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## CONTESTED NORMS, CONTESTED TERRITORY

IS FREEDOM OF NAVIGATION UNDER THREAT IN THE SOUTH CHINA SEA?

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### *Abstract English*

The South China Sea dispute is one of the most complex and multi-layered conflicts globally. For one, it includes the territorial disputes between China, Malaysia, Brunei, the Philippines, Viet Nam, and Taiwan about which maritime features belong to which state. However, the conflict has another, much more global dimension. For centuries, norms based on the logic of 'freedom of the seas' have prohibited states from making substantial sovereignty claims over maritime space. This thesis aims to answer how these 'spatial norms' have affected the South China Sea dispute. By relying on norms research as theoretical underpinning, the thesis develops a threefold approach to investigate the conflict, comprising historical narrative, discursive, and practice elements. In a first step, the study examines the emergence of today's rules, principles, and norms of the oceans as codified by the United Nations Convention on the Law of the Sea. In the next step, the work provides a narrative history of diplomatic, military, and discursive developments in the South China Sea since the early 20<sup>th</sup> century. The study shows that different elements such as material interests, shifting power constellations, nationalism, and big power aspirations have resulted in a contest over the future of ocean governance.

### *Abstract Deutsch*

Der Konflikt um das Südchinesische Meer ist einer der vielschichtigsten Dispute weltweit. Zum einen umfasst er die territorialen Streitigkeiten zwischen China, Malaysia, Brunei, den Philippinen, Viet Nam und Taiwan darüber, welche der Inseln, Riffe und Sandbänke zu welchem Staat gehören. Der Konflikt hat jedoch noch eine andere, wesentlich globalere Dimension. Seit Jahrhunderten haben Normen, die auf der Logik der 'Freiheit der Meere' beruhen, Staaten beschränkt, substantielle Souveränitätsansprüche auf den maritimen Raum zu erheben. In dieser Arbeit soll untersucht werden, wie sich diese 'Räumlichkeitsnormen' auf den Konflikt im Südchinesischen Meer ausgewirkt haben. Mit Rückgriff auf Theorien der Normenforschung, entwickelt diese Arbeit einen dreifachen Ansatz zur Untersuchung des Konflikts, der historische, diskursive und praktische Elemente umfasst. Zunächst untersucht die Studie die Entstehung der heutigen Regeln, Prinzipien und Normen der Ozeane, wie sie im Seerechtsübereinkommen der Vereinten Nationen kodifiziert wurden. Im nächsten Schritt wird eine Geschichte der diplomatischen, militärischen und diskursiven Entwicklungen im Südchinesischen Meer seit dem frühen 20. Jahrhundert entwickelt. Die Studie zeigt auf, dass verschiedene Elemente wie materielle Interessen, wechselnde Machtkonstellationen, Nationalismus und Großmachtbestrebungen zu einem Wettstreit um die Zukunft der Ordnung der Meere geführt haben.

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## List of Abbreviations

AMTI.....	Asia Maritime Transparency Initiative
ARF.....	Association of Southeast Asian Nations Regional Forum
ASEAN .....	Association of Southeast Asian Nations
BBC.....	British Broadcast Corporation
CCP.....	Chinese Communist Party
CLCS .....	Commission on the Limits of the Continental Shelf
COC.....	Code of Conduct
DOC .....	Declaration on the Conduct of Parties in the South China Sea
DoD.....	Department of Defense
ECS.....	East China Sea
EEZ .....	Exclusive Economic Zone
EIA .....	Energy Information Agency
EU.....	European Union
FOIP.....	Free and Open Indo-Pacific
FON .....	Freedom of Navigation
FONOP.....	Freedom of Navigation Operation
G-7.....	Group of Seven
GIGA .....	German Institute for Global and Area Studies
HMS.....	Her Majesty's Ship
IR.....	International Relations
ONI .....	Office of Naval Intelligence
OPSD .....	Optional Protocol of Signature concerning the Compulsory Settlement of Disputes
PCA .....	Permanent Court of Arbitration
PLAN .....	People's Liberation Army Navy
PRC.....	People's Republic of China
ROC.....	Republic of China
SCS.....	South China Sea
SIPRI .....	Stockholm International Peace Research Institute
SLOC.....	Sealine of Communication
UK .....	United Kingdom
UN .....	United Nations
UNCLOS.....	United Nations Convention on the Law of the Sea
UNCLOS I.....	First United Nations Conference on the Law of the Sea
UNCLOS II.....	Second United Nations Conference on the Law of the Sea
UNCLOS III.....	Third United Nations Conference on the Law of the Sea
US.....	United States
USA.....	United States of America
USNS.....	United States Naval Ship
USSR.....	Union of Soviet Socialist Republics
VOC .....	The Dutch East India Company
WWI .....	World War I
WWII.....	World War II



# 1. Introduction

On 8 March 2009, five Chinese vessels approached the *USNS Impeccable*, a US navy military survey vessel operating in international waters about 75 miles off the coast of the Island Hainan in the South China Sea. The Chinese vessels, consisting of two patrol vessels, two small trawlers, and an information collection ship, came for no peaceful reason. In dangerous maneuvers, they encircled the *Impeccable*, coming dangerously close to the US vessel. The American crew sprayed one Chinese ship with water from fire hoses to force the Chinese away, but they maintained the course. Eventually, the Chinese crew stopped only eight meters in front of the *Impeccable*, throwing pieces of wood in the vessel's path and attempting to destroy its towed sonar array with a hook. Their mission was clear – they wanted to force the *Impeccable* away.<sup>1</sup>

But why would the Chinese conduct such dangerous operations in waters considered international? Asked about the incident, Wang Dengping, political commissar of the Armament Department of the Navy of the Chinese People's Liberation Army (PLAN), replied: "It is our sovereignty for Chinese vessels to conduct activities in the country's special economic zone, and such activities are justified."<sup>2</sup> And although the incident left nothing but a few men wet and stripped off to their underwear, it should foreshadow a new level of Chinese assertiveness in the region that would draw the US into the South China Sea conflict. Only two months after the *Impeccable* incident, the Chinese Mission to the United Nations (UN) would present a map of the South China Sea to the world. The map encircled nine dashes around the entire South China Sea. The ominous dashes, whether they indicate what China<sup>3</sup> perceives to be its national territory or whether they only indicate where China is making claims to the islands in the South China Sea, was not further explained. Until today, China's government has left open what the so-called *Nine-Dash Line* means.

Nevertheless, it spurred the Asia-Pacific states' worries that tensions around the territorial disputes in the South China Sea would rise again. Globally, however, the move was seen from another angle: would China seek to use its growing military and economic power to challenge the international laws, principles, and norms that govern the oceans? Is the so-called *Freedom of Navigation* under threat in the South China Sea?

## 1.1 The South China Sea – an Overview

These questions are crucial for various reasons. The South China Sea is in many regards of utmost importance for global trade. Geographically, the South China Sea encompasses the semi-enclosed waters between Singapore and the Strait of Malacca up to the Strait of Taiwan in the north. It is with 3,500,000 km<sup>2</sup> almost 1.5 times bigger than the Mediterranean Sea. The South China Sea is one of the busiest maritime trade routes globally. Estimates of the exact volume shipped through the sea range from 20 to 30 percent

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<sup>1</sup> BBC News 2009; The New York Times 2009; Kraska 2011.

<sup>2</sup> In: People's Daily Online 2009.

<sup>3</sup> The word 'China' will be used for the Qing Empire (up until 1912), the Republic of China until 1949, and the People's Republic (from 1949 on).

of global trade, making it one of the most vital of the world's so-called sealines of communication (SLOCs).<sup>4</sup> Many states depend on the transit of goods that are transported via the seas' waters. About 40 percent of China's trade in goods is carried through the South China Sea, followed by India with 31 percent, Brazil with 23 percent, and Japan with about 19 percent. Between 6 percent to 12 percent of Europe's and the US' trade is passing through this region.<sup>5</sup>

Further, the South China Sea is a major trade route for crude oil and connects the US Westcoast with the Middle East. About 15 million barrels per day were shipped through its waters in 2016, making it a share of about 30 percent of the entire global crude oil trade.<sup>6</sup> The Strait of Malacca, located between the triangle of Malaysia, Singapore, and Indonesia, is one of the most vulnerable 'geopolitical chokepoints' for global trade.

The South China Sea is also an important food source covering large parts of the population's protein needs of the states in the region, about 22 percent of the average Asian diet and about 8 percent of the world's total commercial fishing comes from the South China Sea. As biodiversity in the South China Sea is threatened, further competition between the states can be expected, as the fish stock has already declined by 40 per cent.<sup>7</sup> Further, considerable oil and gas resources can be found in the South China Sea. The US *Energy Information Agency (EIA)* estimates that up to 350 trillion cubic feet of natural gas and 23 billion barrels of oil lie possibly underneath the water's seabed.<sup>8</sup>

These aspects generate many incentives to gain control over the South China Sea and its maritime features.<sup>9</sup> The People's Republic of China (PRC), the Philippines, Viet Nam, Brunei, Malaysia, and Taiwan have overlapping claims to parts of the South China Sea. Viet Nam, China, the Philippines, and Taiwan, claim groups of islands rather than single features, whereby China and Taiwan claim the entirety of the about 250 maritime features in the South China Sea. These features can be largely grouped into two main island chains - the Paracels Islands<sup>10</sup>, which Viet Nam, Taiwan, and China claim. And further south, are the Spratly Islands which all dispute parties claim as territory.<sup>11</sup> Additionally, the Philippines and China have overlapping claims over two rocks called Scarborough Shoal, off the coast of Luzon. Some of the disputed features are shifting sandbanks that consistently change their form and shape with the winds and ocean currents. By the time of writing, China got control over 20 outposts on the Paracel Islands and occupied seven of the Spratly Islands features, including the construction of buildings and military facilities. Viet Nam has lost control over the Paracel Islands but controls about 27 of the maritime features in the Spratly Islands. Malaysia holds five features in the Spratlys close to the Malaysian state of Sabah. The Philippines

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<sup>4</sup> Uren 2020.

<sup>5</sup> China Power Project 2017.

<sup>6</sup> US Energy Information Administration 2018.

<sup>7</sup> Khoury 2017, p. 2.

<sup>8</sup> Asia Maritime Transparency Initiative 2022a.

<sup>9</sup> The term 'maritime features' will be used throughout the piece, as umbrella term for the islands, rocks, sandbanks, atolls, shoals, cays, reefs etc. in the South China Sea, as they entitle to different rights.

<sup>10</sup> Henceforth either Paracels or Paracel Islands. Hoang Sa in Vietnamese, Xisha Qundao in Chinese.

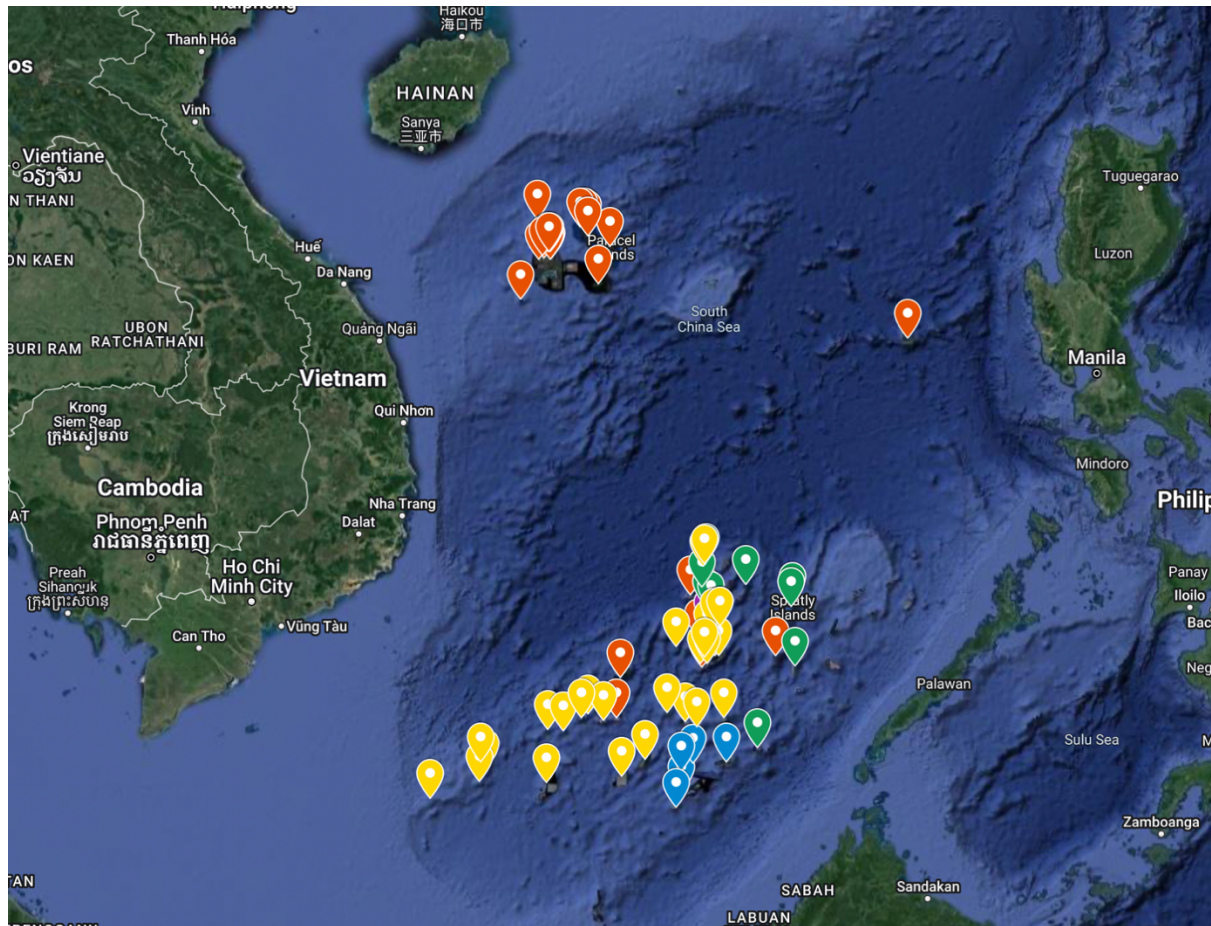
<sup>11</sup> Henceforth either Spratlys or Spratly Islands. Truong Sa in Vietnamese, Nansha in Chinese.

occupies nine maritime features in the Spratly Islands, including Thitu Island, which provides an airstrip. And finally, Taiwan, which holds Itu Aba Island, that is the largest feature in the Spratly Islands and one of the few that can sustain human life. Itu Aba has a big landing strip, and a wharf was constructed in 2015.<sup>12</sup>

### Map 1.

#### *Occupied Islands by Country*

*Yellow – Viet Nam, Red – China, Purple – Taiwan, Blue – Malaysia, Green – the Philippines*



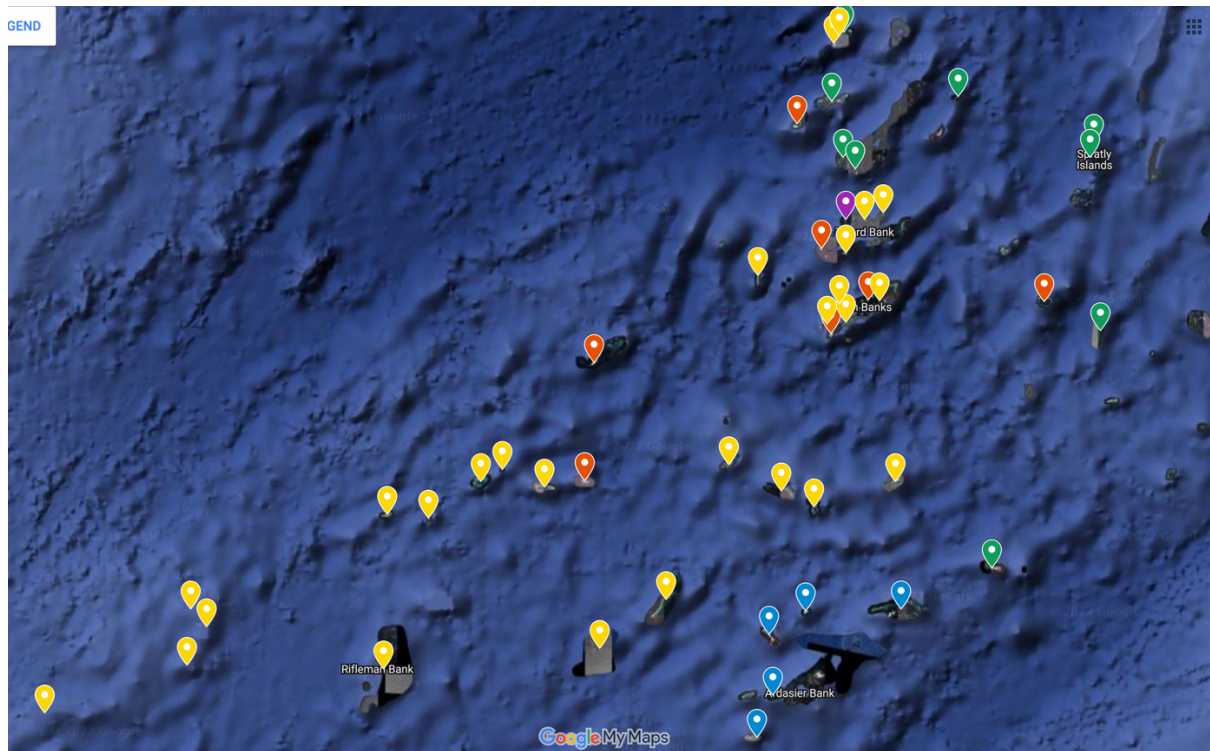
Source: Data retrieved from Asia Maritime Transparency Initiative 2022a, Illustration made by using *Google My Maps*

<sup>12</sup> Asia Maritime Transparency Initiative 2022b.

## Map 2.

### *Occupied Spratly Islands by Country*

*Yellow – Viet Nam, Red – China, Purple – Taiwan, Blue – Malaysia, Green – the Philippines*



Source: Data retrieved from Asia Maritime Transparency Initiative 2022a, Illustration made by using *Google My Maps*

The claimant states regularly collide over the question to whom which maritime feature belongs, which invokes strong national sentiments resulting in protests of the civil societies in the claimant countries.<sup>13</sup> Even on *Google's* review of the islands, users from the respective claimant countries squabble over this question. The protest is most notably directed against the PRC, also diplomatically - until today, the Southeast Asian countries filed more than 200 complaints.<sup>14</sup>

## 1.2 Research Question and Concept

Research around the South China Sea disputes covers many different aspects, angles, and viewpoints of the conflict. Especially 'Realist' perspectives in International Relations (IR) theory that mostly focus on the great power competition between the US and China are dominant. These studies usually revolve around the military-and political 'grand strategies' of China and the US, which are presented as a big power game

<sup>13</sup> See, for example, Fawthrop 2018 or Jaknanihan 2022.

<sup>14</sup> Reuters 2022.

between the dominant power (the US) and its challenger (China).<sup>15</sup> Other studies go in a similar direction but focus more on the regional aspects of the dispute.<sup>16</sup> Another body of literature covers the legal aspects of the South China Sea dispute, usually related to the *United Nations Convention on the Law of the Sea (UNCLOS)* or domestic law.<sup>17</sup> The most important literature for this study came from the historical perspectives on the South China Sea dispute. Here, a.o., especially the work by Bill Hayton, Associate Fellow with the *Asia-Pacific Programme at Chatham House*, was found to be a well-researched and solid base for investigating the origins and developments of the conflict.<sup>18</sup> Most of the studies entail all the different elements and discuss the various aspects of the dispute. However, no study could be found that tells the story of the South China Sea dispute concerning how the conflict evolved from a regional territorial dispute to a dispute over the norms, principles, and rules that govern maritime space. There is a research project by Christian Wirth, a research fellow at the *German Institute for Global and Area Studies (GIGA)* that investigates the freedom of navigation norms and geopolitics of maritime space in the Indo-Pacific. In this context, so far, two articles have been published.<sup>19</sup> Another research paper by Rebecca Strating discusses Australian perspectives on China's norm contestation in the South China Sea.<sup>20</sup> Nevertheless, no study has yet researched the emergence of this aspect of the conflict. The research in this study aims to close this gap by providing a history that covers the military, diplomatic, and political aspects of the history of the South China Sea dispute. The starting point of the thesis is the claim that the South China Sea dispute has evolved into a global dispute over which norms, principles, and rules apply to maritime space. Thus, the research question that guides the study is the following:

*Which set of norms, rules, and principles structure the governance of maritime space, and how are they affecting the South China Sea territorial disputes?*

To answer this research question, the study will proceed as follows. First, a theoretical framework will introduce debates about norms and institutions in International Relations theory. By drawing on different theories, the thesis defines spatial norms as *generalized standards of conduct that delineate the scope of an actor's territorial entitlements, the extent of obligations, sovereignty, and jurisdiction over a geographically- or non-physically defined form of space*.

Based on the theories, the methodology for the study revolves around three approaches: a narrative history, discourse analysis, and a norms-as-practices-approach. Further, this part presents the methods and data sources of the research. After outlining the theoretical and methodological underpinnings, the thesis examines which norms, principles, and rules govern maritime space. This part discusses how different

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<sup>15</sup> See, for example, Radtke 2019 or Hawksley 2018.

<sup>16</sup> For example, Truong and Knio 2016.

<sup>17</sup> See, for, example, Li 2021; Talmon 2016.

<sup>18</sup> Most notably Hayton's Books *The South China Sea. The struggle for power in Asia* (2014) and *The Invention of China* (2020), as well as various journal articles.

<sup>19</sup> The whole name of the project is *Transforming Orders: How 'Indo-Pacific' Geopolitics Reconstruct Maritime Space and Alter the Law of the Sea's Territorial Sovereignty and Freedom of the Seas Norms*. (See Wirth 2022). For the articles: Wirth (2019) and Wirth and Schatz (2020).

<sup>20</sup> Strating 2020.

concepts and visions for the oceans have emerged since the 16th century, with freedom of navigation competing with attempts to territorialize the oceans. Eventually, the United Nations Convention on the Law of the Sea<sup>21</sup> codified maritime norms. For this reason, the thesis provides a short overview of the legal aspects that were perceived to be essential for developing an understanding of the South China Sea conflict.

The next part is the central part of the thesis that develops a narrative history of diplomatic, military, and discursive developments in the South China Sea. This part divides the history of the conflict into four periods: First, ‘Colonialism, the invention of China, and Japanese Hegemony’ 1907-1949. Second, ‘Cold War, the Scramble for Resources and China’s Territorial Sea’ 1949-1990. Third, ‘Rising China, Rising Claims, Rising Tensions’ 1989 to 2008. And fourth, ‘From a Contest over Territory to a Contest over Norms 2009-2020’. The study examines the historical roots of the conflict since colonial times in Asia by relying on a broad range of primary sources. Data sources include historical newspaper collections, government archives, official statements, legal documents, and leaked foreign policy cables. The main finding is that while the regional territorial disputes prevail, the conflict has gained momentum since 2009 as a global conflict about the norms, rules, and principles that govern maritime space. With China’s rise as economic and military power since the 1990s, the whole conflict became increasingly perceived as a dispute about freedom of navigation and extension of sovereignty. Most notably, the US, soon followed by Europe, Australia, and Japan, assessed China’s assertiveness as a threat to the global governance of the oceans.

The findings presented in this piece might be relevant for everyone interested in the military and diplomatic history of the South China Sea dispute. Further, the study’s main contribution is the new perspective on the dispute from a normative and spatial perspective rather than telling the South China Sea story as only led by calculable interests of container-like nation-states. While domestic factors, especially in the case of China, are also part of the thesis, they do not take center stage. Instead, the focus will be on the more significant shifts of the dispute, understood as a relational dispute between changing actors over equally changing claims in the South China Sea fueled by changing interests. Rather than using changes within domestic affairs as an explanatory (or independent) variable that led to a particular outcome in the dispute (as the dependent variable), the study understands the conflict as a multivariate process that had different ‘triggers’ at other points in time. The study investigates these triggers by a historical analysis of the changing foreign policy discourse, threat perceptions, diplomatic activities, and military engagement.

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<sup>21</sup> United Nations 1982.



## 2. Theories

This part is concerned with the theoretical underpinnings of the thesis. The aim is to develop an understanding of what norms are in international relations as a first step. The next part discusses the importance of the contestedness of norms and their ‘meaning-in-use.’ The last aspect of the theoretical part defines ‘spatial norms’ and the logics of sovereign territoriality as ‘taken-for-granted script’.

