-guard-off-borneo/>.

62. A. Ananthalakshmi & Rozanna Latiff, *Chinese and Malaysian Ships in South China Sea Standoff*, REUTERS, Apr. 17, 2020, <https://www.reuters.com/article/malaysia-china-south-chinasea/chinese-and-malaysian-ships-in-south-china-sea-standoff-sources-idUSL4N2C52GL>.

63. UNCLOS, *supra* note 16, art. 58(1).

64. *Id.* art. 58(3).

the extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius [the coastal State], their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom [the State acting in another State's exclusive economic zone] and the availability of alternative approaches. In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State.⁶⁵

In the *Arctic Sunrise* arbitration, the arbitral tribunal emphasized, “the protection of a coastal State's sovereign rights is a legitimate aim that allows it to take appropriate measures for that purpose. Such measures must fulfil the tests of reasonableness, necessity, and proportionality.”⁶⁶ The *South China Sea* arbitration tribunal stressed that “anything less than due diligence by a State in preventing its nationals from unlawfully fishing in the exclusive economic zone of another State would fall short the regard due pursuant to article 58(3) of [UNCLOS].”⁶⁷

Third, with respect to China's maritime law enforcement activities directed at Philippine ships and vessels, China is bound by its obligations under UNCLOS and as specifically resolved in the *dispositif* of the *South China Sea* award. The ramming of Filipino boats in Scarborough Shoal or the seizure of the Filipino fishermen's catch from Scarborough Shoal are inconsistent with the arbitral tribunal's finding that China, “through the operation of its official vessels at Scarborough Shoal from May 2012 onwards, unlawfully prevented Filipino fishermen from engaging in traditional fishing at Scarborough Shoal . . . without prejudice to the question of sovereignty over Scarborough Shoal.”⁶⁸ The seizure of the Filipino fishermen's catch is patently unlawful and contrary to UNCLOS, which specifically grants States such rights of seizure of property only in cases of piracy.⁶⁹

Fourth, the legality of China's blocking of resupply ships to Second Thomas (Ayungin) Shoal can also be determined by reference to the findings of the *South China Sea* arbitral award, which categorically found that the shoal

65. Chagos Marine Protected Area (Mauritius v. U.K.), Case No. 2011-03, PCA Case Repository, Award, ¶ 15 (Perm. Ct. Arb. 2015).

66. Arctic Sunrise Arbitration (Neth. v. Russ), Case No. 2014-02, PCA Case Repository, Award, ¶ 326 (Perm. Ct. Arb. 2017).

67. SCS Award, *supra* note 15, ¶ 744.

68. *Id.* ¶ 814.

69. UNCLOS, *supra* note 16, art. 105.

“is a low-tide elevation within the exclusive economic zone of the Philippines.”⁷⁰ While the arbitral tribunal declined jurisdiction on this issue due to the military activities exception under UNCLOS Article 298(1)(b),⁷¹ China’s asserted maritime law enforcement actions in blocking the resupply ships must be assessed given the due regard owed to the Philippines’ rights and duties as a coastal State under UNCLOS Article 58(3).⁷² Moreover, deliberately cutting off access to Filipinos’ food and other supplies could violate China’s international human rights obligations to, among others, respect and protect rights to health, food, and an adequate standard of living as a party to the International Covenant on Economic, Social, and Cultural Rights.⁷³

As to the swarming of Chinese Coast Guard and other maritime militia vessels of Thitu (Pag-asa) Island in the Spratly Islands, the tribunal legally characterized Thitu as a rock under UNCLOS Article 121.⁷⁴ As such, it is entitled to a territorial sea but it cannot generate entitlements to an exclusive economic zone or continental shelf.⁷⁵ The Philippines, as the coastal State, is in effective possession of this high-tide feature. Thus, because the twelve nautical mile territorial sea surrounding Thitu Island is subject to the exclusive jurisdiction of the Philippines, the actions of the Chinese vessels violated Philippine sovereignty.

Finally, China’s alleged maritime law enforcement of fisheries jurisdiction leading to the ramming and sinking of a Vietnamese wooden fishing boat off the Paracel Islands (an area in dispute between China and Vietnam) at the very least violates UNCLOS Articles 74(3) and 83(3), which impose duties to cooperate and to avoid actions that would hamper reaching final agreement between the parties as to the delimitation of overlapping exclusive economic zones and continental shelves. With regard to the incident itself, analysis of its lawfulness must await ascertainment of China’s claimed legal authority for exercising jurisdiction in the disputed area; the circumstances that necessitated this particular use of force against a Vietnamese wooden

70. SCS Award, *supra* note 15, ¶ 1153.

71. *Id.* ¶ 1162.

72. UNCLOS, *supra* note 16, art. 58(3) (“In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State . . .”).

73. International Covenant on Economic, Social and Cultural Rights arts. 11–12, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

74. SCS Award, *supra* note 15, ¶ 1203(B)(7).

75. UNCLOS, *supra* note 16, art. 121.

fishing boat; the proportionality of the use of force, as well as the reasonableness of the outright destruction of property in allegedly enforcing Chinese fisheries law without prior recourse to procedures required under that law.⁷⁶

III. CONCLUSION

In sum, there is no legal basis for China's assertion of sovereignty and historic rights as justification for maritime law enforcement activities throughout the maritime and territorial areas within the nine-dash line map. The *South China Sea* arbitral award disposed of the map as "without legal effect" and contrary to UNCLOS. Likewise, the 2020 ASEAN 36th Ministerial Statement unanimously reaffirmed the applicability of UNCLOS to the governance, jurisdiction, and determination of maritime entitlements in the South China Sea. Pending negotiations on overlapping maritime entitlements with other South China Sea claimants, China is bound to ensure that its maritime law enforcement activities conform to UNCLOS and international law.

76. 中华人民共和国渔业法 [Fisheries Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Jan. 20, 1986, effective Jan. 20, 1986, amended Oct. 31, 2000 and Aug. 28, 2004), <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/37829/108064/F651627419/CHN37829%20Eng.pdf>.