### 2.1 Norms and Institutions in International Relations: A Definition

The study of norms as standards of conduct in IR theory has recently taken a constructivist turn that emerged after the End of the Cold War. Constructivists see the world as a construction based on interactions of all forms of actors, whereby ideas, norms, and beliefs shape, enable, and constrain agency. These ‘ideational factors’ emerged historically and are upheld by social practices.<sup>22</sup> However, norms research is originally based on the study of so-called Institutions in IR theory, which predates the constructivist term. Different streams in political science and IR, including rational choice institutionalism, historical institutionalism, normative institutionalism, and sociological institutionalism, have different understandings of the term and how to explore it methodologically.<sup>23</sup> Today, as Thomas Risse states, “There are at least as many definitions of institutions as there are theoretical perspectives.”<sup>24</sup> John Duffield provides an umbrella definition of these approaches. He defines institutions as “sets of related constitutive, regulative, and procedural norms and rules that pertain to the international system, the actors in the system (including states and non-state entities), and their activities”<sup>25</sup>. His definition is based on interrelated ideal types of how institutions have been understood in IR theory, sociology, and political science – either as organizations, as behavior patterns, formal rules, and most importantly, as norms.<sup>26</sup>

As there are many definitions and fundamentally different concepts, theories, and schools of thought of institutions, the term can be confusing and analytically misleading. Thus, this piece focuses on norms, considering them as the central element of international institutions. Both norms and institutions are analytically so closely intertwined that some scholars use them synonymously when referring to the same subject. For example, James G. March and Johan P. Olsen define institutions as norms, as some soft institutions that are “a relatively stable collection of practices and rules defining appropriate behaviour of specific groups of actors in specific situations.”<sup>27</sup> Thus, in this study, the concept of norms and institutions

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<sup>22</sup> Theys 2018, p. 36.

<sup>23</sup> Gilad 2015.

<sup>24</sup> Risse 2002, p. 605.

<sup>25</sup> Duffield 2007, p. 7f.

<sup>26</sup> Ibid.

<sup>27</sup> March and Olsen 1998, p. 948.

will be synonymously used, although some norms and institutions scholars have tried to disentangle both concepts, such as Martha Finnemore and Kathrin Sikkink.<sup>28</sup>

The principal definition of norms used in this thesis is provided by Gregory A. Raymond who defines norms as “generalized standards of conduct that delineate the scope of a state’s entitlements, the extent of its obligations, and the range of its jurisdiction.”<sup>29</sup> However, there are other definitions that emphasize the sociological aspects of norms. Peter Katzenstein coined an influential constructivist definition of norms as “collective expectations for the proper behaviour of actors with a given identity”. Norms are seen “as social practice; consciously promoted, as political strategies to further specific interests; deliberately negotiated, as a mechanism for conflict management; or as a combination, mixing these three types”.<sup>30</sup> Unlike values, that are individually ‘believed’, norms are collectively held standards that guide practice. For example, it is widely accepted and a socially shared expectation to help a ship that has capsized at sea. But norms are not only *positive* in the sense that they delineate what an actor *should* do. They also ascribe an obligation for what should *not* be done. For example, the non-use of nuclear weapons became an internationally widely accepted norm.<sup>31</sup> Laws can be in this regard be seen as formalized or codified norms. May it be national or international law – law also embodies expectations about appropriate behavior and can thus a valuable source for norms research.<sup>32</sup> In this sense, norms embody a dual quality, they are both stable and flexible. Flexible, because they are socially constructed and reproduced. The other side of the coin is that they are stable and have a structuring function for all sorts of actors, may they be individuals or collective actors like states.<sup>33</sup> As structures they regulate but also prescribe practices. Some of these structures can become so deeply embedded in the practice of actors that they reach a taken-for-granted quality. These taken-for-granted scripts form the basis of how actors structure their practices according to these scripts.<sup>34</sup>

## 2.2 Norm Contestation

Norms find compliance by actors, or they are contested. Norm contestation has two different ‘faces’. For one, norms can be directly objected to or refused. Second, the meaning of a norm can be questioned discursively or in practice. What a norm means and how it is enacted can change through time and might have a different meaning in different places. This is usually where conflict between different actors emerges. Empirically, an excellent opportunity to investigate a norm is when they are contested. As Antje Wiener argues, “norms, rules and principles of governance are contested and that they, therefore, require regular

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<sup>28</sup> Finnemore and Sikkink 1998, p. 891. The main difference they see is the accumulation or aggregation of standards. While norms refer to “standards of behavior, [...] institutions emphasize the way in which behavioral rules are structured together and interrelate (a “collection of practices and rules”).” However, analytically, the differences between norms, rules, institutions, and even international law are perceived to be minor when applied to a practical case in international relations.

<sup>29</sup> Raymond 1997, p. 128.

<sup>30</sup> Katzenstein 1996, p. 5.

<sup>31</sup> See, for example, Rost Rublee and Cohen 2018.

<sup>32</sup> For more on the relation between norms and law see Finnemore 2000.

<sup>33</sup> Wiener 2007, p. 47ff.

<sup>34</sup> Spruyt 2007, p. 68f.



contestation in order to work”.<sup>35</sup> As it is used here, contestation refers primarily to the objection to norms by rejecting them or refusing to implement them.

However, the identification if and where a norm is contested is often not this visible. When they are diffused globally can change their goals when they are locally reconstructed.<sup>36</sup> This process can result in the same ‘words’ being differently interpreted and enacted and embodying a different ‘meaning-in-use’.<sup>37</sup> Take, for example, the expectation to organize a state by ‘democratic principles’. Even the most autocratic states claim that they are democratic states, such as the *Democratic People’s Republic of Korea* (North Korea), or the *Democratic Republic of Congo*. Thus, the study of practices takes center stage in the study of norms.

In IR theory, norms research is traditionally dominated by constructivist approaches that focus typically on ‘good’ norms in their study, such as the abolition of slavery and the death penalty or how human rights and democracy spread. Thus, these constructivist accounts treat norms as predominantly ideational concerns. An excellent example of this is how some constructivist scholars define the European Union as an actor in IR as *Normative Power Europe*.<sup>38</sup> The constructivist approach is typically opposed by realist thinking that either understand norms as ‘intervening variable’<sup>39</sup> or the promotion of norms is regarded as a ‘second-order concern’ that is always superseded by national economic and security interests.<sup>40</sup> However, interests are not necessarily in opposition to norms. Underlying interests might shape, and condition which norms matter, and a foreign policy actor interprets them. By contrast, shared expectations of appropriate behavior can also shape the actor’s perception of what counts as ‘interest’ and by which means it is pursued.<sup>41</sup>

### 2.3 Spatial Norms as Taken-for-Granted Script

A largely neglected aspect of the scholarly literature about norms is their implication on the distribution of physical and non-physical forms of space. If we understand space as the “outcome of the interaction among people and between people and nature”<sup>42</sup>, changing beliefs and norms strongly impact how these spaces are governed. This is in two regards important. First, how space is distributed among social groups and political entities is itself a product of an international institutionalization process and bears a sense of ‘appropriateness’. For example, the answer to “who can claim what kind of space to be part of its territory” is the outcome of a historical process of human interaction and is inherently contested. The second aspect is that specific formats of space are themselves a structuring or delineating variable *for* norms. A particular spatial setting enables and constrains which and where norms are applied. For example, within its borders, states are expected to fulfill the basic needs of a population, but not necessarily outside of them. These

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<sup>35</sup> Wiener 2014, p. 3.

<sup>36</sup> Archarya 2004, p. 239ff.

<sup>37</sup> Wiener 2009, p. 173 ff.

<sup>38</sup> See for Example Mannes 2002.

<sup>39</sup> See for example Krasner 1982, p. 185ff.

<sup>40</sup> Hyde-Price 2006, p. 222f.

<sup>41</sup> Tocci 2008.

<sup>42</sup> Middell and Mahrung 2019, p. 4.

space-specific norms and structures are what shall be called *spatial norms*. Based on the original definition of norms by Gregory A. Raymond<sup>43</sup> this study defines spatial norms as

*generalized standards of conduct that delineate the scope of an actor's territorial entitlements, the extent of obligations, sovereignty, and jurisdiction over a geographically- or non-physically defined form of space.*

The most evident example of a spatial norm is that of sovereign territoriality, which became directly bound to the idea of modern statehood. Max Weber, for instance, puts a demarcated territory at center stage when he defined states as “a human community that successfully claims the monopoly of the legitimate use of physical force within a given territory”<sup>44</sup>. Scholars of IR like to portray the Peace of Westphalia as the origin of this sovereign territoriality principle that arose after 1648 from the Treaties of Westphalia.<sup>45</sup> The treaties that ended the Thirty Years War are here seen as the beginning of what is called the ‘Westphalian State System’, which laid the legal and normative foundations for modern statehood and thus the set of rules, principles, and norms of international relations.<sup>46</sup> The sovereign territory concept as applied to land space includes a range of spatial norms, such as the *territorial integrity norm* (the norm against conquest), the *norm of decolonization*, and the norm for *stable boundaries*.<sup>47</sup> The notion of sovereignty<sup>48</sup> became almost naturally bound to the notion of territory. However, sovereignty, as John Agnew argues, was not always bound to the territory. “It has been territorialized intellectually by associating it with absolute rule over a bloc of space such that there can be no higher authority within that space and sovereignty cannot be divided or shared.”<sup>49</sup> Thus, sovereign territoriality as a critical principle of international relations “has now acquired a taken-for-granted quality in that it informs individual actors’ calculations and behaviors.”<sup>50</sup> At the heart of the Westphalian System lies the assumption that the world *should* be ordered according to the logic of sovereign territoriality as the idea of sovereignty within a clearly demarked piece of land. The spatial starting point for the Westphalian state system and the norm of sovereignty almost naturally encompasses the idea of a fixed territory. In his sense, it can be seen as “the most fundamental institution” of IR.<sup>51</sup> This taken-for-grantedness has been reinforced through practice and interaction, may they be diplomatic, social or intellectual. Eventually, these scripts were legally enshrined by international agreements and organizations, such as the United Nations and its Charter.<sup>52</sup> And thus, today, as “with the lonely exception of Antarctica, just about every square mile of dry land has now been parceled out to some sovereign state or another.

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<sup>43</sup> See p. 12.

<sup>44</sup> Weber 1946, p. 1.

<sup>45</sup> Arguably, this is largely an invented myth as it has emerged already well before. See for example: Benton 2009, p. 279.

<sup>46</sup> Pietraś 2007, p. 136.

<sup>47</sup> See Zacher 2001, 251ff. and Goertz et al. 2016, p. 99ff.

<sup>48</sup> Originally, the term sovereignty comes from the French word *souverain* which describes “a supreme ruler not accountable to anyone, except perhaps to God.” In other words, sovereignty was rather associated with holding the ultimate authority with no subject being the higher regarding political decisions. See Fowler and Bunk 1996, p. 398.

<sup>49</sup> Agnew 2018, p. 67f.

<sup>50</sup> Spruyt 2000, p. 69.

<sup>51</sup> Duffield 2007, p. 5.

<sup>52</sup> Spruyt 2000, p. 69.

There are still disputes—occasionally bloody—about exactly where these lines should fall, but few argue that land should not belong to some state or another.”<sup>53</sup>

As established sovereign territoriality in international relations is, the spatial norms of other forms of space are currently subject to dynamic processes. These dynamic processes concern also the governance of the so-called *Global Commons*, including the high seas, Antarctica, the atmosphere, and outer space. As single nation states do not regulate the usage and access to these spaces, “the governance of these spaces, shared rules and norms that are adhered to by all are required.”<sup>54</sup> This study traces the origins of the spatial norms and territorial rules of the oceans to investigate their role in the South China Sea conflict. But before doing so, the following part outlines the study’s research design.

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<sup>53</sup> Bosco 2022, p. 12.

<sup>54</sup> Nouwens 2022, p. 3.

### 3. Approach, Methodology, and Method

This section will provide an overview of the methodologies and methods used for analyzing and investigating the shift from a primarily territorial dispute in the South China Sea to a more global dispute over norms, principles, and rules applied to ocean space. To this end, the thesis follows a threefold approach that is highly interlinked and can best be described as an interpretation of *developmental historicism* focusing on the evolution of the conflict and the underlying perceptions. Developmental historicism “locates governance and politics in relation to changing geographical logics of authority and rule that must be interpreted in terms of discourses and practices.”<sup>55</sup> Similarly, norms research typically engages with interpretations of discourses and practices and the evolvement and change of norms throughout history. Studying norms, “one can and must examine what people say, write, using content, discourse and historical analysis”.<sup>56</sup> Thus, the three pillars of the methodology comprise: first, a historical narrative approach. Second discourse analysis. And third, practices and acts that enforce or object to maritime norms. These methodologies will be used to analyze the primarily qualitative data. However, as Marc Trachtenberg put it,

“if you want to study a problem in the light of the sources generated at the time, you would not want to approach those sources in a totally mindless way, just plunging in at some randomly chosen point and reading document after document until the story takes shape in your mind. You would want, as always, to approach the sources with a set of questions in mind, questions that will help you see what’s important in the documents you read.”<sup>57</sup>

And thus, the goal is to by outlining the three methodologies to develop questions that help to structure the textual analysis of the qualitative data. Further they provide a broader framework for the research in the subsequent two main parts about the emergence of spatial norms of the oceans and the history of the South China Sea dispute. Additionally, this part also introduces the method and major data sources used in the research.

#### 3.1 A Historical Narrative Approach

The first of the three methodologies is that of a historical narrative approach to norms research. Methodologically, the analysis of historical events and phenomena and how perceptions of them changed over time can add significant value to the understanding of why and where a conflict emerged. The same logic applies to normative research, especially when norms are contested. If there is a contestation of a norm it might be worth looking at, first, the historical context where it emerged. Second, how it evolved over time. And third, which events and practices have changed the meaning-in use of a norm and the entire set of principles, rules, and standards. As “norms are conceptualised as both stable and flexible holds, and they hence entail historically contingent meanings, identifying their origin will disclose important information.”<sup>58</sup> This is particular the case when they become enshrined in international law. Law, however,

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<sup>55</sup> Agnew 2013, p. 1.

<sup>56</sup> Duffield 2007, p. 9.

<sup>57</sup> Trachtenberg 2006, p. 140.

<sup>58</sup> Wiener 2007, p. 42.

itself is a product of evolving norms. Clashes about its interpretation often represent more profound clashes in interpreting of what they and their underlying norms mean in practice. Tracing the evolution of a norm and the origins of a particular case of norm contestation through historical lenses is hoped to generate an understanding of what conflict emerges.

Here, a narrative method can be a valuable approach for understanding the role of norms in political practices and their evolution over time. According to Sarah Percy, a “narrative method traces the evolution of a norm through changing historical contexts, seeking to examine how the norm influences states and vice versa at different points in time.”<sup>59</sup> Historical evidence in the form of events (such as war, diplomatic meetings, new treaties coming into force, etc.) and speech acts can also show how colliding norms had different consequences in different contexts, how perceptions shifted, and even which actors were involved in the first place.

The historical narrative approach will be operationalized in two parts of this study. First, how the set of norms, principles, rules and laws governing maritime space emerged. And second, they will be applied in the historical analysis of the South China Sea itself. The approach here is chronological and focuses mainly on the broader historical developments by referring to historical events.

The guiding questions to organize these sections are:

*When and how did the conflict over which norms emerge? What is the chronology of the conflict? Which actors became when involved?*

### **3.2 Discourse Analysis:**

One of the dominant methodologies within norms research became discourse analysis. Discourse analysis itself is theorized and conducted by many scholars with sometimes highly diverging agendas, methods, and theoretical assumptions. Like most norms-research, it follows epistemologically a constructivist understanding of knowledge and power upheld by society, which is reflected in the text-, and speech acts, photography, or memorials. In this sense, norms can also be understood as made up of discursively produced structures of signification. Thus, speech acts can be analyzed by an interpretative approach. Discourse analysis emerged from the sociolinguistic turn in sociology and political sciences in the 1970s, considering “that linguistic analysis could provide a valuable additional perspective for existing approaches”<sup>60</sup>. Today, many scholars come from different schools of thought and use discourse analysis as a tool to investigate power structures through language.<sup>61</sup> Therefore, central to discourse analysis is exploring the semantic construction of power.<sup>62</sup> In this regard, discourse is an instrument of political and structural power that (re) constructs social relations. Simultaneously, it structures realities and how they are

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<sup>59</sup> Percy 2007, p. 33.

<sup>60</sup> Blommaert 2005, p. 22.

<sup>61</sup> Blommaert and Bulcaen 2000, p. 448.

<sup>62</sup> Blommaert 2005, p. 24.

perceived. As norms are inherent in almost every form of political interaction, it is possible to analyze these acts through speech acts, texts, and maps. Written texts of these actors are an integral part of the political discourse.<sup>63</sup> Essential for this study is how norms are communicated and how this communication relates to the political and historical context.

In this light, the study investigates what discourses emerge at what time of the South China Sea conflict. It will take a norm-centric approach and look at especially the norms of *freedom of navigation*. The discourse analysis will be operationalized especially in the part about the history and changing perceptions of the South China Sea dispute. It will be applied to a broad range of texts, speech act, maps, newspaper articles, and foreign policy cables. Essential questions that guide the analysis of the textual reproduction of the South China Sea disputes are:

*How, where, and what is the issue represented to be? Whose words count? How are actions and behavior legitimized?*

### 3.3 Practices and Acts

The study, however, does not only look at discourses as reproduced in speech acts and text. It also looks at how the shifting perceptions of the conflict have led to concrete actions. Discourse that does not translate into concrete measures remains to be nothing but words. As Antje Winer argues, “norms lie in the practice”.<sup>64</sup> These practices can include formal and informal validation of norms but can also be contested and the subject of discursive contestation. This study, however, takes a more ‘practical’ approach to practices. In the context of the South China Sea territorial disputes, they are understood as norm enforcing or contesting behavior. This includes especially two aspects: first, the enforcement of the territorial sovereignty norm, which includes the enforcement of territorial claims. Second, acts that directly or indirectly enforce the freedom of navigation norm were investigated. In addition to the discursive reproduction of the conflict, data was collected on military activities to enforce the position of the actors involved. Additionally, quantitative data was collected on the activities of the Chinese-, the US, and regional state’s navies. Especially the changing threat perceptions of the South China Sea disputes to a threat for freedom of navigation is observed by the increase of so-called *Freedom of Navigation Operations (FONOPs)* by the US Navy.

The guiding questions for investigating norm enforcement regarding the freedom of navigation are:

*What acts, militarily, political and civilian, can be observed that are aiming at enforcing or contesting perceived territorial sovereignty rights or the norm of freedom of navigation?*

*What actors, partners, processes, and instruments, are involved? What actions matter? How does discourse translate into practice? Which actions were when taken?*

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<sup>63</sup> van Dijk 1997, p. 14.

<sup>64</sup> Wiener 2018, p. 27ff.

Thus, the characteristics of the methodology entail the three elements of a historical approach, how discourses have shifted over time, which norms are explicitly and implicitly mentioned, what the dominant view of the South China Sea disputes is and how they translated into concrete practices.

### 3.4 Method and Data Collection

The questions developed will be applied to the data researched and collected based on textual analysis. The data used in the research project comprises a considerable body of original documents that were, especially regarding the historical aspects, supplemented by secondary sources. The primary sources include foreign policy cables, leaked emails, speech acts, official statements, legal documents, notes verbales, maps, and quantitative data. The focus, however, is on the interpretation of the qualitative data provided by the primary sources. To ensure the data's correctness, it was as far as possible relied on secondary sources. Prior to the research process, the main concern was that the different languages would provide a barrier. However, this concern was unfounded as the foreign ministries of all involved dispute parties regularly publish their statements in English. Thus, there was more than enough data for the scope of the research. Second, as for the historical data on China, historical newspaper archives of English-speaking newspapers in China provided useful data that covered the relevant periods. The following databases were eventually used for the research of primary sources. However, they only partially represent the research process, as additional sources were collected from official government websites of the People's Republic of China, France, Germany, the US, etc.

#### *Newspaper and Media Databases:*

- New York Times' *Time Machine*, covering the years from 1912 to 2006.<sup>65</sup>
- ProQuest's *Periodicals Archive Online* covers the years from 1926 to 2022.<sup>66</sup>
- ProQuest's '*Historical Newspapers: Chinese Newspaper Collection*' covers the years from 1832 to 1953.<sup>67</sup>

#### *Official and non-official diplomatic correspondences:*

- Federal Foreign Office Political Archive: *The Political Archive of the Federal Foreign Office*.<sup>68</sup>
- WikiLeaks: *Secret Congressional Reports*.<sup>69</sup>
- WikiLeaks: *Hillary Clinton Email Archive*.<sup>70</sup>

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<sup>65</sup> New York Times 2022.

<sup>66</sup> ProQuest 2022a.

<sup>67</sup> ProQuest 2022b.

<sup>68</sup> Federal Foreign Office Political Archive 2022.

<sup>69</sup> WikiLeaks 2009. The use of sources by WikiLeaks added a big value to the research. However, it was also critically reflected on the usage of leaked information. The author is aware of the sensitivity of using leaked data. To ensure that the data does not touch upon private information, all names not considered officials were excluded from quotes provided by the data. For more on ethical questions in WikiLeaks research see Gabriel 2015.

<sup>70</sup> WikiLeaks 2016.

- WikiLeaks: *Public Library of US Diplomacy*.<sup>71</sup>
- United Nations Division for Ocean Affairs and the Law of the Sea: *Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982*.<sup>72</sup>
- United Nations: *United Nations Digital Library*.<sup>73</sup>
- United States Department of State Historical Office: *American foreign policy, current documents*, covering the years from 1956-1991.<sup>74</sup>

*Legal Documents:*

- United Nations: *The United Nations Convention on the Law of the Seas (1982)*.<sup>75</sup>
- Permanent Court of Arbitration: *The South China Sea Arbitration (The Republic of Philippines vs. The People's Republic of China)*.<sup>76</sup>

*Other Data on military deployments and island construction, and arbitration support:*

- Asia Maritime Transparency Initiative: *Arbitration Support Tracker*.<sup>77</sup>
- Asia Maritime Transparency Initiative: *Island Tracker Archive*.<sup>78</sup>
- Stockholm International Peace Research Institute: *SIPRI Arms Transfers Database*.<sup>79</sup>
- US Department of State Office of Ocean and Polar Affairs: *Limits in the Sea Reports*.<sup>80</sup>

Having now outlined the methodologies as a mixed approach to investigate the history of the South China Sea dispute so as to explore shifts in discourse and practices in the conflict, the piece moves on in the following part to outline the emergence of spatial norms as applied to the oceans.

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<sup>71</sup> WikiLeaks 2022.

<sup>72</sup> United Nations Division for Ocean Affairs and the Law of the Sea 2022.

<sup>73</sup> United Nations 2022.

<sup>74</sup> United States Department of State Historical Office 1956-1991.

<sup>75</sup> United Nations 1982.

<sup>76</sup> Permanent Court of Arbitration 2016.

<sup>77</sup> Asia Maritime Transparency Initiative 2021.

<sup>78</sup> Asia Maritime Transparency Initiative 2022b.

<sup>79</sup> Stockholm International Peace Research Institute 2022.

<sup>80</sup> US Department of State Office of Ocean and Polar Affairs 2022.



## 4. The Spatial Norms of Ocean Governance: From Contestation to Codification

Before turning to the history of the South China Sea as core of the thesis, this part is concerned with the emergence of nowadays norms, rules, and principles of the oceans. It reconstructs how ideas of the free seas have historically competed with ideas to territorialize the oceans. Thus, it traces back the history of the making of spatial norms, their contestedness and their changing meaning in use.

For several centuries, there has been a system of ocean governance structured around the core spatial norms of the freedom of the seas and freedom of navigation – the notion that in principle, the seas cannot be made part of a country's sovereign territory like land space. For almost 400 years, these spatial norms have regulated how the oceans could be traveled, exploited for economic purposes, and managed as global commons. Today's governance of the maritime domain dates at least back to the 17<sup>th</sup> century. It is better institutionalized, with well-established laws, spatial norms, principles, and rules, as well as operating procedures than any of the other global commons.<sup>81</sup> The principle that the oceans belong to no one, was treated for a long time like customary law i.e. law based on long-established practices. However, historical developments and technological advances provided new impetus for the piecemeal displacement of this logic. As spatial norms, freedom of navigation and the freedom of the seas has constantly been contested by countries seeking to extend their sovereign territory, something Edyta Roszko calls “maritime territorialization”<sup>82</sup>. In fact, throughout history, freedom of navigation has competed with the vision that the oceans, just like land space, could be territorialized:

“The history of the law of the sea has been dominated by a central and persistent theme – the competition between the exercise of governmental authority over the sea and the idea of the freedom of the seas. The tension between these has waxed and waned through the centuries, and has reflected the political, strategic, and economic circumstances of each particular age”.<sup>83</sup>

Eventually, the competing visions for the spatial ordering of the oceans resulted in a big compromise in the form of the United Nations Convention on the Law of the Sea. The following part investigates this process and the making of the spatial norms that govern maritime space.

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<sup>81</sup> Nouwens 2022, p. 4

<sup>82</sup> Roszko 2015.

<sup>83</sup> Till 2011.

## 4.1 Grotius and the Mare Liberum

The end of the Thirty-Years War in Europe is commonly referred to as the beginning of a world order structured according to the logic of sovereign territoriality. Such a historical point of reference also exists for the governance of the oceans.<sup>84</sup>

Almost forty years prior to the Peace of Westphalia, the Dutch jurist and legal philosopher Hugo Grotius published 1609 a short book called *Mare Liberum*<sup>85</sup> that should become the basis for the norms that govern the oceans for the next 400 years. The story behind it begins in 1603, at the geographical gates to the South China Sea, close to what is today Singapore. *The Dutch East India Company (VOC)* seized a Portuguese ship, the carrack *Santa Catarina*. The VOC hired the 20 years old Grotius as a legal counselor to justify these acts. Back then, the Portuguese were the dominant power in the region. With the *Treaty of Tordesillas* in 1494, the Portuguese Empire and the Spanish Empire under the Crown of Castille had divided the world, including the oceans, effectively into two parts. And thus, the entire South Atlantic, as well as the Indian Ocean, were under the jurisdiction of the Portuguese. Prior to the Portuguese arrival in 1498, the Asian waters were a big free trading zone. However, the Portuguese managed to establish an order where they claimed a monopoly over the East Indies and sovereignty over its waters.<sup>86</sup> The Dutch were challenging the Portuguese hegemony in the region. Grotius justified the seizure of the *Santa Catarina* claiming the act had been lawful because it was taken as booty in a just war outside Portugal's jurisdiction. And thus, at the core of *Mare Liberum* was to defend the right of the Dutch ships to sail through the East Indies.<sup>87</sup>

However, more important than this justification was the basis for Grotius' argument. He made a compelling case for why the oceans should be free based on Natural Law: "For do not the ocean, navigable in every direction with which God has encompassed all the earth, and the regular and the occasional winds which blow now from one quarter and now from another, offer sufficient proof that Nature has given to all peoples a right of access to all other peoples?"<sup>88</sup>

The principal idea guiding through *Mare Liberum* is that the sea cannot be owned by any nation like land space. Grotius observes two general rules:

"The first is, that that which cannot be occupied, or which never has been occupied, cannot be the property of any one, because all property has arisen from occupation. The second is, that all that which has been so constituted by nature that although serving someone person it still suffices for the common use of all other persons, is today and ought in perpetuity to remain in the same condition as when it was first created by nature".<sup>89</sup>

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<sup>84</sup> Although the idea of the freedom of the seas was – just like in the case of sovereignty – already earlier formulated by philosophers such as Francisco de Vitoria and Fernando Vázquez de Menchaca.

<sup>85</sup> The whole title of the pamphlet is "Mare Liberum. Or, The Right Which Belongs to the Dutch to Take Part in the East Indian Trade" and was originally published in Latin.

<sup>86</sup> Almond 2016.

<sup>87</sup> Grotius name, however, was never attached to the document.

<sup>88</sup> Grotius 1916, p. 8.

<sup>89</sup> Ibid. p. 27.

In this sense, the sea *is* different and should be thus separated from laws and principles that apply to land space, which requires that the sea should not be claimed as sovereign territory by any state.<sup>90</sup> As the sea as space is not owned by anyone, all nations are free to use it for their trade, fishing, and exploitation or resources. No nation had therefore the right to hinder ships to access the oceans: “The sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries.”<sup>91</sup>

With *Mare Liberum* Grotius had fostered a discussion that should later become to be known as the “Battle of the Books”.<sup>92</sup> Seventeen years after *Mare Liberum* was published, Serafim de Freitas, a Portuguese scholar at Valladolid’s Faculty of Law in Spain, wrote a response with *De justo imperio Lusitanorum Asiatico* (1626), in which he advocated for a state’s right to having jurisdictional rights over the oceans.<sup>93</sup> In 1635, the English lawyer John Selden published a book named *Mare Clausum*. He turned Grotius’ arguments on their head and argued that God gave man the authority to rule over the oceans. While Grotius himself founded his arguments in religious believes, he argued that God made nature and thus, the rules that govern the oceans can be derived from natural law.<sup>94</sup>

## 4.2 A Canon-Shot Sovereignty

Grotius pamphlet came just about the right time. Only a few years after the battle of the books, the Treaties of Westphalia came into force. The notion that the oceans should remain under no sovereignty resonated well with the complementary idea that land space should be divided among different entities. The peace of Westphalia, however, had another effect on maritime space. Now that the European powers had settled their disputes, they could channel their resources on other military projects. This ushered into an enormous increase in the navies of France and the Netherlands. The most spectacular rise, however, was that of England’s navy that laid the foundations of what should become the British Empire until the beginning of the First World War.<sup>95</sup>

The English dominance of the oceans in the following two centuries shaped the modern perceptions of the spatial norms in the oceans in a fundamental way. Most importantly, the English<sup>96</sup> embraced and promoted the idea of the *cannon-shot-rule*. A Dutch legal scholar, his name was Cornelius Bynkershoek, argued that while Grotius is right that man cannot control the oceans, one can indeed control the waters up to one cannon shot (about three miles) away from land.<sup>97</sup> However, apart from this extension of territorial control, the English were becoming more reluctant to make extensive claims over ocean space.<sup>98</sup> As naval hegemon, the English rather embraced the cannon shot rule which received *grasso modo* international support, but

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<sup>90</sup> Bosco 2022, p. 8

<sup>91</sup> Ibid. p. 28.

<sup>92</sup> Widener, Michael 2009.

<sup>93</sup> Almond 2016.

<sup>94</sup> For more on that see Bosco 2022, p. 34f.

<sup>95</sup> Ibid. p. 36ff.

<sup>96</sup> The British after the Act of Union that united the Kingdom of England with the Kingdom of Scotland in 1707.

<sup>97</sup> Pogies 2021.

<sup>98</sup> Apart from a policy that demanded a ‘salute’ by all ships transitioning the English Channel in recognition of British naval superiority.

supported the idea of freedom of navigation by Grotius.<sup>99</sup> The emergence of the English as naval power showed a trend that should up until today remain. Freedom of navigation is upheld by the dominant global (maritime) powers. Further, the 19<sup>th</sup> century marked first attempts to codify maritime norms, such as in the Declaration of Paris that was signed in 1856 by seven European powers that agreed on abandoning privateering and secure neutral shipping. Attempts to codify rules of the oceans, however, did not only remain on the European level. As maritime commerce was booming from the 19<sup>th</sup> century on, numbers of naval collisions at sea were also increasing. And thus, naval safety became an increasing global concern. In October 1889 another conference was held in Washington with 19 participating states, including, amongst others, China, Japan, and Chile to formulate a common code for navigational safety.<sup>100</sup>

The attempts to secure the oceans and promote freedom of navigation coincided with another major development. The Western powers certainly also adhered to the Grotian vision of the maritime order because open and secured sealines enabled possibilities to exercise power and domination over other states and societies. For example, British naval superiority in military as well as in economic terms, eventually provided the base for winning the opium wars against China and coercing the Qing dynasty into signing the *Unequal Treaties* which eventually led to what China is today referring to as *Century of Humiliation*.<sup>101</sup> The link between colonialization and norms of freedom of navigation should become at a later stage in history a subject of discussions between former colonized states and their colonizers.<sup>102</sup> In any case, it is evident that the promotion of freedom of navigation norms was never separated from military and economic interests of the dominant naval powers. Up until WWI, this was most notably the British Empire and as it was benefitting from these maritime norm, freedom of navigation rights as well as limited rights to territorialize the oceans beyond three miles were in full bloom.

The upcoming both World Wars marked a new beginning of the global power constellation and thus how maritime space is governed. In 1914, the UK closed the entire North Sea. Every ship that would enter this 'military area' without prior permission would face severe consequences. Germany, as rising military power enacted its policy of counterbalancing British power under sea by an own submarine program. Freedom of Navigation was effectively abandoned during WWI. The interwar period, however, marked new attempts to reestablish norms of the freedom of the seas. The new promotor: the United States of America.<sup>103</sup>

On 18 January 1918, US President Woodrow Wilson proposed *Fourteen Points* in an address to the Congress that should restore world peace. His points were later taken as the basis for peace negotiations. While making a plea for the self-determination of all peoples under colonial rule, he also claimed that one condition for a post-war peace order should be "absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by

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<sup>99</sup> Another famous exception is that the British declared in 1820 all forms of slave trade on the oceans as a form of piracy which would allow crews to board vessels under suspicion to carry slaves even on the high seas.

<sup>100</sup> Bosco 2022, p. 50.

<sup>101</sup> Kaufmann 2011.

<sup>102</sup> Bosco 2022, p. 60.

<sup>103</sup> Ibid. p. 71.

international action for the enforcement of international covenants”.<sup>104</sup> The Covenant of the League of Nations only half-heartedly embraced the idea and another aspect started gaining relevance: some states, such as Portugal, were proposing to extend territorial waters up to 12 nautical miles. The Grotian idea of the oceans as inexhaustible in resources was increasingly questioned and especially countries that depended on fishery wanted to assure that no foreigner could benefit from the fish stocks closer to their costs. However, the major naval powers declined it as they were afraid this would undermine freedom of navigation.<sup>105</sup> What is more to say, the British saw their naval dominance fading. The US’s navy was growing as their attempts to establish their vision for ocean governance which resulted in a dispute between the two major naval powers over wartime navigational rights. However, these disputes became irrelevant when the next war started. After all, the interwar period foreshadowed two major trends in ocean governance that should characterize the following century. First, the US as an emerging naval hegemon, and second, increasing territorialization of the oceans.

### 4.3 The Scramble for the Oceans

The postwar world order became the beginning of renewed attempts to construct a peaceful order based on the principles of sovereign territoriality with the United Nations as the primary organization aiming at maintaining international peace and security and harmonizing interstate actions.<sup>106</sup> The end of WWII should be followed by an enormous process of de- and reterritorialization, not only in Europe and the growing USSR but also through decolonization processes when the British pulled out of India and what should become Pakistan, the Dutch left the East Indies, followed by the decolonization in Africa from the mid-1950s on. Until the end of the century, the UN should grow from its 51 founding states to a total of 193 sovereign countries.<sup>107</sup> Apart from these massive reconfigurations of land space, once again, new attempts to alter the spatial norms that apply to maritime space were undertaken to bring large parts of formerly free oceans under territorial sovereignty. This time, the push came ironically from the self-proclaimed defender of freedom of navigation – the USA. No twenty-six days after the End of WWII, on 26 September 1945, the US government under Harry S. Truman issued two presidential directives which should become to be known as the *Truman Proclamations*. In one of the proclamations (Proclamation 2667), he declared that “the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just” and thus “having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States”.<sup>108</sup> The other proclamation, the proclamation 2668, concerned the fishing resource whereby “the Government of the United States regards it as proper to

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<sup>104</sup> Wilson 1918.

<sup>105</sup> Bosco 2022, p. 86.

<sup>106</sup> Wilson 1918.

<sup>107</sup> MacMillan 2009.

<sup>108</sup> Truman 1945a.

establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale”.<sup>109</sup> The declarations should set of a territorialization process that fundamentally changed the international maritime order in the upcoming forty years.

The Truman Proclamations led almost immediately to other states adopting the ideas in a much more assertive than the US.<sup>110</sup> The following years should be characterized by a series of countries proclaiming extended territorial waters. Mexico proclaimed the same continental shelf as the US, 1947 Chile and Peru, Costa Rica, El Salvador, and Honduras asserted a 200 miles maritime zone within which they would have exclusive rights to sovereignty and exploitation of resources.<sup>111</sup> But the territorialization claims of the sea did not stop in the Americas. The Soviet Union made claims to territorial waters up to 12 miles, and Iran, Syria, and Lebanon extended their territorial waters to six miles.<sup>112</sup> Outside of the ‘western’ world, countries became to see freedom of navigation as just another tool of the powerful nations to suppress their former colonies and keep the wealth they acquired through the seas for themselves.<sup>113</sup> By contrast, Europe, especially those countries that relied on their fishing industry, saw this territorial awakening as a possibility to draw baselines around their shores that prevented foreign fishing vessels from entering these exclusive zones. The WWII aftermath met an advancement in the possibilities to extract fish resources, and so-called super-trawlers were more and more able to catch thousands of tons of fish stock. What used to be descried as an inexhaustible resource by Grotius became increasingly seen as a resource that needed national protection. In 1958 Iceland declared a 12-mile zone within which it claimed exclusive fishing rights.<sup>114</sup> These claims led to a series of conflicts between Iceland on the one side and the UK, West Germany, Denmark, and Belgium on the other side, which became to be known as the *Cod Wars*.<sup>115</sup>

The US had neither foreseen nor intended the consequences of its claims to a continental shelf, and Truman stated that the claims in the proclamations would not intervene with freedom of navigation. However, they marked a shift in the set of rules, norms, and principles that should govern the territorial rules as applied to the oceans that should continue throughout the second half of the 20<sup>th</sup> century. Rather than replacing the old freedom of navigation norm that delineated the appropriate claims of states according to the cannon-shot rule, it was displacing it by the piecemeal extension of ‘sovereign rights’ instead of complete sovereign territoriality. The governance of maritime space and its territorial norms demanded renewed attempts to codify maritime spatial norms.

The first attempts after WWII to find common ground on maritime matters happened during the 1958 *Geneva Convention on the Law of the Sea* or *UNCLOS I*.<sup>116</sup> The main convention consisted of seven

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<sup>109</sup> Truman 1945b.

<sup>110</sup> Bosco 2022, p. 94.

<sup>111</sup> United Nations Division for Ocean Affairs and the Law of the Sea 1998.

<sup>112</sup> Bosco, 2022, p. 95.

<sup>113</sup> Ibid. p. 102ff.

<sup>114</sup> In the 1970s Iceland extended this exclusive fishing zone up to 50 nautical miles.

<sup>115</sup> See, for example, Steinson 2016.

<sup>116</sup> In this case, UNCLOS refers to United Nations Conference on the Law of the Sea. The conferences have the same abbreviation as the convention.

conventions<sup>117</sup> including the Convention on the Territorial Sea and the Contiguous Zone.<sup>118</sup> The most pressing issue regarding the extension of the territorial waters of a coastal state and its sovereign rights could not be resolved. The next convention *UNCLOS II* did not produce an outcome at all. The center stage took the question of how far into the oceans a state could make claims. While primarily the US and the British insisted on the three-miles rule, that was as customary law. The stalemate regarding the rights and entitlements a state has was put under even more pressure, as technological advances enabled new possibilities to extract resources under the seabed, like diamonds, tin, and most importantly oil – including the risk of massive pollution of the coasts. And thus, by the late 1960s, oil exploration was moving progressively further from the land territory and deeper into the bedrock of continental margins.<sup>119</sup> The hunt for oil and other resources had begun and led – once again – to an enormous increase in unilateral territorial claims in the oceans and generating a myriad of territorial claims and sovereignty disputes.

Further, the superpower rivalry between the US and the Soviets also spread to the oceans. New submarine technology significantly increased the possibility of waging a nuclear war. The submarine-launched ballistic missiles made almost immediate reactions to an attack at any time possible. Freedom of navigation became thus also the freedom of unhindered passage for military vessels and submarines. As much as the cold war can be described by the colliding ideologies of the two superpowers, the US, and the USSR, regarding ocean governance, they were both more or less in line: coastal states should be stopped from making too extensive claims to maritime space.<sup>120</sup> In this sense, the concept of freedom of the seas gained another essential meaning. Today, oceans are the most crucial space where states can act militarily. And thus, “although military power is projected by long-range aircraft and missiles and from bases in the region, only the oceans can sustain it. Power projection requires forces with combat vehicles and heavy equipment, much of which cannot be transported by air.”<sup>121</sup>

Due to these technological advances, the world urgently needed a new maritime order. In November 1967, the Maltese Ambassador to the UN, Arvid Pardo held a powerful speech that stressed the importance of such a new order for the oceans. Pardo demanded a new concept that envisioned the oceans as neither free space (such as Grotius) nor *Mare clausum*. Instead, he proposed the idea of “an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction.” The oceans should become “the common heritage of mankind.” Pardo was afraid that the new technological advances would lead to some kind of scramble over the seas, and thus internationalizing the oceans would be “the only alternative by which we can hope to avoid the escalating tension that will be inevitable if the present situation is allowed to continue.”<sup>122</sup> Eventually, Pardo’s original ideas were never wholly established. Yet, Pardo set of another process to find common ground on the norms that govern the oceans.

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<sup>117</sup> Including the Convention on the High Seas, the Convention on Fishing and Conservation of the Living Resources of the High Seas, the Convention on the Continental Shelf, and the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (OPSD).

<sup>118</sup> Treves 2008.

<sup>119</sup> United Nations Division for Ocean Affairs and the Law of the Sea 1998.

<sup>120</sup> Bosco 2022, p. 109.

<sup>121</sup> Tangredi 2012, p. 71.

<sup>122</sup> Pardo 1967.

UNCLOS III convened for the first time in 1973, shortly after the Yom-Kippur War and the subsequent oil embargo that led to skyrocketing oil prices. These events further sparked the eagerness to exploit more of the offshore oil reserves located under the seabed. A vast amount of oil was already coming from offshore facilities – even though barely 2 percent of the world’s continental shelves had been explored.<sup>123</sup> The whole negotiation process of UNCLOS III took over 25 years until the *United Nations Convention on the Law of the Sea (UNCLOS)* was eventually signed in 1982. And yet, it took another 12 years until the convention came into force with the 60<sup>th</sup> ratification after a modification process that lasted from 1990 to 1994. However, UNCLOS had already heavily impacted how states were practicing the spatial norms of the sea: by 1990 more than 120 states had established a 12-miles territorial sea. Additionally, more than 100 countries extended their *Exclusive Economic Zones (EEZs)* to 200 nautical miles.<sup>124</sup> The US as biggest proponent of freedom of navigation signed, but never ratified the treaty. The US senate never provided the 2/3 majority as most notably the Republicans see the treaty as too much of an interference into American sovereignty – once again, the US’ hunger for oil had trumped its pledge to defend freedom of navigation.

#### 4.4 UNCLOS as Codification of Spatial Norms of the Oceans

Eventually, UNCLOS can be regarded as a big compromise trying to reconcile the two competing norms of sovereign territoriality with freedom of navigation norms. In this sense, the ‘solution’ is that a state has fading sovereign rights the deeper the state enters into the oceans. Nevertheless, the convention plays the central role in how the oceans are governed today and is also labeled the “Constitution of the Seas”.<sup>125</sup> It is one of the most complex and comprehensive agreements in international relations and one of the most far-reaching international legal documents, with 168 members and 157 signatory parties from the 193 sovereign states of the United Nations.<sup>126</sup> Today, the Convention comprises a total of 17 parts, 400 articles, and 9 annexes, the essence of which can be broken down to three principles according to Mar Zacharias and Jeff Ardron.<sup>127</sup> First, that states have sovereign rights and exclusive rights to extract resources in their contiguous maritime areas within clearly defined geographic boundaries. Second, that portions of the world’s oceans are to be considered the ‘common heritage of humankind’ over which no state can exercise exclusive sovereignty. Third, the commitment of the signatory parties to respect the needs of other states and to protect the oceans. However, the most important aspect that became codified with UNCLOS are the competing visions of what sovereign rights a state has versus guarding the norm of freedom of navigation. In a way, UNCLOS encompasses all three concepts of the oceans, to make it national territory (*Mare Clausum*) to make it space that is owned by no one (*Mare Liberum*) and to make it the space of everyone (Common heritage of mankind). UNCLOS is the attempt to find a balance between these three territorial

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<sup>123</sup> The UN indicates that 483 million tons of the oil are produced in the Middle East, 431 million barrels in Nigeria, 141 million barrels in Malaysia, and 246 million barrels in Indonesia. See United Nations Division for Ocean Affairs and the Law of the Sea 1998.

<sup>124</sup> Bosco 2022, p. 172.

<sup>125</sup> Permanent Court of Arbitration 2016.

<sup>126</sup> Zacharias and Ardron 2019, p. 65ff.

<sup>127</sup> Ibid. p. 67.

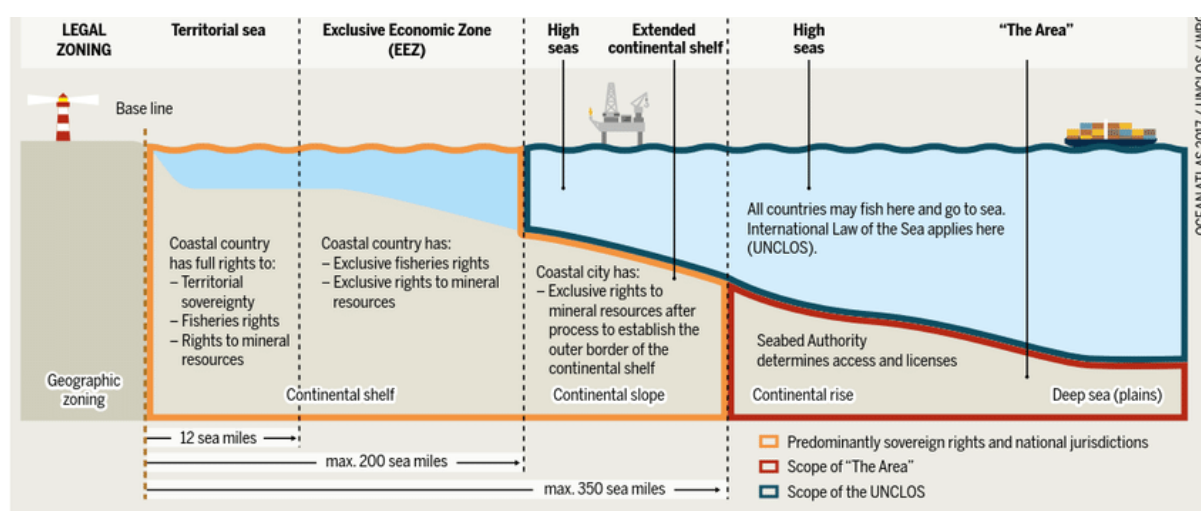


principles and decided to establish certain ‘territorial’ zones with diverging sovereign rights. Thus, it is worth taking a closer look at the specific provisions made by the conventions and how sovereign rights are granted to the states while simultaneously aiming at safeguarding in essence the freedom of the seas. In this regard, UNCLOS is the codification of different spatial norms.

There are seven different zones, as provided by UNCLOS, where states can exercise different sovereignty rights: 1. The Internal Waters, 2. the Territorial Sea, 3. the Contiguous Zone, 4. the Exclusive Economic Zone (EEZ), 5. The Continental Shelf, 6. The High Seas, and 7. The Area.

### Map 3.

#### *Territorial Entitlements in the Oceans*



Source: Bähr 2017

#### *Internal Waters*

As provided by Article 8 of UNCLOS, internal waters are those waters lying landward of the baseline from which the territorial sea is measured.<sup>128</sup> More specific, they are the waters around the coast of a state up until the low water mark, which is usually the level reached by the water at low tide, or all internal rivers and lakes, but also all those waters that enclose ports and harbors and the waters by so-called straight baselines which are drawn when a coastal state has fringing islands.<sup>129</sup> States exert complete sovereignty in their internal waters, and they can be considered part of their sovereign territory as it applies to land space. Rights to innocent passage do not apply here. According to UNCLOS, if a coastal state decides to prevent a foreign vessel from entering the internal waters it has the legal basis to do so. An exception are the so-called *archipelagic waters* of islands states such as the Philippines (also called archipelagic states). They also fall under the category of internal waters with the exception that they must provide innocent passage.

<sup>128</sup> United Nations 1982, p. 28.

<sup>129</sup> International Institute for the Law of the Sea Studies 2021b.

However, coastal states can make specific laws that regulate the use of their internal waters without interference from the outside.<sup>130</sup>

#### *Territorial Sea*

The Territorial Sea, as provided by Article 3 and 4 of UNCLOS are the 12 nautical miles that come after the straight baseline of the internal waters of a coastal state. The territorial sea can extend up to 12 nautical miles from a state's coast, but they do not necessarily have to. They are still part of the territory of a coastal state and the territorial sea lays therefore within its jurisdiction. UNCLOS, however, already restricts the complete sovereign rights of a state, by providing the right to *innocent passage*. Within the territorial sea, the state exercises also full sovereignty over the air space above the sea as well as over the seabed. A foreign airplane cannot pass through the air space defined by the territorial sea. Further, the state has complete legislative rights on everything that controls the reduction and prevention of pollution and the preservation of the maritime environment. Also, resources, such as fish or oil, are completely reserved for the usage by the coastal state.<sup>131</sup>

#### *Contiguous Zone*

The contiguous zone can to a certain degree be understood as the extension of the territorial sea. The coastal state has the right to implement measures against, for example, pollution, fiscal immigration and the right to punish violations of its customs.<sup>132</sup>

#### *EEZ*

The Exclusive Economic Zone of a state, as provided by Part V of UNCLOS is for the purpose of giving coastal states control over the resources in the waters adjacent to their coasts. Coastal states, as stated in Article 56, enjoy "sovereign rights" in the EEZ for the purpose of "exploring, exploiting, conserving and managing the natural resources, whether living or non-living". While the coastal states have certain duties and can make exclusive claims, this means they enjoy sovereign rights and not full (territorial) sovereignty. The EEZ stretches up to "200 nautical miles from the baseline from which the breadth of the territorial sea is measured"<sup>133</sup>. In this zone the states have limited jurisdiction, including legal rights over conducting marine scientific research offshore installations, and certain rights concerning the protection and preservation of the sea. Further, states may install facilities for energy production purposes, such as installing wind parks. In contrast to the territorial sea, foreign states enjoy full freedoms of navigation in the EEZ and overflight over it as if on the high seas. Further, states have the right to establish artificial islands and other structures for scientific research or economic ends.<sup>134</sup> By contrast, foreign states are

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<sup>130</sup> Today, there are 22 sovereign states claiming to have archipelagic status. However, UNCLOS in 1982 approved only the Philippines, the Bahamas, Fiji, Indonesia, and Papua New Guinea.

<sup>131</sup> International Institute for the Law of the Sea Studies 2021c.

<sup>132</sup> International Institute for the Law of the Sea Studies 2021d.

<sup>133</sup> International Institute for the Law of the Sea Studies 2021a.

<sup>134</sup> International Institute for the Law of the Sea Studies 2021e.

already allowed to install submarine cables and pipelines. Other internationally lawful uses of the EEZ include a broad range of military activities, such as intelligence collection, surveillance operations, and naval oceanographic surveys. What is more, a coastal state must make a formal claim in order to establish an EEZ. Today, about 36 percent of the oceans consist of EEZs.<sup>135</sup> UNCLOS only provides sovereign rights and not full territorial sovereignty over an EEZ. Some states disagree on whether full freedom of navigation principles apply for military purposes and research operations.<sup>136</sup>

### *Continental Shelf*

Another area of particular importance for the exploitation of natural resources is the continental shelf which can hold significant amounts of oil reserves as well as fish stock. According to Art. 76.1 of UNCLOS, the continental shelf usually “comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured”<sup>137</sup>. However, in some cases, states can claim an extended continental shelf, based on specific geologic requirements. In this case, UNCLOS requires a formal submission to the *Commission on the Limits of the Continental Shelf (CLCS)*, which decides whether a state is entitled to make claims up to 350 miles from its baselines. Once the outer border of the continental shelf is established, coastal states have exclusive rights to the extraction of mineral resources (Art. 77).

### *The High Seas and the Area*

The rest can be subsumed under the category of high seas. All countries may fish here, and no state can legally claim any sovereign rights. They are still governed by freedom of the seas in the classical Grotian sense. Its resources are governed according to the principle of the common heritage of mankind (Art. 136).<sup>138</sup>

### *The Role of Maritime Features*

Maritime features are maybe one of the most complicated issues of UNCLOS as well as the most conflict-generating ones. One of the core principles for generating maritime entitlements as provided by UNCLOS is that every claim to ocean space is derived from its relation to land space. Thus, certain maritime features that lay offshore can substantially extend sovereign rights to maritime space. There are many different forms of maritime features, such as reefs and archipelagos, or sand elevations. Against the backdrop of UNCLOS, at least five of them can be distinguished: 1. islands, 2. rocks, 3. low-tide elevations, 4. artificial islands, installations, and structures, and 5. submerged features.<sup>139</sup> Islands – as in Article 121.1 defined as “a naturally

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<sup>135</sup> Ibid.

<sup>136</sup> Nouwens 2022, p. 5.

<sup>137</sup> United Nations 1982, p. 53

<sup>138</sup> Ibid. p. 70.

<sup>139</sup> International Institute for the Law of the Sea Studies 2021a.

formed area of land, surrounded by water, which is above water at high tide.”<sup>140</sup> - are in this regard of particular importance, because they are the only features of the above listed that can generate internal waters, its own territorial seas, a contiguous zone and an EEZ. By contrast “rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”<sup>141</sup> (Article 13). Although low-tide elevations as “a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide are not entitled to create a territorial sea and there like such as islands, they “may be used as the baseline for measuring the breadth of the territorial sea.” (Art. 13). Further, neither artificial islands, nor submerged features (such as reefs) generate territorial seas and other zones. However, a state can generate a ‘safety zone’ around the former and enjoy exclusive jurisdiction over them within their EEZ.<sup>142</sup> Submerged features, however, are principally nothing more than part of the seabed.

### *Innocent Passage*

Today, one of the significant aspects of the global South China Sea territorial disputes is the aspect of freedom of navigation as *Innocent Passage through the territorial sea and transit through straits*. According to Article 52 of UNCLOS<sup>143</sup>, innocent passage is defined as moving through the territorial sea in a way that is not jeopardizing the security of the coastal state, which also includes anchoring and stopping necessary for ordinary navigation. The coastal state is expected not to hinder, deny, or stop innocent foreign vessels from passing through its territorial sea. The coastal state can only suspend these rights within the territorial sea for concrete security reasons. Even warships are granted passage if they pass for innocent purposes without prior authorization, provided they proceed without delay or stop. However, a coastal state can adopt regulations to designate specific sea lanes with which foreign ships must comply.<sup>144</sup>

Today’s UNCLOS is the product of century-long shifts in the underlying rules, norms, and principles as applied to the oceans. Freedom of navigation partially gave way for a process of semi-territorialization of the seabed. In this regard, Truman’s proclamations in 1945 opened Pandora’s box for states to extend their claims gradually. UNCLOS should in this sense be regarded as a big compromise. This compromise for the legal order of the oceans is a compromise between the attempt to uphold the freedom of navigation and the increasing hunger to include sea space into the sovereign land territory. Additionally, UNCLOS left many loopholes for states that wanted to extend their territorial claims. Article 298 of the convention, for example, would provide states the possibility to exclude important parts of UNCLOS that concerned binding dispute settlement procedures. And thus, UNCLOS enshrined a halfway maritime territorialization process that would leave much room for interpretation of which rules apply to the different zones. As maritime spatial norms had been subject to change throughout history (from Grotius’ to the 3-miles rule

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<sup>140</sup> United Nations 1982, p. 66.

<sup>141</sup> Ibid. p. 29. A naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide

<sup>142</sup> International Institute for the Law of the Sea Studies 2021a.

<sup>143</sup> United Nations 1982, p. 42.

<sup>144</sup> Federal Foreign Office 2019.

to the 12-miles rule and EEZs), they will remain to be contested in the future. History has shown that the norms and rules applied to the oceans always depended on the view of the dominant naval power that was likely to alter these rules in accordance with its own interests.

The following chapter of the thesis turns to the history of the South China Sea. The role of spatial norms applied to maritime space as outlined in this chapter will form the understanding of what spatial norms apply to maritime space and what role they have been playing in the more recent history of the conflict.

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## 5. The History of the South China Sea Disputes: Perceptions, Interests, and the Struggle for Freedom of Navigation

This part is concerned with the way today's conflict on the South China Sea became a conflict, including all its geopolitical, security, and economic challenges that led to the situation of the South China Sea becoming a global arena of great power rivalry between China and the US. This part is divided into four chapters, each observing central aspects crucial for understanding today's conflict. It is worthwhile to take the 'long road' from the early 20<sup>th</sup> century. First, it will be shown that today's Chinese official position of 'indisputable sovereignty' is a product of the construction of a Chinese nation, based mainly on the drawing of maps in this time. The struggle for sovereignty against the backdrop of Western colonialism and Japanese Imperialism paved the way for nowadays China's fundamentalist opposition to any peaceful resolution of the conflict and lies at the core of the clash with the norm of the freedom of navigation as formulated in the UNCLOS. These aspects will be covered in the first period. The following part will discuss the PRC's early understanding and opposition to spatial norms of the oceans. Equally, the impact Cold War had on the conflict in this time will be covered, as well as the discovery of oil. From the end of the Cold War to 2008, the third phase will be described as the build-up of the conflict about spatial norms in the South China Sea that was up to emerge. Besides regionalization processes in the context of the *Association of Southeast Asian Nations (ASEAN)* that attempted to prevent conflict, the PRC was making claims in its domestic law that could not be aligned with UNCLOS that China signed about the same time. 2009 marked the beginning of a new level of China's assertiveness that became to be viewed globally as a threat to freedom of navigation. The last chapter thus turns to China's naval build-up to enforce its territorial claims and the reaction of the US as the leading defender of the norm of freedom of navigation in the region, aligned with its like-minded partners.

### 5.1 Colonialism, the 'Invention of China', and Japanese Hegemony 1907-1949

People in the countries bordering the South China Sea did not show much interest in the maritime features for a long time. The islands, reefs, and low-tide elevations were more perceived as a danger for navigation than something the littoral empires and kingdoms wanted to own and reign. Ships were regularly wrecked on the reefs and rocks, and thus, they were regarded as places that should be avoided. The only people interested in them and their adjacent waters were fishermen, which saw them as "regional commons where everybody, regardless of nationality, could find and take what they wished."<sup>145</sup> Colonialism in the South China Sea region emerged in the sixteenth century and left its footprint for the following centuries. Spain,

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<sup>145</sup> Freeman 2015.

the Netherlands, France, the United Kingdom, and the Portuguese divided the littoral land that is surrounding the South China Sea into spheres of influence. Malaya, the northern Borneo colonies, and Hong Kong should be colonized by the British. Indochina should go to France, the East Indies were occupied by the Dutch, and the Philippines got under Spanish rule until the USA took over.<sup>146</sup>

In the 19<sup>th</sup> and 20<sup>th</sup> centuries, the region should witness the rise of Japan, which expanded southwards to China, and Viet Nam and started occupying some of the maritime features located in the South China Sea. The Western colonizers were particularly interested in the maritime lines and establishing safe trading routes. To this end, the colonizers started mapping the South China Sea.<sup>147</sup> In 1806, a businessman of the East India Company named James Horsburgh wrecked in the South China Sea and dedicated himself to producing accurate maps. The modern technique of accurate map-making was still relatively new. He appeared to be the first geographer to identify several features in the South China Sea, including the Spratly Islands.<sup>148</sup> Many of the maritime features in the South China Sea have up until today the names that the western powers gave them during the centuries of colonialization or have adopted their literal translations.

Colonialism also brought other ideas and practices that should fundamentally shape the South China Sea disputes for the next century. Drawing boundaries and ruling this territory while having complete sovereignty of this land was imposed by the Western colonizers on Asia, with little attention to cultural or ethnic spaces.<sup>149</sup> Like the territorialization of sovereign land space, Western ideas of freedom of navigation and how boundaries apply to maritime space traveled eastwards. Consequently, people who formally understood frontiers as fluid and maritime space and its features mostly not belonging to anyone started thinking about dividing them and making them part of their sovereign territory. And thus, the transition from fluid frontier to fixed boundaries laid the foundations for the current conflict in the South China Sea.<sup>150</sup>

Three main players with distinct interests characterized the first stage of the South China Sea disputes. France, as colonizing power. Japan, a rising power mirroring Western practices and attempting to become the new hegemon in the region, replaced centuries of Chinese dominion. And third, China under the Qing rule transformed into a nation-state according to Westphalian notions of sovereign territory struggling with its semi-colonialization, its internal power competition between conservative powers, the Guomindang, the Communists, and warlords.

### ***5.1.1 Early Conflicts and China's Struggle for Power***

The transitioning phase of China, from the last years of its imperial rule under the Qing dynasty, through the proclamation of the Republic of China after the Xinhai Revolution in 1912, and its struggle against

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<sup>146</sup> Huang and Billo 2015, p. 15.

<sup>147</sup> Ibid.

<sup>148</sup> Bosco 2022, p. 57.

<sup>149</sup> Zacher 2001, p. 217.

<sup>150</sup> Hayton 2014, p. 47.

Western and Japanese imperialism formed the basis of Chinese national sentiments as they are defended today. Sovereignty over the newly defined country, including full territorial sovereignty over its maritime claims, became a matter of survival. In 1907, China was a weak empire ruled by the Qing dynasty, the first clashes between the Qing and Japan appeared over an atoll that is now under Taiwanese control. The Pratas Island (or Dongsha-Island) located about 170 nautical miles from Hong Kong is the largest of the South China Sea islands. In 1907 it was covered with a valuable phosphor and nitrogen-rich resource provided by bird droppings: guano, a fertilizer that was much needed in Japan to make the cultivation of rice much cheaper – a big business.<sup>151</sup> Several clashes between Japanese guano miners and the Chinese appeared and outraged people on the mainland, but in 1909, Japan recognized the Pratas Islands as Chinese territory in exchange for 130,000 Canton silver dollars.<sup>152</sup> However, the clashes led to a process where the Chinese imperial government started making claims over the islands in the South China Sea, including first, the Patatas, the Paracels, and later by claiming sovereignty over the archipelagos of the Spratly Islands, and Macclesfield Bank. In 1909, the imperial government deployed ships under the guidance of Admiral Li Zhun to the Paracels that were back then largely unknown to the Chinese public.<sup>153</sup> Mimicking the Westerners making territorial claims, Li stuck a flag into Woody Island and declared full sovereignty over the Paracels. For the French colonialists, the Paracels had been of little interest until the early 20<sup>th</sup> century. The *Convention relative à la délimitation de la frontière entre la Chine et le Tonkin* delaminated the frontiers between French Indochina and the Chinese empire did not mention any islands or other maritime features further in the south from the Gulf of Tonkin.<sup>154</sup> A year later, the Chinese started making plans to exploit the Paracels economically. However, these plans would not be seen to be carried out during the Qing rule as the empire was collapsing.

In January 1912, the Republic of China (ROC) was formally proclaimed. The following 20 years should be characterized by competing governments trying to reestablish the old imperial order, as represented by Yuan Shikai, or to establish a modern Chinese nation, as defined by Sun Yat-sen, as well as many different warlords, and the communist party until China was partially unified by the Guomindang under Chiang Kai-shek with the new capital established in Nanjing. During this turbulent period, the different parties within the young republic needed to gain political legitimacy. For one, by modernizing the nation, and second, by establishing a sentiment of national cohesion, and, most importantly, by gaining sovereignty against the imperial powers over a clearly defined space – the territory. And thus, defending territories in the South China Sea became a matter of demonstrating the government's commitment to defending the Chinese nation.<sup>155</sup> Drawing national boundaries and maps became an essential part of the making of this new Chinese nation, or, as Bill Hayton has put it, “the invention of China”.<sup>156</sup> Cartography and geography became closely bound to the making of the new China and to nationalism. A geographer, Bai Meichu, proposed in 1913 a new geographical concept: “Loving the nation is the top priority in learning geography

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<sup>151</sup> Hayton 2020, p. 218f.

<sup>152</sup> Granados 2005, p. 448.

<sup>153</sup> See, for example, Granados 2005, p. 447; Hayton 2014, p. 52 and Hayton 2020, p. 222f.

<sup>154</sup> Granados 2005, p. 447.

<sup>155</sup> Ibid. p. 445.

<sup>156</sup> Hayton 2020.



while building the nation is what learning geography is for.”<sup>157</sup> In other words, geographers were at full service for the nation. It was also Bai who drew a line that should leave a lasting impact on the disputes up until today. In 1936 Bai published the *New Atlas of China's Construction* for use in schools. The atlas showed a map of China that was clearly encircled by a thick red line, including Mongolia, Manchuria, and Tibet. Most importantly, the red line encircled almost the entire South China Sea. As a matter of fact, Bai had little knowledge about the region and translated many of the British maps that indicated reefs and other maritime features simply as islands. Bai's work did not find great recognition at that time. The maps he drew were seen as technically outdated and did not find recognition besides their usage in a few Chinese schools until the end of WWII.<sup>158</sup> The government continued to regard the Paracels as the southernmost territory of China.<sup>159</sup>

Besides the increasing interest in the maritime features, the Guomindang was closely following western discussions about freedom of navigation and ocean governance. Debates in the West to extent the territorial sea by a contentious zone up to 12 miles also found attention in China. In 1930, the *China Press* commented: “China has some interest in this matter. Nanking has consistently regarded the excellent service provided for her coasts and rivers by foreigners as an infringement of her rights. Quite recently Mr. Maze<sup>[160]</sup> proposed that China by arbitrary enactment should extend her boundaries twelve miles to seaward. Well, we are taught that fortunes has great favors for the bold.”<sup>161</sup>

### 5.1.2 The Harsh Reality of Military Inferiority

The Chinese visions of a nation, the map-making and the struggle to sovereignty over South China Sea islands met the harsh reality of colonial and imperial superiority of the Western powers and Japan. By the end of the 1920s, the French and Japanese interest in the Paracels had grown. The French also expanded their activities in 1928 by starting with the extraction of guano. In 1927, the newly centralized government of the Republic of China in Nanjing investigated the Paracels as possible sides for the extraction. Once there, they discovered that Japanese people were already using the islands and reefs as sites for extractions. France's advances sparked the protest from the Chinese, which was met with little interest by the French colonizers.<sup>162</sup> China protested these activities, but it had few naval forces that could enforce its claims anyways. The *Mukden Incident* in September 1931 marked the beginning of the Japanese colonialization of China that should be accompanied by a 15-year long war. China, during the Nanjing decade, already nothing more than pieces of territory, had no means, but diplomacy, to challenge Japanese and French claims in the South China Sea. The French government and the Nationalists exchanged notes in December 1931, July and September 1932, September 1933, March 1934 and February 1937, but could not reach an agreement

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<sup>157</sup> In: Wu 2011.

<sup>158</sup> Hayton 2020, p. 233f.

<sup>159</sup> Granados 2005, p. 450.

<sup>160</sup> Presumably Sir Frederick William Maze, a British civil servant and Chinese customs commissioner, serving as Inspector-General of the Chinese Maritime Customs Service from 1929 to 1943.

<sup>161</sup> The China Press 1930.

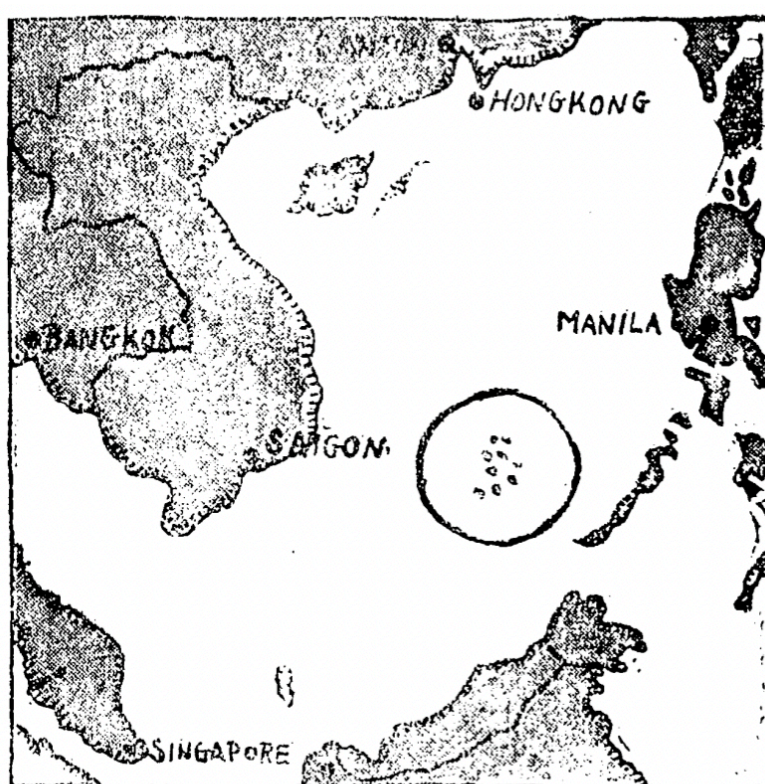
<sup>162</sup> Granados 2005, p. 449.

on the sovereign rights.<sup>163</sup> And thus, during the 1930s China's role in the territorial disputes can be characterized by its reluctance to take an active stance in claiming the islands as territory.<sup>164</sup>

In August 1933 France announced publicly that it had annexed the Spratlys. Immediately, as a reporter in *The China Weekly Review* writes, "instructions have been given the French navy and to school-book publishers to stamp the five small islands and a coral reef in the China Sea about 400 miles west of the Philippines on maps in the name of France."<sup>165</sup> "The islands", the reporter continues, are "admittedly part of Chinese territory."<sup>166</sup> So far, it was the first expansion of French colonial territory since WWI.

#### Map 4.

##### *French Colonization of the Spratly Islands*



—Reproduced from the China Press

Islands Occupied by France Shown in Circle in above Map.

Source: *The China Weekly Review* 1933b

Chinese officials and journalists appeared to be confused about which islands the French actually had seized and initially thought it was about the Paracels.<sup>167</sup> Despite the fact that the Spratlys were largely unknown to the Chinese public, the French official annexation caused a strong protest by Chinese nationals: "From our investigations and studies we know that the Chinese discovered the Paracel Islands many centuries ago

<sup>163</sup> Granados 2005, p. 451.

<sup>164</sup> Ibid.

<sup>165</sup> *The China Weekly Review* 1933a.

<sup>166</sup> Ibid.

<sup>167</sup> Hayton 2019, p. 144ff.

before the West knew anything about the East”<sup>168</sup>, stated a Chinese Nationalist Newspaper. And, as another Chinese nationalist newspaper is quoted in *the China Weekly Review*: “The French occupation of these islands marks the beginning of another race between the imperialist Powers in looking for new colonies. By occupying these islands, the French secure a strong fortification in the southern waters for the defence of Indochina. This fact shows that the Powers are gradually diverting their attention to the Pacific [...]. In all these movements, China seems to be the victim”<sup>169</sup>. However, the Nationalist government in Nanjing was more reluctant to claim full sovereignty over these Islands and, as *The China Weekly Review* writes, “The belief is expressed in Nanking that *if the islands belong to any nation* by right of settlement, that nation is China.”<sup>170</sup>. Thus, lacking the military means to bolster any sovereignty claims over the islands, China was undoubtedly the loser in the imperial game between France and rising Japan seeking to advance their interests in the South China Sea. Given China’s internal turmoil, however, it is safe to say that the South China Sea was anyways not a top priority.

When the Second World War broke out in 1939, the Japanese had already invaded China, which was followed suit by the occupation of the Pratas Islands and the South China Sea archipelagos. The South China Sea Islands were used as a ‘jump board’ for the Japanese military to invade Southeast Asia. In 1938 France occupied the Paracels, but when the war broke out France, and the other colonial powers, and Russia, became allies against Germany and were mainly focusing on Europe. And thus, the entire region encircling the South China Sea, from the Strait of Malacca up to Taiwan and further to Japan, was under the control of the Japanese Empire. In fact, “the South China Sea became a ‘Japanese lake’ and would remain so until January 1945.”<sup>171</sup> The Japanese would use Woody Islands in the Paracels and Itu Aba as bases during WWII which were consequentially targeted by the American fighters.<sup>172</sup>

### **5.1.3 The End of War and New Maps**

After WWII, the Republic of China and Colonial France were determined to (re-)gain sovereignty over the islands in the South China Sea. In the immediate aftermath of the war, none of the South China Sea islands, neither the Spratly- nor the Paracel Islands, were occupied. However, when the French tried to regain control over the Paracels in 1947, it caused nevertheless a heavy reaction by China’s nationalist forces. A Chinese Nationalist newspaper is quoted that “the French Navy has now invaded Chinese territory” and that “the Paracel Islands definitely belong to China”. Further, China must “lodge a strong protest with France and should also look upon the incident as a warning to ourselves... if we fail to solve our internal problems, China will again become a semi-colonial country subject to invasion by other nations”<sup>173</sup>. After

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<sup>168</sup> Meng 1933.

<sup>169</sup> *The China Weekly Review* 1933b.

<sup>170</sup> *Ibid.*

<sup>171</sup> Hayton 2014, p. 57.

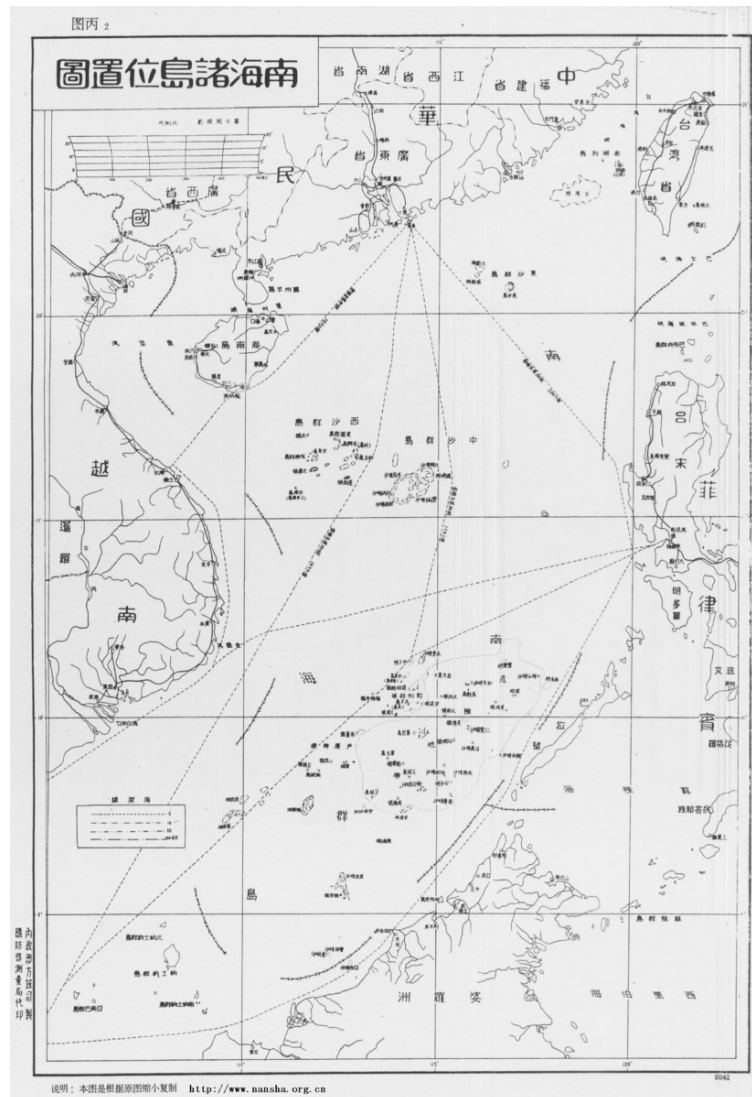
<sup>172</sup> *Ibid.*

<sup>173</sup> *The China Weekly Review* 1947.

a short (and by France halfheartedly-fought ) stand-off between the Nationalist forces, the Chinese had regained control over large parts of the Paracels.

## Map 5.

### *Chinese Eleven-Dash line as of 1947*



Source: Secretariat of Government of Guangdong Province 1947

Besides this victory of Chiang-Kai Shek against Colonial France, China was still in the midst of reclaiming control over the South China Sea and was mapping out its claims. The Canadian scholar Chris P.C. Chung<sup>174</sup> traced the emergence of these maps from 1946 to 1948, which should later become the foundation of China's claims in the form of the nine-dash line. For the first time, China publicly claimed the Spratly Islands and all the other maritime features in the South China Sea. In September 1946, representatives of the Ministry of Foreign Affairs, Ministry of the Interior, Ministry of National Defense, and other

<sup>174</sup> Chung 2016.

government bodies met to decide on the scope of claims they would make in the South China Sea.<sup>175</sup> In this context, they revisited old maps of China to derive their territorial claims in the South China Sea from – Bai Meichu’s work suddenly found recognition. China first publicly claimed 159 of the maritime features in the South China Sea in 1947 by publishing a map with eleven dashes, including the major features such as the Pratas, the Paracels, and the Spratlys, as well as Scarborough Reef.<sup>176</sup> There are discussions, about whether the Chinese government had published the maps as a reaction to the Truman Proclamation as some kind of extension to the continental shelf.<sup>177</sup> The eleven dashes, however, should most likely not depict the ROC’s claims to the entire South China Sea, but rather delineate the scope of the maritime features China would claim as national territory.<sup>178</sup>

However, the Chinese internal turmoil was still not over. As the journalist Lin Chi-chun writes in an essay titled “China in Transition” for the *China Weekly Review* in November 1948:

“The history of China is in a transitional stage. There are conflicts between two different cultures, the old and the new, Oriental and Occidental, feudalistic and anti-feudalistic. China is in a period of disorder and catastrophe, in a stage of surprise and wonder, a time of brutality and inhumanity, and also on an age of bravery and progressiveness. While the present-day history of China is a page of blood and tears, it is also a page of hope and light.”<sup>179</sup>

The big change came soon. After 100 years of foreign rule, state collapse and civil war, Mao Zedong proclaimed the People’s Republic of China on Tiananmen in Beijing, on 1. October 1949.

And thus, the first period of the South China Sea disputes can be characterized by three major developments that should determine the future evolvement of the conflict. The first aspect is the colonial or imperial footprint in the region. Although China made claims over the islands, the military might of colonial France and Imperial Japan really decided at the end of the day over who was holding power over the South China Sea. The second main aspect was the struggle of China as a sovereign nation within a territory. Although the territorial claims over the islands and other maritime features really emerged at this time, they became a matter closely bound to nationalistic sentiments in China, against the backdrop of colonialism and powerlessness to enforce these claims. In this regard, in the first episode of the disputes, the great symbolism of the South China Sea for political ruling and its legitimacy emerged. The last aspect is that the first episode already showed how much of a global conflict the disputes are, with different ‘players’ with different interests entering and leaving the ‘playfield’.

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<sup>175</sup> Ibid. p. 42.

<sup>176</sup> Bosco 2022, p. 95f.

<sup>177</sup> Ibid. p. 95.

<sup>178</sup> Chung 2016.

<sup>179</sup> Chi-Chun 1948.

## 5.2 Cold War, the Scramble for Resources and China's Territorial Sea 1949-1990

The End of the of WWII altered the power constellation in the South China Sea radically. For one, Imperial Japan as one of the major powers involved in the claim making of the South China Sea maritime features had dropped out. Japan had abandoned all the islands it had occupied during WWII in the *San Francisco Peace Treaty* in 1951 and Article 2(f) stated that “Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands”<sup>180</sup>. However, the treaty did not mention to whom these islands belonged. In other words, the South China Sea question remained to be unsolved, and the allies never promised the islands to China.<sup>181</sup> Another major development was taking place: The US formally recognized the independence of the Philippines in 1946. After eight years of war, the French came to an end of their colonial rule in Viet Nam in May 1954.<sup>182</sup> Malaysia eventually gained independence from the British in 1957, after 12 years of decolonial struggle. Another aspect that should shape the conflict in a fundamental way were the powershifts in the Cold War as well as newly found resources in the South China Sea. But the major shift came certainly from within China itself when the nationalist forces around Chiang Kai-Shek were fleeing the Mainland and the People's Republic was installed. Although it took up until the 1970s that the PRC was recognized by most of the international community and exchanged seats at the UN with the ROC, its leader Mao Zedong overtook the maps that the Nationalists had made in 1947. Ever since, the PRC and Taiwan have been mirroring their position regarding their claims, although the PRC removed in 1953 two of the dashes from the Gulf of Tonkin as a favor to brother Communists - eventually creating the infamous nine-dash line.<sup>183</sup>

### 5.2.1 China's Early Maritime Claims

The 1950s and 1960s should be characterized by relatively peaceful relations between the states regarding the South China Sea. At about the same time, the PRC started thinking about the rules and principles it would apply to maritime space. First, more in a more ideological sense, about its position regarding freedom of navigation. And second, about the extent of its own territorial sea as applied to its land as well its islands – including the maritime features in the South China Sea. The Chinese Communist Party became aware of its interests as well as the potential the maritime domain would provide. China, still not recognized by large parts of the international community, announced a territorial sea of 12 miles in 1958 – about five months after the UNCLOS I negotiations over the territorial sea had failed.

In the statement the PRC declared that “the breadth of the territorial sea of the People's Republic of China shall be twelve nautical miles. This provision applies to all territories of the People's Republic of China“. Moreover, the declaration stated that “no foreign vessels for military use and no foreign aircraft may enter

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<sup>180</sup> United Nations 1951, p. 50.

<sup>181</sup> Hayton 2021.

<sup>182</sup> Though the country was split by the ‘Geneva Accords’ in the Communist North and the ‘Capitalist’ South, which made them de facto two new parties in the dispute.

<sup>183</sup> Hayton 2014, p. 59. Up until today Taiwan uses the eleven-dash line.

China's territorial sea and the air space above it without the permission of the Government of the People's Republic of China". These principles, the statement made clear, would [...] apply to Taiwan and its surrounding islands, the Penghu Islands, the Tungsha Islands, and Hsisha Islands [Paracels], the Chungsha Islands, the Nansha Islands [the Spratly Islands], and all other islands belonging to China."<sup>184</sup>

There were plenty of reasons for claiming a 12 miles territorial sea. The first reason was that the Soviets favored it, while the British and US 'imperialists' wanted to stay with the 3 miles rule. In addition, the PRC became aware of potential future advantages, especially regarding the access to the Taiwanese Islands Quemoy and Matsu close to its coast.<sup>185</sup>

The US responded to these claims:

"The US position on this matter is quite clear. The United States only recognizes the Government of the Republic of China; and as far as the United States is concerned the declaration of the Chinese Communist regime has therefore no force or validity. In addition, the United States considers that international law recognizes only a 3-mile limit, that it is not possible for a country by unilateral action to take unto itself that which is the common property of all nations, and that this is, moreover, in violation of the universally accepted principle of the freedom of the high seas."<sup>186</sup>

This response should foreshadow the US' position regarding China's South China Sea in the 21<sup>st</sup> century. Yet, the second half of the 20<sup>th</sup> century, the US was far away from enacting its pledge for freedom of navigation at least in the South China Sea. As a foreign policy cable from 1970 would reveal after Chinese patrol boats were shadowing American oil exploration ships in contested waters in the East China Sea, it became subject of discussions how the US would react if the Chinese would attack the American vessel. The decision was made not to intervene, as the US should restrain from becoming involved in territorial disputes. Henceforth the US foreign policy regarding maritime territorial disputes in Asia, including the South China Sea, should "not only be one of scrupulous noninvolvement, but of active discouragement."<sup>187</sup>

But Beijing did not only claim its own rights for extended territorial seas. It actively opposed the norms of freedom of navigation as promoted by the US. This becomes clear in a speech by Shen Wei-liang to the United Nations Sea-Bed Committee where he outlined the PRC's view on freedom of navigation norms. The PRC was clearly in line of the tradition of countries that saw freedom of navigation rights as another tool of colonialism. Shen stated that "a small number of maritime powers have long dominated and run amuck on the seas and oceans by utilizing the so-called "freedom of the high seas". These freedoms, he continued, are "freedoms of superpower aggression, threat and plunder against other countries, particularly the developing countries, and freedoms of superpower hegemony and power politics."<sup>188</sup> Further, the PRC stated that it would "firmly support the just struggle initiated by [Latin] American countries in defense of the 200 nautical-mile territorial sea and their own marine resources, and resolutely oppose the maritime

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<sup>184</sup> In United States Department of State 1972, p. 2.

<sup>185</sup> Bethill 1974, p. 727.

<sup>186</sup> United States Department of State Historical Office 1962, p. 1198.

<sup>187</sup> Chang 2015.

<sup>188</sup> Bethill 1974, p. 734.

hegemony and power politics of the superpowers.”<sup>189</sup> Additionally, in 1972 to 1973, after Iceland’s clashes<sup>190</sup> with British and German trawlers fishing within 50 sea miles of the Icelandic coast, the PRC was backing the Icelandic claims: “Every state in the world has the right to define the extent of its territorial seas; that is its sovereign right” is Beijing’s delegate to the UN Seabed conference quoted.<sup>191</sup> The PRC even endorsed the idea to ‘nationalize’ the Strait of Malacca by Indonesia and Malaysia – something that would nowadays be absolutely unimaginable. “One clue” As one commentator writes in the *Barron’s National Business and Financial Weekly*

“may lie in the Formosa Strait, between Taiwan and Mainland China. Applied there, Iceland’s rule would give Peking, which claims sovereignty over the island, power to regulate commercial sea traffic and prohibit warships from the passage. Moreover, Mao’s government asserts sovereignty over scores of islands in the South China Sea, including many also claimed by Taiwan, the Philippines, South Vietnam and France. Chinese claims often are based on on flimsy historical grounds, but [...] Peking takes such claims seriously. If they were enforced, and then the Icelandic precedent invoked, Peking would have hegemony over much of the South China Sea”.<sup>192</sup>

In December 1973, the Third UN Conference on the Law of the Sea was convened. The People’s Republic, which just had found recognition from the UN, was for the first time part of the negotiations but had little weight compared to the superpowers. Soon after the negotiations had begun, China and Taiwan established a new situation in the South China Sea. In early 1973, Taiwan occupied the biggest of the islands in the Spratlys, Itu Aba.<sup>193</sup> A year after the US withdrawal from Viet Nam in March 1973, Chinese forces started occupying the western Paracel Islands.<sup>194</sup> On 19 January 1974, China eventually seized the Western part of the Paracel Islands from South Viet Nam after a short battle.<sup>195</sup> The South Vietnamese fled to the Spratly Islands where they installed a permanent occupation. South Viet Nam asked for support from the US, but the Americans – just withdrawn from the war – rejected.<sup>196</sup> The Vietnamese officials were outraged about the PRC’s aggressions: “the fact that the Paracels and Spratly archipelagos are indivisible parts of the Republic of Vietnam’s territory is evident and undeniable and is based on geographical and historical grounds as well as on international law.”<sup>197</sup> South Viet Nam tried to resolve the territorial disputes over the Spratly Islands in the UN Security Council, which was rejected by the USSR, as well as the PRC<sup>198</sup>. The Chinese seizure of the Paracels was also noted during the next law of the sea negotiations that took place five months after the battle but remained only as a side note.<sup>199</sup> The seizure of most of the Paracel Islands

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<sup>189</sup> In: Bosco 2022, p. 14.

<sup>190</sup> The second so-called *Cod War*. There were three of them 1958-1961, 1972-1973 and 1975-1976. Iceland tried to prevent foreign fishing vessels from fishing within the 12 nautical miles off its shores it claimed as an exclusive zone, which led to collisions. Eventually, the Icelandic asserted their claims and established another 200 miles zone where foreigners first needed Icelandic permission to enter.

<sup>191</sup> McInnes 1972.

<sup>192</sup> Ibid.

<sup>193</sup> United States Embassy in the Philippines 1973.

<sup>194</sup> Tønnesson 2002.

<sup>195</sup> Xu et al. 2020.

<sup>196</sup> South Vietnam pleaded for help from the US fleet in the region, but Washington demurred. “We have cautioned our forces not to get involved,” a Defense Department spokesman said at the time. In: Bosco 2022, p. 124.

<sup>197</sup> US Embassy in Ho Chi Minh City 1974.

<sup>198</sup> Ministry for Foreign Affairs of the German Democratic Republic 1976.

<sup>199</sup> Bosco 2022, p. 124.



by Chinese forces from Viet Nam, constantly led to a diplomatic exchange of blows, even after South and North Viet Nam were eventually unified. Hanoi repeatedly declared that it intends to gain the islands back. As one commentator notes “Peking replies that it regards “liberation” of the remaining islands as no less vital than the return of Taiwan to its control.” Further, the commentator writes that the disputed islands “are little more than rocks in the sea, but sovereignty over them would enormously extend a nation’s territorial waters in a region where oil is likely to be found”.<sup>200</sup> And the People’s Republic, although tensions with the other socialist states, especially the USSR were rising, found the agreement of the other socialist states.<sup>201</sup>

### 5.2.2 *The South China Sea and Cold War*

The 1970s marked in other aspects a new development: first, while the relations between the PRC and the Soviet Union soured, the 70s marked a notable shift towards improving relations between the US and the PRC. Both sides agreed to work in some respects together against the USSR as a common foe. In the 1980s, the greatest threat to stability in the South China Sea, as perceived by China and the young *Association of Southeast Asian Nations (ASEAN)*<sup>202</sup> was coming from Viet Nam backed by Soviet forces. In 1977 Viet Nam had silently seized some of the islands that were prior under Malaysian control, but not under permanent occupation. It is striking, how much the discourses and policy approaches of the Southeast Asian nations about Viet Nam’s assertiveness in the disputes resemble in many regards nowadays conflicts with China. Within the ASEAN Malaysia and Indonesia advocated a much more Viet Nam-friendly policy, and tried to resolve the disputes peacefully through negotiations, while other countries advocated a much more robust approach.<sup>203</sup> In sharp contrast to today’s disputes, the PRC was even perceived as being a “protector” of maritime rights of smaller Southeast Asian countries, albeit historical reservations remained.<sup>204</sup> Interestingly, the PRC was cooperating with the US to prevent Viet Nam and the USSR from blocking the Strait of Malacca as a geopolitical chokepoint to ensure freedom of navigation. As one reporter writes in a newspaper:

“Over and over again Chinese spokesmen declare the Soviet Union must be blocked from its plans to seize control of the strait. If Vietnam backed by the Soviet Union consolidates control of Cambodia, they charge, the Soviet Union will be encouraged to construct a naval stranglehold on the oil-tanker clogged strait that connects the Indian Ocean with the South China Sea. That, say the Chinese, would open the way for World War III. Hence the need to resist the Soviet Union by working in concert with the United States”.<sup>205</sup>

US worries about the role of the USSR in the South China Sea were mounting during the time of the Reagan administration. The number of Red Fleet ships and submarines was drastically increased in the South China Sea. Viet Nam was providing naval buildup service facilities at the former American base at Cam Ranh Bay

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<sup>200</sup> McInnes 1976.

<sup>201</sup> As indicated in a foreign policy cable by the GDR. See Ministry for Foreign Affairs of the German Democratic Republic 1976 back then consisting of the Philippines, Indonesia, Malaysia and Thailand.

<sup>203</sup> Moritz 1980a.

<sup>204</sup> Moritz 1980b.

<sup>205</sup> Ibid.

to build even more ships.<sup>206</sup> As a result, the Soviet Union was perceived to have gained a strategical foothold for its power projection in the South China Sea.<sup>207</sup> The Reagan administration therefore even fostered the role of Japan's navy to secure the sealines against the Soviets and Viet Nam – which was met with a lot of skepticism by many partners due to Japan's role during WWII.<sup>208</sup> The threat perception of the USSR in the South China Sea was not unjustified. By the mid-1980s more than 30 soviet vessels were operating in the South China Sea – something the US Defense Department called “the largest concentration of Soviet naval units outside the U.S.S.R.”<sup>209</sup> In addition, the Vietnamese asserted a 12 miles territorial sea that was extended by another 12 mile security zone. The US which attempted to secure these waters had to face that Viet Nam was also enforcing these claims. In 1982, Viet Nam fired on an American cruiser for entering these waters.<sup>210</sup>

### 5.2.3 Oil and EEZs

Apart from the question of securing the South China Sea, a new dynamic gained momentum in the 1970s that eventually added – literally – fuel to the simmering conflicts. The Philippines became eventually in the 1970s a conflict party in the dispute over the Spratly Islands. The Filipino's claim was – and is up until today - based on events in May 1956, when a Filipino businessman named Tomás Cloma claimed possession over a group of islands based on the right of discovery. His hopes were to extract guano and start a fishing industry. The islands he claimed are located about 600 kilometers off the Filipino island Palawan and form a part of the Spratly Islands. Cloma and his fellows proclaimed the *Free Territory of Freedomland*, effectively creating a micronation, and started constructing buildings on the islands. Reacting swiftly, the Taiwanese dispatched their navy to the islands, destroyed all the constructions Cloma, and his peers had built and expelled him from the islands.<sup>211</sup> The story, almost forgotten by the public, received renewed political attention in the 1970s when oil explorations began off the coast of Palawan. In this context, the Philippines also entered some of the Spratly Islands formerly claimed by Cloma. For the first time, the Philippines made a formal claim to parts of the Spratly Islands – based on the borders of Freedomland.<sup>212</sup> For this end, the Philippine government under the dictatorship of Ferdinand Marcos, imprisoned Cloma for flimsy reasons.<sup>213</sup> Cloma understood. After he spent 56 days in prison, he handed over Freedomland to Ferdinand Marcos.<sup>214</sup> Ever since the Philippines base their claims on the islands on this ground, but evidently the main driver was the assumed oil reserves. However, it also meant that a new state actor joined the dispute whose territorial integrity is assured by a mutual defense treaty with the US.

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<sup>206</sup> Moritz 1982.

<sup>207</sup> The Christian Monitor 1981.

<sup>208</sup> Moritz 1982.

<sup>209</sup> The Wall Street Journal 1985.

<sup>210</sup> The New York Times 1982.

<sup>211</sup> Hayton 2014, p. 64ff.

<sup>212</sup> Ibid. p. 69.

<sup>213</sup> The New York Times 1974.

<sup>214</sup> Hayton 2016, p. 64ff.

But the Philippines were not the only ones interested in the Oil. US-, West German-, Soviet-, and Japanese oil companies had already started their global hunt for oil in the ocean since the late 1960s.<sup>215</sup> As large oil reserves were already assumed in the South China Sea in the 1960s, they were ready to exploit them once they would get permission. As cooperation with Viet Nam was overshadowed by the US-Viet Nam war, and the US as the major host of oil companies approached the PRC, the Western companies were hoping on China. When Deng Xiaoping became the paramount leader of the PRC and started his *Reform and Opening-Up* policy, the country was incrementally opening the country for foreign investments. Finally, in the 1980s, the People's Republic of China let foreign oil companies search for oil along China's coasts, which led to a gold-digger mood like rush of American, Japanese, and French Oil companies into China. Rapidly, the formerly quiet fishing port of Zhanjiang in South China was transformed into an oil boomtown. The Chinese government authorized 31 western oil companies by decreed to use Zhanjiang as their operation base to start offshore explorations in the South China Sea – delicately enough in parts also claimed by Viet Nam. The Chinese were ready to explore the resources. The theoretical knowledge was there – only the machines were missing. A newspaper report covering the story of Zhanjiang reported:

“Although China is generally technologically backward, the skills of its oil field workers, particularly the women, stunned visiting Westerners. One Texas driller recounted how he once handed an intricate piece of machinery to a toolpusher and quizzed her on it. “Identify the machinery? Why, she’d even memorized the catalogue page number,” said the driller with amazement.”<sup>216</sup>

In the mid-eighties the prospects for China's economy could not have been better. The world bank forecasted a huge increase in production equipment – a big opportunity, especially for expanding US markets. This concerned especially onshore and offshore oil programs the World Bank assisted with millions of US dollars. Interestingly, but not very surprising – the PRC left all of the offshore oil development to foreign companies.<sup>217</sup> And thus, based on production-sharing contracts awarded by the PRC, the US American Oil companies Exxon Corp. and Occidental Petroleum Corp. started offshore work in the South China Sea despite the still existing tensions between Viet Nam and China.<sup>218</sup> It seems like it did not bother the foreign companies that they had to operate in contested waters. By 1984, more than 27 companies from nine countries had been awarded contracts to explore 18 tracts in the South China Sea including an area of about 390,000 square miles.<sup>219</sup> The oil prospects also led to a huge foreign investment influx with an investment of more than \$685 millions – by the US only.<sup>220</sup> The Chinese politicians put great hope in that the oil in the South China Sea would boost China's economy:

“With the promise of oil from the South China Sea - and the flood of oil money it is expected to bring - the Chinese hope to move mountains. Already, the coast teems with bulldozers changing the landscape, even though the dozens of Western oil companies there haven't produced a drop of crude for sale. All along the south China coast, plans are

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<sup>215</sup> Bosco 2022, p. 136.

<sup>216</sup> McGirk 1981.

<sup>217</sup> Lachica 1984a.

<sup>218</sup> Lachica 1984b.

<sup>219</sup> The Wall Street Journal 1984a.

<sup>220</sup> Bennett 1984.

being laid for building airports, oil refineries, petrochemical plants, hotels, and even golf courses.”<sup>221</sup>

By the mid-1980s, however, no substantial oil reserves could be found. Hopes for the big oil eureka moment in the South China Sea ebbed relatively quickly as western firms failed to discover the oil they were hoping for.<sup>222</sup> However, up until today, potential oil and gas reserves remain to be one of the greatest material interests to occupy as many of the maritime features to extent the EEZs in the South China Sea.

The rush for oil in the South China Sea had a positive side effect. As China sought to attract foreign investments, it was reluctant to assert its territorial claims militarily. But in 1982, after UNCLOS was signed (yet, it had to be ratified), new incentives for occupying the maritime features were building up for further territorial expansion and creating overlapping economic zones. This concerned especially the newly established legal framework that habitable islands would create an EEZ.<sup>223</sup> In the wake of UNCLOS, Chinese nationalism and economic interests to possess the maritime features in the South China Sea aligned. And thus, “vague assertions of historic connections to islands, rocks, and reefs became adamant claims of ownership.”<sup>224</sup> In 1983, roughly a year after UNCLOS was signed, Malaysia had joined Taiwan, the Philippines, Viet Nam by occupying reefs. In 1984, Brunei eventually got independent from the British – the last claimant of some of the Spratly Islands had joined the playfield. Maritime legal experts already warned that UNCLOS could lead to increasing tensions regarding the Spratly- and Paracel Island: “These tiny atolls lie in the eye of a political typhoon created by the Law of the Sea Treaty, completed this year [1982].” And “almost all the questions left over from Law of the Sea are found in the South China Sea”.<sup>225</sup>

In 1988, Western naval military attachés started reporting on China’s increasing military activities: “China’s Navy in recent months has been showing the flag in the South China Sea with an unusual regularity and further from home than has been customary”.<sup>226</sup> Eventually, on 14 March 1988, after a decade of relative calm in the South China Sea, China and Viet Nam fought over the Johnson Reef, marking China’s first armed conflict over the Spratly archipelago. The People’s Liberation Army Navy (PLAN) destroyed three Vietnamese vessels. Eventually, 74 Vietnamese were killed, making the incident the most serious clash in the South China Sea so far.<sup>227</sup> The PRC captured six of the islands in total. Eleven days later, the Chinese mission to the UN addressed a letter to the Secretary General, that claimed that “the present tensions in and around the Nansha Islands [Spratlys] are the sole making of the Vietnamese side. Viet Nam must withdraw its forces from the illegally occupied islands and atolls of China’s Nansha Islands and stop its provocations in this sea area, otherwise, the Vietnamese side must bear full responsibilities for all the

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<sup>221</sup> Bennett 1985.

<sup>222</sup> Wall Street Journal 1984b.

<sup>223</sup> See p. 29f.

<sup>224</sup> Freeman 2015.

<sup>225</sup> Mark Valencia, marine policy specialist at the East-West Center. In: Clayton 1983.

<sup>226</sup> Tyson 1988.

<sup>227</sup> Xu et al. 2015.

consequences arising therefrom”.<sup>228</sup> However, although the PRC had claimed the Spratlys for a while, it was not until this clash that it had occupied one of the Islands in the Spratlys. Compared to the other claimants Taiwan, the Philippines, Malaysia, Brunei, and Viet Nam, “China was a latecomer to the Spratlys party”.<sup>229</sup>

The second episode of the South China Sea conflict can thus be characterized by several developments. First, the PRC overtook most of the ROC’s claims in the South China Sea, including its strong sovereignty fundamentalism, but additionally formulated its own maritime claims. The PRC was overtly rejecting norms of freedom of navigation as an imperialist project to suppress developing countries. Considering the Cold War and the prospective of vast oil reserves, the US foreign policy in the South China Sea can be characterized by its reluctance to overtly confront China. In the 1980s, China and the US worked together in concert against the USSR and Viet Nam as common foes. Additionally, assumed resources provided incentives for new actors to join the dispute, making it even more complex. When UNCLOS was signed in 1982, the littoral states saw the EEZs as the possibility to get control over resources. China had seized large parts of the Paracels from Viet Nam in 1974. The clashes in the Spratly Islands in 1988, however, marked a new degree of Chinese assertiveness. China was expanding militarily further south in the South China Sea, to enforce the claims it has been making since 1947.

### 5.3 Rising China, Rising Claims, Rising Tensions 1989-2008

The end of the Cold War marked another fundamental shift in the power constellation of the South China Sea. Unlike the end of WWII, and the following decades, however, it did not produce a range of new claimant states but instead changed diplomatic relations. As it is commonly referred to, *China’s Rise* would bring new dynamics to the South China Sea conflict. The other major trend was that the “End of History”<sup>230</sup> moment also affected how the US perceived the South China Sea – not as substantially under threat anymore after the end of the USSR. And thus, after the Philippines had ordered them to leave, the US left its naval base at Subic Bay. The military subsidies for the Philippines left with the Americans, leaving the Philippines in many regards defenseless.<sup>231</sup> However, the US perception did not last long. Soon, the US became to see that China was filling the “power vacuum” as a secret congress report unveils. These “strong Chinese nationalistic ambitions” would further fuel the PRC “to assert its interests in the face of opposition from the United States and others.”<sup>232</sup> Until the 1990s Beijing had been relatively limited to the islands it had occupied in the 1970s and in 1988. The following years, however, should see a trend that the PRC wanted to further enforce its sovereignty and maritime power throughout the entire area within the nine-

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<sup>228</sup> Permanent Mission of China to the United Nations 1988.

<sup>229</sup> Hayton 2014, p. 89.

<sup>230</sup> Fukuyama 1989.

<sup>231</sup> Sanger 1991, p.1.

<sup>232</sup> Congressional Research Service 1996, p. 5.

dash line.<sup>233</sup> The two decades from 1989 to 2008 should be characterized by China becoming more assertive in its territorial claims including stating “historic rights”, its outreach to the oceans, its military build-up, and its diplomacy. Most importantly, China legally enshrined some of the claims, although they could not be aligned with UNCLOS that the PRC signed at the same time. Although the US started becoming increasingly worried about China’s behavior as a possible threat to freedom of navigation, it remained reluctant to intervene, while ASEAN members already foresaw the conflict potential arising from this issue.

### 5.3.1 ASEAN and China’s Rise

A development that should characterize the two decades was that ASEAN started working closer together. Considering China’s rising assertiveness, the Southeast-Asian states worked on establishing a binding *Code of Conduct*. The ASEAN states began to view China’s behavior in the South China Sea as an increasing threat to regional stability, as the PRC was increasingly asserting its territorial claims in the 1990s; both ideologically, as well as physically. The basis for these claims as formulated by the CCP was that China has unquestionable “historic rights” in the South China Sea – a doctrine that should prevail for the following decades.<sup>234</sup> Interestingly, it was not until the 1990s that the PRC started using this ‘argument’ and it really emerged from Taiwan, originally.<sup>235</sup> These historic rights discourses culminated also in new attempts by the PRC to enshrine its territorial claims in the South China Sea in Chinese law. Like in 1958, the PRC published its understanding of how far it should reach out at sea. Just, this time the power constellation was a different one. On the 25<sup>th</sup> of February 1992, the PRC published its *Law on the Territorial Sea and the Contiguous Zone*. Article 2 holds that the People’s Republic

“territorial sea refers to the waters adjacent to its territorial land. And the PRC’s territorial land includes the mainland and its offshore islands, Taiwan and the various affiliated islands including Diaoyu Island, Penghu Islands, Dongsha Islands, Xisha Islands, Nansha (Spratly) Islands and other islands that belong to the People’s Republic of China. The PRC’s internal waters refer to the waters along the baseline of the territorial sea facing the land.”<sup>236</sup>

At about the same time, the PRC signed an oil exploration contract with the US American oil company *Crestone Energy* for an area that is also claimed by Viet Nam. China pled it would protect the drilling “with their full naval might”. These developments raised the worries of some of the neighboring countries. “There are some indications that China is changing its policy toward disputed areas and taking a more aggressive stance” an Asian diplomat is quoted in *The New York Times*. “But it’s still too early to say if this is a turning point”.<sup>237</sup>

In addition to China’s extensive territorial claims around the disputed island in the South China Sea that would go beyond the rules of UNCLOS, in Washington, China was expected to build up its military soon

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<sup>233</sup> Hayton 2014, p. 22.

<sup>234</sup> Hayton 2018, p. 379.

<sup>235</sup> Ibid.

<sup>236</sup> People’s Republic of China 1992.

<sup>237</sup> Kristof 1992.

to target the South China Sea within the upcoming ten to twenty years.<sup>238</sup> In January 1995, the Philippines discovered that the PRC had occupied Mischief Reef – another step further in the South China Sea, coming closer to the Philippines’ and Malaysia’s coastal areas. This was the first time that the US administration under Bill Clinton became increasingly worried about if China’s seizure of the islands in the South China Sea would potentially impede the freedom of navigation in the South China Sea and addressed the issue publicly.<sup>239</sup> The Chinese Foreign Ministry spokesman Shen Guofang replied that “we hope the ordinary sailing of foreign vessels through the South China Sea shall not be adversely affected by the existing disputes”.<sup>240</sup>

The Southeast Asian countries were not convinced about China’s attempts to ease tensions. Shortly after the Mischief seizure, the ASEAN started the drafting process of a *Code of Conduct (COC)* between the ASEAN and China to resolve the overlapping territorial claims peacefully.<sup>241</sup> The same time Viet Nam joined the community, making the PRC and Taiwan the only claimants not part of the union. Asked about China’s behavior and its implications for Singapore, Senior Minister of Singapore Lee Kuan Yew said that

“This is a big issue in which Singapore as a major seaport has a vital interest. So too, the other maritime nations - Japan, the United States and Europe - they have an abiding interest in sea and air passage. So the two issues of ownership and of passage over these waters have to be separated and dealt with sensibly. Ownership of the oil and gas can be resolved between the claimants but it must not impinge on the freedom of navigation of ships, flights of aircraft. This is a wider issue, an international issue.”<sup>242</sup>

### 5.3.2 UNCLOS, Straight Baselines, and a ‘Great Maritime Wall’

A year later, after the PRC had occupied Mischief Reef, China ratified UNCLOS. In the following years, the other claimant nations followed. However, those who hoped that the ratification would ease the tensions around the disputed islands in the South China Sea were proven wrong. Besides the question of to whom the islands belonged, the two points of dispute were about drawing baselines around the features. Further, whether ships are granted the right of innocent passage through territorial waters and EEZs in the South China Sea should become the main issue. What happened was that China, literally the same year it had ratified UNCLOS, released its *Declaration of the Government of the People’s Republic of China on the Baseline of the Territorial Sea of the People’s Republic of China*.<sup>243</sup> The declaration reiterates not only China’s claims to a territorial sea around the Paracels<sup>244</sup> it further specifies the intention to draw a straight baseline around all the features from which the territorial sea and the EEZ would be measured.<sup>245</sup> This law implied that China would claim the same rights over the disputed maritime features as an archipelagic state.<sup>246</sup> The Philippines

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<sup>238</sup> Tyler 1992a, p. 2.

<sup>239</sup> Tyler 1995b, p. 11.

<sup>240</sup> Ibid.

<sup>241</sup> Hayton 2014, p. 192f.

<sup>242</sup> The Asian Wall Street Journal 1995.

<sup>243</sup> In: US Department of State 1996, p. 9

<sup>244</sup> as in its law on the territorial sea from 1992

<sup>245</sup> In: US Department of State 1996, p. 9

<sup>246</sup> See *ibid.* p. 28f.

and Viet Nam were alarmed. Asked about this issue, Chinese foreign ministry spokesman Shen Guofang said: “the delimitation of baselines is in itself a sovereign act of the country. It is impossible to review it.” Further, he added, that China will add more baselines to the contested South China Sea features in the future: “This time China did not announce its baselines in the Nansha islands and in the future we will gradually be announcing [other] baselines.”<sup>247</sup>

Besides nationalistic sentiments concerning the maritime features and material interests in extending China’s EEZs to gain control over the assumed oil and gas reserves, the South China Sea reached new importance in China’s national security strategy which was to build a military belt around its mainland. One of the key features of this belt was the naval military build-up in the South China Sea.<sup>248</sup> This maritime zone was part of President Jiang Zemin’s strategy to “build up the nation’s maritime Great Wall.” And thus, Beijing purchased several new missiles armed warships from Russia, while also increasing the production of its own warships, effectively producing a huge maritime superiority compared to the other claimants.<sup>249</sup> In light of China’s military build-up, the USA and Viet Nam, former war foes, formally started normalizing their defense relations. Ever since, both countries have exchanged information on maritime security information, most notably about the freedom of navigation.<sup>250</sup> Further, in 1999, the US and the Philippines renewed their Mutual Defense Treaty which raised again questions concerning the US defense commitment regarding the disputed maritime features in the South China Sea. However, the US made clear that the treaty does not cover territorial claims and that the US will not take part in the conflict over which island belongs to which nation. This included explicitly the Spratly Islands which could not provide the basis for a US intervention. However, the question remained, whether this also includes Scarborough Shoal remained open.<sup>251</sup>

Despite noticing that China’s increasing regional posture could possibly hinder freedom of navigation, worries about China were mostly raised by the regional states. In 2000, as a leaked secret report by the congressional research service of the US shows, the South China Sea was not a priority in the military strategy of president Bill Clinton.<sup>252</sup> While the US began discussions about possible implications of China’s rising assertiveness in the South China Sea on free navigation in the region, it did not even mention the issue in its bilateral talks with the PRC.<sup>253</sup> Worries were only marginally raised and, as the Commander of US Pacific Forces Admiral Prueher, stated in February 1999, the US navy would only make “a little bigger show of our presence there [South China Sea] than we have in the past.”<sup>254</sup> On 1 April 2001, however, the first incident occurred between the US and China, based on different understandings of the territorial sea and sovereignty rights granted by an EEZ. A US reconnaissance aircraft collided with a Chinese interceptor,

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<sup>247</sup> In: Son 1996.

<sup>248</sup> Pedrozo 2011.

<sup>249</sup> Bosco 2022, p. 189.

<sup>250</sup> Secretary of State 2008.

<sup>251</sup> Chang 2021.

<sup>252</sup> Congressional Research Service 2000.

<sup>253</sup> Ibid.

<sup>254</sup> In: Ibid.



in an area of about 70 miles off the province of Hainan and the Paracel Islands. The Chinese subsequently detained the American crew as one Chinese pilot went missing. Eventually, the crew was released but the Chinese pilot was never found. The Chinese Foreign Ministry spokesman said that the collision occurred above China's EEZ and that the US plane had "threatened China's security".<sup>255</sup> However, both, the Chinese and the American side under the newly elected Bush administration, remained reluctant to directly express the issue as a territorial issue.<sup>256</sup> Yet, it was another incident in the South China Sea region during a time when worries about the security implications of China's rise were increasing.

In 2002, things eventually eased for a while as the ASEAN signed a *Declaration on the Conduct of Parties in the South China Sea (DOC)*.<sup>257</sup> In the case of Viet Nam, although the situation was still perceived to be "Vietnam's greatest external security threat", 2002 marked a year where this threat was at least viewed as "no longer an imminent one".<sup>258</sup> While PRC government officials reiterated that there was "no doubt" that the PRC has sovereignty over the entire South China Sea as "historical fact", they simultaneously established the new mantra to "maintain the status quo, refrain from further complications and settle the dispute through peaceful means".<sup>259</sup> Among other things, the signatory parties reaffirmed "their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea."<sup>260</sup> Eventually, the signatory parties agreed on their intention to develop a legally binding *Code of Conduct (COC)* soon.<sup>261</sup> There was reluctance from all sides to go too far regarding their sovereignty rights, but the PRC in particular "was anxious to sign a COC".<sup>262</sup> Although the declaration was not legally binding, it was assessed by US officials as "an important step forward in regional solidarity and further diminishment of territorial tensions in the South China Seas."<sup>263</sup>

### 5.3.3 *Rising Diplomatic Tensions*

After four years of relative calm<sup>264</sup> that had raised the hopes in the region and in the rest of the world that China would follow a more conciliatory policy in the South China Sea, the worries about China's behavior were rising again. The ASEAN member states reported in general about a more assertive Chinese diplomacy.<sup>265</sup> But also regarding the South China Sea disputes, China changed its approach. For one, instead of developing a joint agreement, the PRC developed a new strategy to implement its claims by developing

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<sup>255</sup> Kan et al. 2001.

<sup>256</sup> Rosenthal and Sanger 2001, p. 1.

<sup>257</sup> Business Times 2002.

<sup>258</sup> US Embassy & Consulate in Vietnam 2002a.

<sup>259</sup> US Embassy & Consulate in Vietnam 2002b.

<sup>260</sup> Association of Southeast Asian Nations and the People's Republic of China 2002.

<sup>261</sup> Ibid.

<sup>262</sup> US Embassy & Consulate in Vietnam 2002c.

<sup>263</sup> US Embassy & Consulate in Vietnam 2002d.

<sup>264</sup> Despite that the *Vietnam Seaports Association* reported about an incident in the Gulf of Tonkin in 2005, where it claimed that a Chinese boat had fired on Vietnamese fishermen, whereby 9 fishermen were killed and seven more injured (see Vietnam Seaport Association 2005). After the incident, diplomatic relations significantly soured between Viet Nam and the PRC (see US Embassy & Consulate in Vietnam 2005).

<sup>265</sup> US Embassy & Consulate in Thailand 2004.

bilateral agreements which would enable it to lever much more power compared to an agreement with ASEAN. This was perceived as not only disregarding the DOC but also as an attempt to “drive a wedge” among the ASEAN partners, as one Vietnamese official put it.<sup>266</sup> But not only the regional states were concerned. In 2006, China reaffirmed that it had a view of ‘innocent passage’ very different from the one by Washington.<sup>267</sup> It stated to the UN that ‘innocent passage’ “shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign state to obtain advance approval from or give prior notification to the coastal state for the passage of its warships through the territorial sea of the coastal state.”<sup>268</sup> In addition, based on Article 298, China excluded in 2006 the compulsory dispute settlement procedures of UNCLOS that concerned, maritime delimitation, historic titles, as well as military and law enforcement activities.<sup>269</sup>

Besides statements that would impede the freedom of navigation as understood in Washington (and in UNCLOS) China further pushed the modernization of its military. In 2007 alone, Beijing increased its military spending by 18 percent<sup>270</sup> with the goal to “protect national security and territorial integrity.”<sup>271</sup> One of the major pillars of its military spending became the maritime area, clearly aiming at projecting more power on the South China Sea. Satellite imagery could confirm that the PRC had built a major naval base on Hainan Island that would provide China with the capability to enforce its claims in the South China Sea.<sup>272</sup> Considering these developments, the Vietnamese Vice Foreign Minister, as a foreign policy cable reveals, speculated that “rising China may now view itself as strong enough to take action against what it sees as territorial interlopers.”<sup>273</sup>

Another worrying development was that China pushed diplomatically for its rights within the nine-dash line (although not publicly), even though it could not provide clarification on what the dashes would exactly mean. In 2008, as a leaked US foreign policy cable shows, China was increasingly including the nine-dash line in its official diplomatic exchanges, most remarkably in an exchange between US officials and Yin Wenqiang, Deputy Director of the Chinese Ministry of Foreign Affairs *Department of Treaty and Law Oceans and Law of the Sea Division*.<sup>274</sup> It marked the beginning of how China was reshaping its foreign policy discourse about its claims, and most importantly the nine-dash line. Yin stated that “China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters.” Despite that China claimed features located in the EEZs and the continental shelves of Indonesia, Malaysia, Brunei, the Philippines and Viet Nam, Yin stated that China’s claims “do not contradict” the UNCLOS because its claims would predate the convention. While he stressed that the nine dashes are a “reflection of history” Yin admitted he was not aware of the historical basis for the nine dashes. Notwithstanding this unclarity, Yin said that

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<sup>266</sup> US Embassy & Consulate in Vietnam 2004.

<sup>267</sup> Bosco 2022, p. 188.

<sup>268</sup> Permanent Mission of China to the UN 2006.

<sup>269</sup> Ministry of Foreign Affairs of the People's Republic of China 2016, p. 906.

<sup>270</sup> Council on Foreign Relations 2022b.

<sup>271</sup> Cody 2007.

<sup>272</sup> Thayer 2010, p. 69.

<sup>273</sup> US Embassy & Consulate in Vietnam 2007.

<sup>274</sup> US Embassy in Beijing 2008.

China will not refer its South China Sea claims to dispute settlement procedures established in UNCLOS because “it is not in China’s tradition” to submit to such compulsory or binding decision mechanisms.<sup>275</sup>

All things considered, the two decades from 1989 on marked an up and down of China’s foreign policy in the South China Sea. Nevertheless, its behavior can be characterized by the *peaceful rise* doctrine by President Hu Jintao that rather sought to establish “harmonious relations”, most notably with its regional neighbors.<sup>276</sup> The 1990s and the beginning of the millennium marked the build-up for what was about to emerge as a global conflict soon. While the other claimant states tried to establish more cooperation through a binding conduct within ASEAN, China’s increasing military spending raised anxieties about the possibility that Beijing would further enforce its claims through military means. Although China ratified UNCLOS in the 1990s, it also announced baselines and rules that are contrary to the convention while claiming maritime features within the EEZs of other claimant states. Further, neglecting the transition of military vessels was also part of China’s claims, but was not yet seen as a serious concern by the USA. As described before, the USA had been reluctant to become involved in the conflict but began observing China’s military buildup with an increasing suspect.

#### **5.4 From a Contest over Territory to a Contest over Norms 2009-2020**

The following decades, however, should be characterized by mounting big power confrontation between the US and China, and, later some European states, as well as Japan and Australia. Competition between a rising China and the US is certainly not limited to the South China Sea, but the question of which norms and rules would apply to this maritime space became a major aspect of it. While the conflict has always been global to some extent, the South China Sea dispute turned into a global arena for the contest over the future of the rules-based international order.

The year 2009 really was a turning point in many regards that would draw much more global attention to the South China Sea. While the ‘West’ was struggling with the financial crisis, China managed surprisingly well the crisis and avoided a recession.<sup>277</sup> In 2008, the PRC celebrated during the Olympic games – the whole world was supposed to watch its newly acquired power and national pride. If the prior 20 years or so were already characterized by rising tensions and China’s increasing military posture in the South China Sea, the following decades would become more openly confrontative, and even more so, since the Communist Party elected Xi Jinping as the new party leader in 2012. On the other side of the Pacific, in Washington, another development would shape the South China Sea development fundamentally. Barack Obama became elected as the 44<sup>th</sup> President of the United States. The new administration, with Hillary Clinton as Secretary of State, would assess the importance of the entire Asia-Pacific region differently than

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<sup>275</sup> Ibid.

<sup>276</sup> In: People 2005.

<sup>277</sup> See Yi and Wu 2017.

the Bush administration and become more active in the South China Sea. Most notably, after the *Impeccable* incident.<sup>278</sup>

#### **5.4.1 The Nine-Dash Line, 'Core Interests' and enhanced Cooperation**

What really spurred the worries that the conflict would reach a much more confrontative level was when China made a submission to the UN appending a map of the South China Sea with the nine-dash line.<sup>279</sup> A day prior, on 6 May 2009, Viet Nam and Malaysia had made a joint submission to the Commission on the Limits of the Continental Shelf aiming at getting permission to an extended continental shelf.<sup>280</sup> The Chinese were outraged. The next day they submitted a protest to the Commission, declaring that Malaysia and Viet Nam had “seriously infringed China’s sovereignty, sovereign rights and jurisdiction in the South China Sea” and that the “Chinese Government seriously requests the Commission not to consider the Joint Submission” because “China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof”.<sup>281</sup> That the Chinese claimed the islands and maritime features in the South China Sea was not precisely new. But using a map including the nine-dash line in an international context was a new step in the assertion of what the Chinese regard to be as their sovereign right. And in doing so, the Chinese “appeared to be laying claim to almost the entirety of the South China Sea. The game changed.”<sup>282</sup> The argument that China had historical rights became to be the major justification for why China could make claims that superseded UNCLOS. In the logic of the PRC’s communication, it could make extensive claims to what it perceived to be “territorial waters” as defined by the nine-dash line because it is a “reflection of history” that would predate and therefore “does not contradict” UNCLOS.<sup>283</sup> Up until today, however, it is not entirely clear what the dashes mean. China has never completely clarified whether the dashes only delineate the scope of where China is claiming the maritime features, or whether China claims the entire sea.

The same year China presented the map with the nine-dash line to the UN, Chinese diplomats, such as Dai Bingguo<sup>284</sup>, started referring to the South China Sea as a “core interest” – a term that had previously been reserved for China’s policy in issues like Tibet, Taiwan, or Xinjiang.<sup>285</sup> A notable discursive shift. Simultaneously, Asian diplomats complained about China’s recent style of diplomacy regarding South China Sea issues. As a Japanese official reports in a leaked cable, the PRC’s South China Sea policy has been referred to as “more aggressive and arrogant” and Chinese diplomats as “aggressive and difficult”. Further, the Japanese diplomat concluded about China’s South China Sea policy, that “on the surface, and in front of cameras, the Chinese are friendly. But underneath, they are putting huge pressure on Southeast Asian

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<sup>278</sup> See introduction, p. 5.

<sup>279</sup> Permanent Mission of the People’s Republic of China to the United Nations 2009.

<sup>280</sup> In: Commission on the Limits of the Continental Shelf 2011.

<sup>281</sup> Permanent Mission of the People’s Republic of China to the United Nations 2009.

<sup>282</sup> Hayton 2014, p. 190.

<sup>283</sup> US Embassy in Beijing 2009.

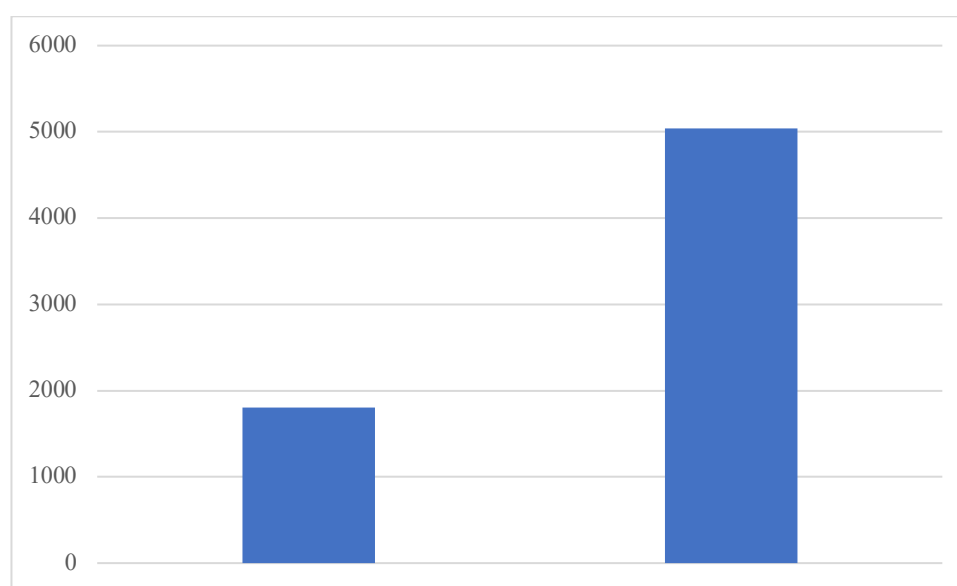
<sup>284</sup> One of the highest-ranking figures of Hu Jintao’s foreign policy.

<sup>285</sup> In: Chaudhury 2021.

countries and trying to divide them.”<sup>286</sup> If the Chinese diplomatic efforts prior to 2009 was to bilaterally divide the position, it became now overtly hostile against multilateral efforts, and would, as a leaked foreign policy cable states “only re-engage in the ASEAN-China Joint Working Group on the Implementation of the Declaration of Conduct (DOC) of Parties in the South China Sea if ASEAN member-states dropped efforts to form a coordinated ASEAN position.” China clearly attempted to lever its unequally higher economic, military, and political leverage to exercise power over the smaller claimant countries. And, in the case of Viet Nam, it was well perceived that Viet Nam “did not possess the requisite strategic strength to negotiate with China bilaterally, given the aggressiveness with which China asserted its claims.”<sup>287</sup> China’s newly overt assertiveness and diplomatic aggression toward the other claimants had two effects on them. First, the other claimants invested in their navies which led to a process of maritime militarization in the region.<sup>288</sup> The import of military vessels of the claimant states (besides the PRC and Taiwan) in the decade after 2009 was more than twice as high than the two (!) decades prior to 2009.<sup>289</sup>

**Figure 1.**

*Import of Military Vessels by the Philippines, Brunei, Viet Nam and Malaysia 1989-2008 vs. 2009-2018 in US Dollars, Millions*



Source: Data retrieved from Stockholm International Peace Research Institute 2022, *SIPRI Arms Transfer Database*

The other effect of China’s assertiveness was that the ASEAN members, especially the Philippines and Viet Nam, enhanced their naval cooperation with the United States. Relations between Viet Nam and the US

<sup>286</sup> US Embassy in Beijing 2010.

<sup>287</sup> US Embassy in Beijing 2009.

<sup>288</sup> Grossman 2020, p. 186f.

<sup>289</sup> See Figure 1. Source: own calculations based on data retrieved from Stockholm International Peace Research Institute 2020. Please note that to measure the transfer of military resources instead of military expenditures the numbers are based on the production costs of weapons and not the financial value of the arms transfer.

were reported as getting from “normalizing” to “normal” and, as a leaked cables states “Vietnam increasingly views the U.S. presence in the region as a force for stability”<sup>290</sup>. Further, in the case of Viet Nam, they pushed the idea that the US should become more active in defending maritime norms and the freedom of the seas against China. A leaked cable reporting on an informal meeting between members of the Vietnamese intellectual elite and back-then Deputy Secretary-General Steinberg and US Ambassador to Viet Nam Michael Michalak reveals that the Vietnamese “specifically suggested that the United States should take a stronger position in asserting the importance of freedom of navigation.”<sup>291</sup>

#### 5.4.2 *The US are Back in Asia*

The major turn from 2009 onwards toward a more global conflict about the norm of freedom of navigation was certainly coming from the fact that the newly elected US administration would be much more aware off the South China Sea dispute and China’s rise. When Barack Obama became the 44<sup>th</sup> President, he and his Secretary of State Hillary Clinton made the Asia Pacific a new priority of US foreign policy which became to be known as the *Pivot to Asia*, a term Obama first announced during a speech to the Australian parliament in 2011.<sup>292</sup> The new administration was convinced that the George W. Bush administration had paid not enough attention to the developments in the region, most notably to the South China Sea dispute. As “the first Pacific president,” as Obama pled, he would notably enhance US engagement in the region.<sup>293</sup> The strategy was further enhanced in the subsequent years, but it revolved – besides increasing cooperation in human rights issues and economic cooperation – most importantly around security concerns, “which included upholding international laws and norms, maintaining US regional defense spending, and military presence”<sup>294</sup>. Under the Obama administration, the US became therefore much more proactive, especially regarding what it viewed as key sealines of communication (SLOCs).<sup>295</sup> Nevertheless, while taking a new step forward in defending maritime norms, the US was still cautious not to side up on the question of which maritime features belong to which nation in the South China Sea dispute. “The US” as a foreign policy cable mentions “takes no position on the competing legal claims in the South China Sea [...] We do, however, have a strong interest in maintaining freedom of navigation and the ability of our naval ships to conduct routine operations.”<sup>296</sup> US diplomats became to treat China’s South China Sea policy increasingly as territorial disputes *and* conflicting with international maritime norms of freedom of navigation.<sup>297</sup> This new policy approach was especially implemented in the context of ASEAN as a multilateral organization that could possibly outbalance China, and regionally defend freedom of navigation. Beginning with the ASEAN Regional Forum (ARF) meeting in July 2010, the dispute became a key priority of US diplomacy with ASEAN.<sup>298</sup> But also publicly, the US became more outspoken about what it perceived to be a potential

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<sup>290</sup> US Embassy & Consulate in Vietnam (2009a).

<sup>291</sup> US Embassy & Consulate in Vietnam 2009b.

<sup>292</sup> Obama, 2011.

<sup>293</sup> Lieberthal 2011.

<sup>294</sup> Anderson and Cha 2017, p. 597.

<sup>295</sup> Thayer 2010, p. 79.

<sup>296</sup> US Embassy & Consulate in Vietnam 2009a.

<sup>297</sup> US Embassy in Beijing 2009.

<sup>298</sup> Simon 2012, p. 1002.

threat to maritime norms. Freedom of navigation in the South China Sea became a “national interest” of the US, as Secretary of State Clinton put it in a speech.<sup>299</sup> However, not only the discourse regarding the dispute changed. Upholding the freedom of navigation norm should be implemented by increasing US military practices. To support US’ national interests to uphold freedom of navigation in the South China Sea, the US Department of Defense’s (DoD’s) strategy should unfold around four central practices:

“1) clearly demonstrating, through word and deed, that US forces will remain present and postured as the preeminent military force in the region; 2) deliberate and calibrated assertions of our freedom of navigation rights by US Navy vessels; 3) building stronger security relationships with partners in the region, at both the policy level through strategic dialogues and at the operational level by building partner capacity, especially in the maritime security area, and 4) strengthening the military-diplomatic mechanisms we have with China to improve communications and reduce the risk of miscalculation.”<sup>300</sup>

The Chinese side reacted with anger to the new US strategy and that some ASEAN countries aligned with the US. Dai Bingguo is quoted of having suggested to Hillary Clinton: “Why don’t you ‘pivot’ out of here?”<sup>301</sup> And Vice Foreign Minister Cui Tinkai said regarding increasing ASEAN-US cooperation: “I believe the individual countries are actually playing with fire”, further adding that he hopes that “the fire will not be drawn to the United States.”<sup>302</sup> China insisted that it would comply with international maritime norms. Freedom of navigation would be guaranteed by the Chinese state, and, as the Assistant Foreign Minister Liu Zhenmin put it: “The Chinese government has always maintained that the freedom of navigation and overfly in the South China Sea, a right enjoyed by all countries in accordance with the international law, should be fully guaranteed. It has worked with parties concerned, actively participated in international cooperation on maritime safety in this region and made positive contribution to safeguarding navigation safety in the South China Sea.”<sup>303</sup> Thus, as Chinese Defense Minister Chang Wanquan said: “Certain countries should stop playing up the issue of freedom of navigation in the South China Sea as it has never been a problem”.<sup>304</sup> In sharp contrast to the US, China’s interest would be to “shelve disputes and seek joint development” and done its utmost to uphold peace and stability in the South China Sea.<sup>305</sup>

Nevertheless, while the PRC insisted on its peaceful development and that it intends to resolve the South China Sea dispute based on principles of mutual respect, China did not precisely do very much to bolster this claim with deeds. In April 2011, the Permanent Mission of the PRC to the UN issued a note verbal that declared that “China’s Nansha Islands [Spratly Islands] is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.”<sup>306</sup>

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<sup>299</sup> The Washington Post 2011.

<sup>300</sup> In Thayer 2010, p. 80.

<sup>301</sup> Smith 2017.

<sup>302</sup> Durfee 2011.

<sup>303</sup> Liu 2011.

<sup>304</sup> China Daily 2016a.

<sup>305</sup> Information Office of the State Council 2011.

<sup>306</sup> Permanent Mission of the People’s Republic of China to the United Nations 2011.

## Map 6.

### *China's Claims according to its official baselines*



Source: US Department of State of Ocean and Polar Affairs 2022, *Limits in the Seas Report* 150.

There was little evidence that China was interested in practicing self-restraint to cool down the conflicts. Quite the opposite was the case. In 2011 alone, several media reported on how a Chinese frigate was shooting at Philippine fishing vessels close to Jackson Atoll in the Spratlys<sup>307</sup>, as well as two incidents where the Vietnamese reported that the Chinese cut cables of a survey vessel.<sup>308</sup> Tensions between China and the

<sup>307</sup> Jamandre and Files 2011.

<sup>308</sup> BBC News 2011.



Philippines, however, have been threatening to escalate since early 2012 when a skirmish broke out as the Philippine coast guard discovered eight Chinese fishing vessels inside Scarborough Shoal, about 120 miles off the coast of the Philippine's Luzon Island. The Philippines sent an offshore patrol vessel to further inspect what they perceived to be intruders in Philippine territory. They discovered that the fishermen had illegally collected protected corals as well as shells and fish. However, the Philippines could not inspect them any further because soon, two Chinese surveillance ships showed up to shield the fishing vessels from being arrested. A possible more violent conflict was arising. To prevent it, however, the Chinese and the Philippine government agreed on withdrawing their vessels which was soon followed by the Philippines. Not so by the Chinese who remain present up until today.<sup>309</sup> Eventually, the Scarborough Shoal was the trigger for the Philippines' decision to bring China's extensive maritime claims in the South China Sea to court. Based on Annex VII of UNCLOS<sup>310</sup>, the Philippines initiated an arbitration at the Permanent Court of Arbitration (PCA) in The Hague.

#### **5.4.3 The Arbitration**

Three and a half years passed before the court would eventually announce its final ruling. The process began on 22 January 2013, when the Philippines initiated proceedings through the PCA in The Hague against the People's Republic of China and ended on 12 July 2016. The court was initially consulted by the Philippines to seek an award that

1. declares that the Parties' respective rights and obligations in regard to the waters, seabed and maritime features of the South China Sea are governed by UNCLOS, and that China's claims based on its "nine dash line" are inconsistent with the Convention and therefore invalid;
2. determines whether, under Article 121 of UNCLOS, certain of the maritime features claimed by both China and the Philippines are islands, low tide elevations or submerged banks, and whether they are capable of generating entitlement to maritime zones greater than 12 [miles]; and
3. enables the Philippines to exercise and enjoy the rights within and beyond its exclusive economic zone and continental shelf that are established in the Convention.<sup>311</sup>

Further, the Philippines stressed that it "does not seek in this arbitration a determination of which Party enjoys sovereignty over the islands claimed by both of them. Nor does it request a delimitation of any maritime boundaries."<sup>312</sup>

In response, the Chinese Foreign Ministry issued a note verbal on 19 February, rejecting the arbitration and announcing that it would not participate in a process and, consequently, would also decline to adhere to the ruling, arguing that the core of the proceedings involved sovereignty issues and that both parties had agreed to resolve them through bilateral negotiations.<sup>313</sup> The PCA nevertheless began its work, even though China refused to nominate a judge. In August of the same year, the court made a call to issue a full statement

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<sup>309</sup> Hayton 2014, p. 115f.

<sup>310</sup> United Nations 1982, p. 186.

<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid. p. 12.

on which points the arbitral tribunal was to decide. Following the court's call, the Philippines handed its official fifteen points in. In the following years, another point was added, asking the court to rule on whether China further exacerbated the conflict during the process. The People's Republic then responded in December 2014 with a *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*, stating that the arbitral tribunal "does not have jurisdiction over this case" because "the essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention". Further, the statement highlighted that "China has indisputable sovereignty over the South China Sea Islands" because "Chinese activities in the South China Sea date back to over 2,000 years ago". In conclusion, the paper reiterates that "it is not China that has become 'increasingly assertive'; it is the Philippines that has become increasingly provocative."<sup>314</sup>

The initiation of an arbitration as well as China's rejecting any participation received a lot of attention from the regional states. In addition to the Philippines, Viet Nam, Malaysia, Japan, Indonesia, Thailand, and Brunei applied for observer status. But also globally, the process was closely observed, and various states made statements regarding their view on whether there should be an arbitration process or not.<sup>315</sup>

Eventually, the arbitral tribunal took up the issue of jurisdiction and organized a *Hearing on Jurisdiction and Admissibility*. It invited China and the Philippines to further elaborate on their respective views, but the PRC did not follow the call to express and substantiate its legal concerns. In sharp contrast, the PRC continued to further expand its foothold in the region by constructing artificial Islands on a large scale. Since 2013, the PRC has created more than 3,200 acres of new land in the South China Sea.<sup>316</sup>

In October 2015, the tribunal eventually concluded that it was properly constituted and that it could rule over most of the points issued by the Philippines, even so, without China's participation.<sup>317</sup> However, verbal notes and statements from the Chinese side were treated as an official submission during the process. On November 24 to 26 and 30, 2015, under the presidency of Judge Thomas A. Mensah, eventually, the hearings could begin, and the tribunal presented its final ruling in 2016. The tribunal ruled in almost every of the submitted points in favor of the Philippines. It declared that

"as 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 the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention. The Tribunal concludes that the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein."<sup>318</sup>

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<sup>314</sup> Ministry of Foreign Affairs of the People's Republic of China 2014.

<sup>315</sup> Asia Maritime Transparency Initiative 2021c.

<sup>316</sup> Council on Foreign Relations 2022a.

<sup>317</sup> Permanent Court of Arbitration 2016, p. 19.

<sup>318</sup> Ibid. p. 117.

Further, the tribunal found that the maritime features China claims within the Philippine's EEZ are either submerged features and do not constitute any entitlements at all, or legally nothing more than rocks that generate no entitlement to an exclusive economic zone or continental shelf.<sup>319</sup> In addition, the tribunal found that China had violated the Philippines' rights over the non-living resources of its continental shelf.<sup>320</sup> The court found also that China had failed to protect and preserve the marine environment in several aspects, especially through harmful fishing practices, as well as through its construction activities on seven reefs.<sup>321</sup> The court also found that during the process, China continued to deepen the dispute through actions that are inconsistent with the Law of the Sea Convention. This concerns the unlawful construction of an artificial island in a Philippine EEZ, as well as other constructions on Philippine reefs.<sup>322</sup> Another important aspect of the ruling concerned China's straight baselines. The tribunal found that China "is constituted principally by territory on the mainland of Asia and cannot meet the definition of an archipelagic State."<sup>323</sup> And, further it stated that "in the Tribunal's view, any application of straight baselines to the Spratly Islands in this fashion would be contrary to the Convention."<sup>324</sup>

The same day the award was announced, the PRC reacted with a long statement that declared that "the award is null and void". That the Philippines had initiated a ruling of a tribunal "is out of bad faith" and would not aim at resolving "the relevant disputes between China and the Philippines, or to maintain peace and stability in the South China Sea, but to deny China's territorial sovereignty and maritime rights and interests in the South China Sea." The PRC would "not accept any means of third party dispute settlement or any solution imposed on China." And "China's territorial sovereignty and maritime rights and interests in the South China Sea shall under no circumstances be affected by those awards."<sup>325</sup>

After the PCA's ruling, the Philippines, however, remained surprisingly quiet. The new president, populist-nationalist politician Rodrigo Duterte, came to power just a month before the ruling. Duterte has since been focusing on good relations with China and negotiating new investment deals with China.<sup>326</sup> However, the ruling attracted global attention. At least 50 states have publicly declared that they support, acknowledge, or reject the ruling – the territorial disputes and which norms apply to maritime space in the South China Sea became a subject of a global divide of opinions.

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<sup>319</sup> More precisely the tribunal ruled that a. Scarborough Shoal, b. Cuarteron Reef, c. Fiery Cross Reef, d. Johnson Reef, e. McKennan Reef, and f. Gaven Reef (North) were declared rocks. f. Hughes Reef, g. Gaven Reef (South), h. Subi Reef, i. Mischief Reef, and j. Second Thomas Shoal are considered low-water elevations.

<sup>320</sup> Permanent Court Of Arbitration 2016, p. 286.

<sup>321</sup> Ibid. p. 319ff.

<sup>322</sup> Ibid. p. 464.

<sup>323</sup> Ibid. p. 236.

<sup>324</sup> Ibid. p. 237.

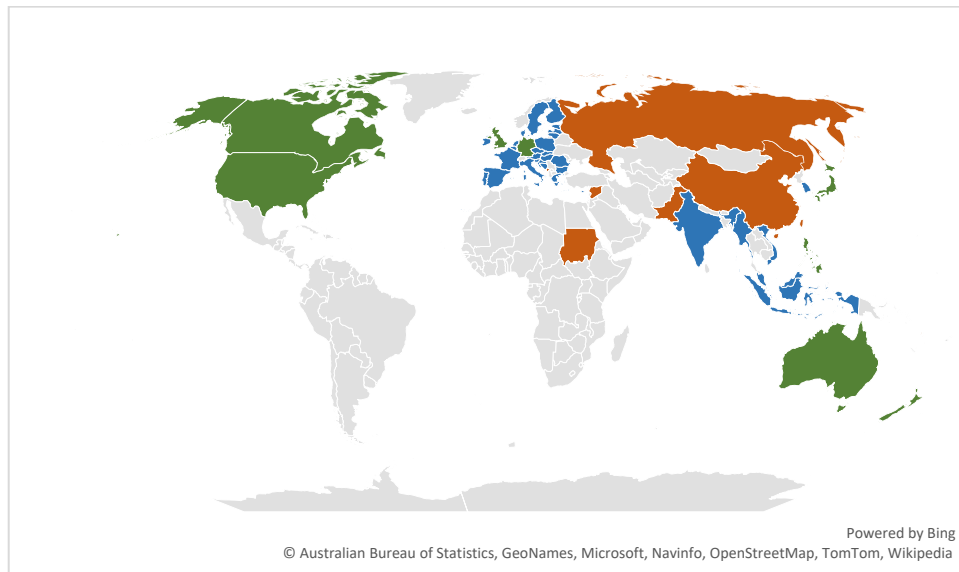
<sup>325</sup> In: China Daily 2016b.

<sup>326</sup> Rowand 2020.

## Map 7.

### *Support for the Ruling after Arbitration*

*Green – support ruling, Blue – acknowledge ruling, red – oppose ruling*



Source: Data retrieved from Asia Maritime Transparency Initiative 2021c

#### **5.4.4 Xi Jinping and the Naval Build-Up**

The initiation of the arbitration should come in a time of great power transition in China. In September 2012, Xi Jinping was named the General Secretary of the CCP as well as Head of the Central Military Commission (CMC). A year later, he became President. His leadership brought a new dynamic to the conflict and the upcoming arbitration process. Xi's leadership came with three developments regarding the South China Sea dispute. First, although tensions regarding South China Sea issues had been rising before, Xi's presidency catalyzed these developments. His "Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era" was enshrined as the central state doctrine.<sup>327</sup> His ideology is characterized by a much more nationalistic approach aiming at implementing "the Chinese dream of national rejuvenation" of the "five thousand years of Chinese civilization" and transforming China into a "powerful and prosperous nation" and to finally overcome the heritage of the "century of humiliation" that was ended, according to the narrative, when the CCP came into power in 1949.<sup>328</sup> And thus, the first element Xi brought to the conflict was a resurgence of nationalism in China. The second element of Xi's leadership regarding the South China Sea dispute brought was to bring statements and the official position regarding the dispute into a much clearer policy line. Official discourses and practices would henceforth be characterized by their common narratives and even harder stance regarding China's 'indisputable sovereignty' and 'historic rights' in the South China Sea. The third, and maybe the most important, aspect

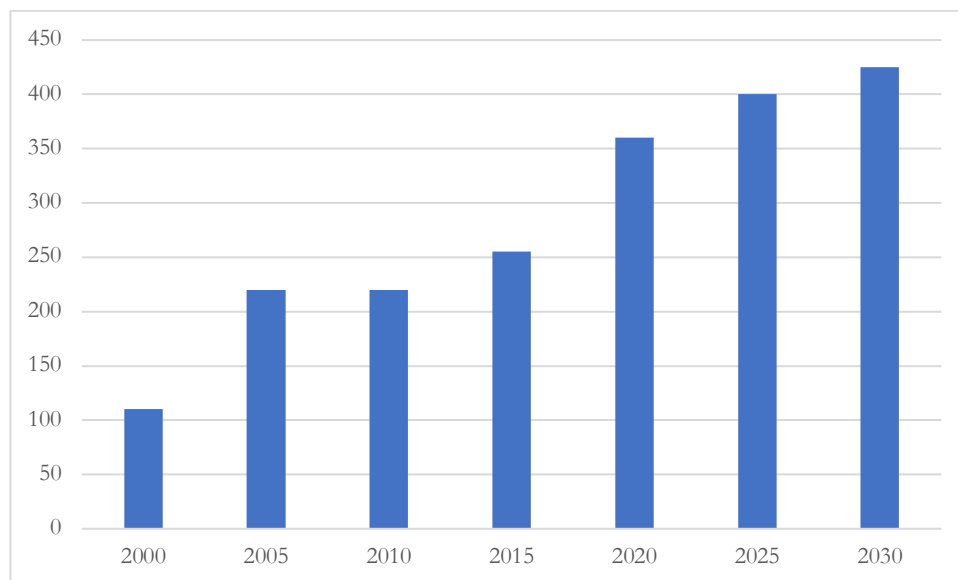
<sup>327</sup> Buckley 2017.

<sup>328</sup> Xi 2017.

of Xi's leadership is, however, that he continued the militarization project of his predecessors on a much larger scale. The same year Xi came into power, the first of China's two aircraft carriers, *Liaoning*, became fully operational and has conducted deployments to the South China Sea ever since. Additionally, at the 18<sup>th</sup> Party Congress in 2012 the CCP elites outlined the strategic objective to “resolutely safeguard China's maritime rights and interests, and build China into a maritime power.”<sup>329</sup> This ushered into a process where China sought to build its already increasing capabilities into a global blue water navy and play a stronger role in shaping maritime governance regimes which deepened the divide between China and the US on South China Sea issues even more.<sup>330</sup> What began in the 1990s as military modernization should develop into the world's largest navy with an overall battle force of more than 350 ships and submarines by 2020.<sup>331</sup>

**Figure 2.**

*Number of Chinese Battle Force Ships 2000-2030*



Data retrieved from: Office of Naval Intelligence 2020.<sup>332</sup>

China's increasing number of battleship forces is only a mosaic in larger Chinese attempts to military hard power projections in the South China Sea. It became to be assessed as aiming at a military solution to incorporate Taiwan, but particularly to gain control over the South China Sea, to regulate foreign military activities within the 200-miles of China's EEZs and the territorial seas around the straight baselines around the Paracels.<sup>333</sup> As the Asia Maritime Initiative observed, from 2013 on, the PRC has begun with the

<sup>329</sup> Embassy of the People's republic of China in the United States of America 2012.

<sup>330</sup> Nouwens 2022, p.16.

<sup>331</sup> Office of the Secretary of Defense 2020.

<sup>332</sup> The numbers are based on an unclassified document provided by the Office of Naval Intelligence (ONI) which is the military intelligence agency of the United States Navy. Numbers after 2020 refer to plans of the PLAN to build battle ships. The numbers of the chart include major combatant ships, submarines, mine warfare, seagoing amphibious ships, and major auxiliary ships. Please note that ONI's battle force criteria do not include missile patrol craft (China operates approximately 85 ASCM-armed patrol combatants and craft (PGG/PTG)).

<sup>333</sup> Congressional Research Service 2022a.

construction of, so far, four large military outposts.<sup>334</sup> By 2016, the PRC had completed the construction of an outpost in the Spratly Islands which significantly increased its military lever. In addition, China has from 2013 on increasingly begun with the transformation of reefs and sandbanks into artificial islands that can be inhabited. But their main function is to extend China's military outreach. These outposts enable airplanes to land on around three kilometers long runways in the South China Sea, including Woody Island, Fiery Cross Reef, Mischief Reef, and Subi Reef. China has already deployed substantial military assets to these outposts, including anti-air and anti-ship missiles (HQ-9 and YJ-12, respectively) communication and radar technology, buildings to hold combat aircraft and military personnel, etc. In theory, these outposts enable Chinese aircraft to further enhance their power over the entire South China Sea by increasing their possible strike range.<sup>335</sup> Another worrying trend was, that China increasingly relied on so-called grey zone strategies.<sup>336</sup> In the case of the South China Sea, the strategy became increasingly to blur the line between PLAN vessels and fishing vessels which became part of China's maritime militia, that seeks to enforce China's claims by harassing other foreign vessels. While this strategy is not new in China (as for example during the 2009 Impeccable incident), the years after 2012 up today marked a notable shift to systematic use.<sup>337</sup> Most importantly, the military build-up provided the bases to exert its claims in practice and the possibility to militarily enforce China's territorial claims and impede the freedom of navigation.

#### ***5.4.5 Rising Norm Enforcement***

China's militarization as well as its reaction and practices during and after the arbitration process hardened how the US assessed China's South China Sea policy. After 2012, with China's increasing land reclamation, its construction of artificial islands and military bases in the South China Sea, its nationalization under Xi Jinping, as well that China was disregarding the rule of law became enough reason to also step up militarily against China. President Obama reiterated the US willingness to support the smaller countries against China's assertiveness and the US' willingness to uphold freedom of navigation in the region:

“the 20th century has taught all of us [...] that the international order upon which our mutual security depends is rooted in certain rules and norms. Nations are sovereign, and no matter how large or small a nation may be, its sovereignty should be respected, and its territory should not be violated. Big nations should not bully smaller ones. Disputes should be resolved peacefully. [...] In the South China Sea, the United States is not a claimant in current disputes. But we will stand with partners in upholding core principles, like freedom of navigation and overflight, and lawful commerce that is not impeded, and the peaceful resolution of disputes, through legal means, in accordance with international law. As we go forward, the United States will continue to fly, sail and operate wherever international law allows, and we will support the right of all countries to do the same.”<sup>338</sup>

Obama's words came at a time when the US already significantly stepping up its military efforts in the South China Sea to counter what it perceived to be “excessive maritime claims” that would pose a danger to

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<sup>334</sup> Asia Maritime Transparency Initiative 2021.

<sup>335</sup> Ibid.

<sup>336</sup> Layton 2021.

<sup>337</sup> Poling et al. 2021.

<sup>338</sup> Obama, Barack 2016.

freedom of navigation.<sup>339</sup> The US' perception has ever since been that China's EEZ claims, including neglecting passage of military ships and overflight became in addition to the territorial claims a key feature of the South China Sea dispute and a major challenge for the norm of freedom of navigation. A 2016 Congress report found that "the EEZ dispute is arguably as significant as the maritime territorial disputes because of the EEZ dispute's proven history of leading to US-Chinese incidents at sea and because of its potential for affecting US military operations not only in the SCS [South China Sea] and ECS [East China Sea], but around the world."<sup>340</sup> And thus, China's claims to straight baselines were perceived as a major obstacle to free navigation by the US. But the US should also in practice become more active to defend freedom of navigation. In 2013, the US conducted its first Freedom of Navigation Operation (FONOP) in the South China Sea.<sup>341</sup> The US Navy's FONOPs in the Indo-Pacific, and most importantly in the South China Sea became the main means to reinforce maritime norms and sea law.

In a FONOP, warships enter a maritime zone (for example, an EEZ) and generally conduct several activities.<sup>342</sup> In some FONOPs, the vessel simply transits without prior notification to the claimant state. In other cases, the ship explicitly conducts military activities to demonstrate to the claimant state that innocent passage provisions as requested by UNCLOS do not apply in that specific area.<sup>343</sup> In the case of the US, most of the FONOPs were conducted by vessels transiting through China's territorial sea without prior notice, the zones where China claimed straight baselines, as well as through areas around maritime features that do not generate any maritime zone at all.<sup>344</sup> China first appeared in the US Department of Defense's *Annual Freedom of Navigation (FON) Reports* in 1992. It was, however, after the 2016 arbitral tribunal ruling that the PRC's excessive maritime claims were listed in much more detail.<sup>345</sup> China is not the only country that is perceived to be a challenger of freedom of navigation. In fact, the US lists 19 countries. However, it is by far the country with the most excessive claims totaling a number of seven unlawful or "excessive" claims whereby only one is not located in the South China Sea.<sup>346</sup> When Donald Trump came into office in 2017, he briefly halted the US' military measures in the region but became soon even more robust than his predecessor.<sup>347</sup> Further, the discourse around China's maritime claims became even more antagonistic. Trump's first Secretary of State Rex Tillerson went so far to make calls to prevent Chinese vessels from entering the artificial islands which he compared as similar to Russia's annexation of Crimea.<sup>348</sup> His successor, Mike Pompeo twittered that "The United States' policy is crystal clear: The South China Sea is not China's maritime empire. If Beijing violates international law and free nations do nothing, history shows the CCP will simply take more territory. China Sea disputes must be resolved through international

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<sup>339</sup> US Department of State Office of Ocean and Polar Affairs 2022.

<sup>340</sup> Congressional Research Service 2022b.

<sup>341</sup> US Department of Defense 2014.

<sup>342</sup> Freund 2017.

<sup>343</sup> Panter 2021.

<sup>344</sup> Freund 2017.

<sup>345</sup> Department of Defense 2020.

<sup>346</sup> Letts and Rothwell 2022.

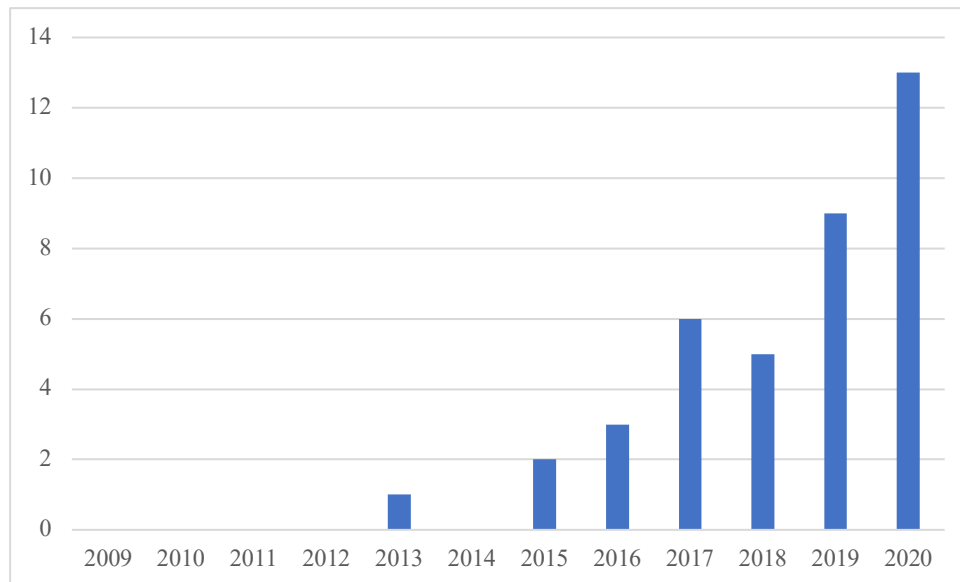
<sup>347</sup> Cooper 2017.

<sup>348</sup> In: Forsythe 2017.

law.”<sup>349</sup> And thus, the number of FONOPs conducted rose from three in 2016 (Obama administration) up to thirteen in 2020 (Trump administration).

**Figure 3.**

*US Freedom of Navigation Operations (FONOPs) in the South China Sea*



Source: Based on Data retrieved from Panter 2021 and Wirth 2020

But the South China Sea conflict did not only raise the worries of the US and the countries in the region. China’s increased reclamation and practice from 2013 onwards, its naval build-up and an arbitration tribunal’s award finally brought the issue to the G-7 leaders and EU decision-makers’ attention.<sup>350</sup> What began as *Pivot to Asia*, under Obama, transformed into Trump’s *Free and Open Indo-Pacific* (FOIP) concept, that was adopted in a similar way by several countries. Today, many countries have released their own strategies to counter China’s assertiveness and to emphasize the freedom of navigation. This concerned especially Japan, as it has a strong interests in the South China Sea dispute because its economy depend on free sealines of communication in the South China Sea and has its own maritime dispute with China.<sup>351</sup> Already in 2017, Australia’s prime Minister Malcolm Turnbull pled “to step-up Australia’s commitment in the Pacific”.<sup>352</sup> Ever since, freedom of navigation in the South China Sea as well as ‘defending the maritime order’ has been a central aspect of Australia’s discourse about the South China Sea.<sup>353</sup> France announced its own Indo-Pacific strategy in 2018, and emphasized that “it is essential to ensure freedom of navigation and overflight, in full compliance with the United Nations Convention on the Law of the Sea.”<sup>354</sup> The Netherlands and Germany followed with a similar concept in 2020, both emphasizing the norm of freedom

<sup>349</sup> Pompeo 2020.

<sup>350</sup> Wirth 2018, p. 476.

<sup>351</sup> See for example Koda 2016.

<sup>352</sup> In: Wallis 2021.

<sup>353</sup> See Wirth and Schatz 2020.

<sup>354</sup> French Republic 2018, p. 3.



of navigation as central interests.<sup>355</sup> And a year later, Germany – traditionally very reluctant concerning military exercises – even sent the frigate *Bayern* through the South China Sea.<sup>356</sup> In 2021, already militarily present in the South China Sea, the United Kingdom announced what became to be known as the *Tilt to Asia Strategy*.<sup>357</sup> But even prior, in 2018, the UK had conducted its own FONOP with the amphibious assault ship *HMS Albion*. And although the Chinese foreign ministry stated that the “actions by the British ship violated Chinese law and relevant international law, and infringed on China’s sovereignty”, the Royal Navy insisted on that “HMS Albion exercised her rights for freedom of navigation in full compliance with international law and norms.”<sup>358</sup> Eventually, even the European Union launched its own Indo-Pacific strategy, where it named the South China Sea a “major waterway” and that “cooperation to maintain and ensure maritime security and freedom of navigation, in accordance with international law and in particular the United Nations Convention on the Law of the Sea (UNCLOS), will be essential.”<sup>359</sup> And President of the European Council, Charles Michel, reiterated that Europe would “shoulder its full responsibility in protecting freedom of navigation, including in the South China Sea.”<sup>360</sup> Long story short, at the latest from 2020, the South China Sea had become a global arena where states all around the globe contest China’s increasing territorialization of maritime space and seek to defend the norm of freedom of navigation.

All things considered; the last period of the South China Sea dispute generated a notable shift to more global recognition of the conflict. The year 2009 marked the starting point for China’s overt assertiveness regarding its claims. While officially holding up freedom of navigation norms, through its practice as well through its declarations regarding innocent passage, China made clear that it poses a challenge to the spatial norms as laid out in UNCLOS. Although the PRC ratified the convention, its neglect of the arbitration award made clear that its own interests in the South China Sea would always supersede these international norms. Additionally, through its naval build-up China has heavily invested in its possibilities to exercise military power over the South China Sea. In other words, the PRC’s contestation of freedom of navigation norms is no longer only part of US rhetoric, but a real possibility. Similarly, US foreign policy discourse changed clearly from 2009 on towards recognizing China’s practices in the region as posing a threat to freedom of navigation. This was not only related to China’s Xi Jinping’s military buildup, but already part of Obama’s pivot to Asia strategy. The discourse was accompanied by increasing norm enforcement through FONOPs. The US was soon followed by like-minded partners that all pled to uphold the freedom of navigation norm in the region.

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<sup>355</sup> Government of the Netherlands 2020; Federal Government 2020.

<sup>356</sup> See, for example, Sauerbrey 2021.

<sup>357</sup> The title of the policy Paper behind the term is *Global Britain in a Competitive Age: the Integrated Review of Security, Defence, Development and Foreign Policy*. See Government of the United Kingdom 2021.

<sup>358</sup> In: Forces 2018.

<sup>359</sup> European Commission and High Representative of the Union for Foreign Affairs and Security Policy 2021.

<sup>360</sup> In: Crabtree 2022.

## 6. Contested Norms, Contested Territory: A Conclusion

The last chapter of the thesis now turns to the conclusion of the thesis. This part summarizes the key findings and discusses whether freedom of navigation is under threat in the South China Sea. Further, it will discuss the possible meanings of the nine-dash line and how it will possibly shape the future conflict about maritime spatial norms. To conclude, the chapter introduces ideas of how the multilayered conflicts might be solved in the future.

### 6.1 Summary of Findings

The starting point of this thesis was that the South China Sea is a multilayered and complex conflict over territory and material interests. However, the conflict – so the hypothesis – turned into a conflict about spatial norms that govern maritime space. Thus, the introduction raised the question of what role these spatial norms play in the South China Sea dispute. To this end, the thesis introduced discussions in IR theory and social sciences about international norms. As expectations of appropriate behavior, norms apply differently to different geographical and non-physical space forms and delaminate an actors' jurisdiction, entitlements, and rights. Norms may be legally enshrined, but they are not static because they are the product of a historical emergence process, contestation, and compliance through practices and discourse until they develop a 'taken for granted quality'.

To investigate maritime norms and what role they became to play in the South China Sea dispute, the research design of the thesis unfolded around three intertwined conceptual pillars. A historical narrative approach, discourse analysis, and the analysis of norm practices. Each of the three methodologies provided questions that structured the research and guided the textual analysis of qualitative data. The data for the research includes different sources, such as historical archives, WikiLeaks, official government websites, and newspaper collections. Additionally, quantitative data complemented the qualitative research.

The next part of the thesis gave a historical outline of the emergence of the spatial norms that govern the oceans. This part observed that there has always been a historical tension about whether oceans should be treated just like land space and be part of sovereign territory, whether they should be 'free', or the 'common heritage of mankind'. Or even subject of sovereign territoriality. The discovery of oil and gas resources led to countries claiming sovereignty over territorial seas up to 200 miles. Eventually, the United Nations Convention of the Law of the Sea legally enshrined the different visions and concepts for the governance of maritime space – a big compromise of the three concepts. Thus, UNCLOS comes with complex territorial norms, rules, and principles, including a kind of 'fading sovereignty-logic'. Different zones, measured from land, entitle states to certain rights, jurisdiction, and duties. Further, UNCLOS clarifies what kind of maritime features entitle states to exercise sovereignty around them – if at all - and where ships enjoy the central norm of ocean governance: freedom of navigation.

The core of the thesis provided a narrative history of the diplomatic, normative, geopolitical, and military shifts of the dispute. With China as the central actor, the history of the dispute reveals many intertwined and complex layers of the conflict that should shape today's power competition in the region. The first of the four phases periodized from the first time Imperial China collided with Japan over the Pratas Islands to 1949 – the year the Chinese Communist Party gained control over Mainland China. Shedding light on the early days of China's island reclamation helps understanding why the South China Sea dispute invokes such heavy reactions by the Chinese political leadership. Two aspects are in this regard important. First, the maps on which China bases its claims emerged during the Republican era when map-making became a central aspect of nation-building. As the maps showed a line drawn around the South China Sea, defending these boundaries became a matter of defending China. The second aspect was the experience of political and military powerlessness against colonial France and imperial Japan when they annexed the South China Sea islands. Gaining sovereignty against the colonial powers and Japan in mainland China was one of the central sources of political legitimacy in the young republic, encompassing the South China Sea islands. Taking these two elements together, it is possible to understand why China's leadership is so determined to defend China's "indisputable sovereignty" over the islands in the South China Sea. It became a moral imperative in China's South China Sea policy, a 'sovereignty fundamentalism' that is from the Chinese perspective competing with the norms that delineate where the PRC can exercise sovereignty in the South China Sea.

During the second phase, periodized from 1949 to 1989, many dynamic shifts would make the conflict even more complex. The first development was that the CCP came into power and replaced the Guomindang government, though not internationally recognized until the 1970s. The PRC used the same maps of the South China Sea as the ROC but removed two of the dashes, effectively drawing the nine-dash line as we know it today. In 1958, the PRC announced for the first time its 12-miles territorial sea, by that time a contested move as the three miles rule was still the primary territorial norm governing the oceans. However, the CCP saw its claims as its sovereign right and openly condemned freedom of navigation as imperialism. The period brought two other elements. In light of the cold war, China and the USA began a rapprochement process in the 1970s. The Soviet Union and communist Viet Nam were perceived as a common enemy that could be a maritime security threat in the South China Sea. The 1970s marked another development. With the discovery of oil and gas in the South China Sea, the littoral states and foreigners took a new interest in the region. Eventually, the central conflict parties Viet Nam, Malaysia, the Philippines, Taiwan, Brunei, and the PRC made territorial claims in the South China Sea. Spurred by UNCLOS in 1982, which provided states with the legal framework for extending their EEZs, almost every dry maritime feature in the South China Sea became occupied. Further, the two major military clashes happened during the period when the PRC seized the Paracel Islands in 1974 and Johnson Reef in 1988 from Viet Nam. This period is in so far interesting for the study of spatial norms, as it shows to what an extent interests such as oil and gas, but also security interests during Cold War, were shaping a) the conflict and b) reshaping the littoral state's claims to maritime space.

The following two decades after the Cold War were the buildup to what was about to come after 2009. In the 1990s and the first eight years of the new millennium, China expanded further south in the South China Sea, which the other claimants viewed with increasing discomfort. ASEAN diplomacy was in full bloom to prevent an escalation of the conflict. Thus, from 1995 onwards, attempts were made to develop a Code of Conduct in South China Sea matters. Although the ASEAN and China agreed on a Declaration of Conduct, no binding code has been established up until today. Simultaneously, although China ratified UNCLOS in 1995, it also declared a territorial sea around disputed maritime features that would, according to the convention, not provide for such a zone. Additionally, Beijing made clear that it understands freedom of navigation as fundamentally different from the US, as it excluded military vessels from the rights of innocent passage. Although China was changing its approach in the South China Sea towards more assertiveness, the US did not yet see China's behavior as a fundamental challenge to freedom of navigation.

This study found that the following decade was a fundamental change towards increasing confrontation on freedom of navigation matters and maritime territorial norms. In their diplomatic exchanges, the regional states reported that Beijing had begun to take a much more aggressive stance in South China Sea matters and tried to lever its power bilaterally, instead of developing a multilateral code with ASEAN. In 2009, the PRC presented a South China Sea map to the UN – the next step on the escalation ladder. The same year, Barack Obama became president of the United States and followed a policy in Asia toward China, aiming at outbalancing China's maritime claims in the South China Sea. When Xi Jinping rose to power, China asserted its claims in the South China Sea in a much more confrontational manner. Eventually, after China occupied Scarborough Shoal, the Philippines initiated an arbitration. Simultaneously, China invested heavily in its navy, constructed military outposts on contested islands which enabled it to project much more military power in the region, and further constructed artificial islands. In 2016, the arbitration tribunal ruled that China's activities in the region and most of its claims are not in line with UNCLOS. However, China rejects the ruling by claiming 'indisputable sovereignty' and the ruling as 'null and void'. China's assertiveness in the region and the rejection of the ruling further fueled the conflict. The US started conducting FONOPs to enforce freedom of transition, as provided by UNCLOS. Soon, other states followed with their own strategies in the Indo-Pacific with the South China Sea dispute taking center stage – the South China Sea became a global arena for the contest over the norm of freedom of navigation. This study suggests that the South China Sea dispute has evolved from a regional conflict over a few maritime features into a global conflict over the principles and norms that apply to maritime space. The different elements of the conflict, including China's sovereignty fundamentalism, material interests such as oil and gas, and overlapping claims, broiled up to the point where the dispute poses a threat to the entire region. Moreover, China's contestation of the norms, principles, and rules that govern maritime space affected the South China Sea dispute by providing the primary reason for the US and like-minded partners to step up their military and diplomatic engagement.

## 6.2 Is Freedom of Navigation under Threat in the South China Sea?

The findings indicate that China's behavior in the South China Sea is neither in line with international law, nor can it be reconciled with spatial norms as applied to maritime space. China's increasing military buildup can therefore be seen as the attempt to enforce at a later point its own understanding of sovereignty over the South China Sea, which is – at least for now – left ambiguous what this exactly entails.

**Table 1.**

*China's contestation of certain spatial norms as applied to maritime space*

<b>China</b>	<b>Maritime spatial norms and law</b>
Waters between islands and features are considered internal waters. Military transit requires PRC permission	Only some archipelagic nations considered have a right to treat islands as a group and draw straight baselines. This does not apply to the disputed maritime features
Territorial sea of 12 nm measured from the illegally drawn baselines of the island groups; as well as from artificial islands and other features	Territorial sea measured from each individual legally recognized feature. However, most PRC-claimed features do not meet the standards provided by UNCLOS
Can regulate military activity within EEZ.	Permits only regulation of economic activities there.
Claims rights to "historic rights" within nine-dash line. The PRC, however, must provide a clarification of the implications	Historic rights concept unclear, but it has no legal basis under UNCLOS.
China is building artificial Island	Extending national territory by constructing artificial islands is explicitly rejected by UNCLOS
Treats low water elevations, rocks and reefs like islands	rocks, low-tide elevations, artificial islands, installations, and structures, and submerged features do not constitute territorial entitlements

Sourece: Based on Mastro 2021 and own findings

It is not entirely clear how, where, and on what bases the Chinese government exercises sovereignty over the South China Sea. Based on official statements and the nine-dash line, there are three different perspectives that one can interpret China's confusing claims in the South China Sea. First, the PRC claims sovereignty over all the maritime features in the South China Sea, such as rocks, reefs, islands, and archipelagos, but does not seek to advance any rights that would collide with UNCLOS. In this perspective, China would still have a dispute with the other claimants but prevent the more significant global conflict over maritime spatial norms. China's reaction to the ruling and its current claims and practices makes this

scenario unlikely to be fulfilled soon. Second, China extends its maritime borders and territorial sea by establishing straight baselines around groups of islands to extend its territory, as UNCLOS provides for archipelagic states. There are good reasons to believe that Beijing sees the maritime features and the South China Sea in such a way – at least according to Chinese law. China has implemented and practices these straight baselines around the Paracel Islands group and would likely do the same if it gains control over the entire Spratly Island group. A third perspective could be that China claims the entire South China Sea to be either an EEZ, a territorial sea, or as internal waters that are part of China like its land territory. The South China Sea would be – in this perspective – some kind of Chinese saltwater lake, only that it is 1.5 times bigger than the Mediterranean Sea. For now, this perspective is not realistically implementable, although there are good reasons to believe that many Chinese understand the map in such a way.<sup>361</sup> A recent study has traced Chinese vessels that search for oil and gas and found that they follow almost exactly the delamination provided by the nine-dash line.

### Map 8.

#### *Chinese Surveys in the South China Sea 2020-2021*



Source: Asia Maritime Transparency Initiative 2022d

So, all things considered, is freedom of navigation under threat in the South China Sea? China certainly contests certain navigational rights of passage and limited sovereignty over maritime space, including a range of maritime standards of conduct that developed throughout history until UNCLOS codified them.

<sup>361</sup> Beech 2016.

However, at least discursively, China is (unlike in the 1960s) not directly challenging norms of freedom of navigation in principle. Its interest as an economic giant is that trade through the oceans remains unimpeded. Although China's increasing military foothold in the region could pose a potential threat to SLOCs during a hypothetical war, it is unlikely that China will impede trade routes as China largely depends on free trade. Freedom of navigation for military vessels, by contrast, is opposed by China. This became the primary reason for the US to start their FONOPs in the region – certainly not out of an ardent enthusiasm for Grotian visions of free seas, but mainly to ensure that the US could project its naval power in the region to outbalance China as a strategic rival. If China manages to gain control over the entire South China Sea maritime features and enforces the straight baselines around them, freedom of navigation would be significantly restricted.

China's practices, including the construction of artificial islands, unlawful drawing of straight baselines lines around maritime features, the nine-dash line, and the military buildup in the region, make it likely that Beijing will further bend the principles that govern maritime space for its own interests. The nine-dash line should be seen in this light. China's ambiguity to define what these dots and dashes exactly mean is likely a strategy of leaving future options open to make the entire South China Sea an EEZ, territorial waters, or even internal waters. China could easily clarify what the dashes imply - but leaves its options open. In this regard, the military presence of the US and its like-minded partners can contribute in a valuable way to the prevention of China's piecemeal extension of maritime territorialization.

### **6.3 A Solution in Sight**

To conclude, although the conflict seems hopelessly stuck between China's assertiveness and overlapping territorial claims over maritime features by all conflict parties, there could be solutions to ease the tensions if all involved conflict parties were making efforts. This process would have three elements. First, the most pressing short-term measure to prevent further escalation would be to finally adopt a legally binding Code of Conduct between ASEAN and China. This COC must be developed on the basis of equality, which is why it is important that is developed multilaterally and not bilaterally. Second, besides the question to whom which maritime feature belongs, an international commission should rule over which maritime feature generates what kind of territorial entitlements in the South China Sea based on UNCLOS. A third element, arguably the most difficult one, would include resolving the question to whom which maritime feature belongs. The first step would be, according to Bill Hayton, to break down the claims to entire groups of features down to single features. In the next step, an international commission could be formed. Each country would have then to submit its historical evidence that it owned the respective maritime feature first. Based on this evidence the commission could decide which country has the most convincing arguments.<sup>362</sup> Considering the Chinese reaction to the PCA ruling in 2016, of course, these ideas do not seem realistic for now. Nevertheless, in the long run, there will be no way around finding a way to align the territorial claims

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<sup>362</sup> Hayton 2022.

with the set of rules, principles, and norms as applied to maritime space. Until then, however, the South China Sea will remain an arena for the contest over territory and international norms and the future of ocean governance.

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