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Julie Franki

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SEIZE THE SEA: THE TERRITORIAL CONFLICT BETWEEN THE UNITED STATES AND CHINA OVER MILITARY OPERATIONS IN THE SOUTH CHINA SEA

The United Nations Convention on the Law of the Sea (UNCLOS) has left a battle of interpretation that the United States and China have been clashing over for decades.¹ One particular focus of their disagreement is over certain U.S. military operations in the South China Sea.² The United States wants its military presence to endure and China believes the United States does not have any right to conduct military operations in “its” waters.³ Both countries cite support from UNCLOS, which further highlights the need for clarification of which position should be accepted in international law.⁴

The South China Sea is in the middle of a world trade route on which all major trading nations depend;⁵ over one third of all seaborne commercial trade goes through the South China Sea.⁶ But China has allegedly infringed on the freedom of navigation⁷ and has built up artificial islands among the Spratly Islands⁸ hundreds of miles from China’s mainland baseline.⁹ China supports its

⁶ Id.
⁷ Id.
⁹ See Gabriel Dominguez, China’s Nine-Dashed Line Has ‘No Basis Under International Law,’ DW DEUTSCHE WELLE (July 27, 2015), http://www.dw.com/en/chinas-nine-dashed-line-has-no-basis-under-international-law/a-18609290; DAVID J. BEDELMAN, INTERNATIONAL LAW FRAMEWORKS 126–27 (2d ed. 2006) (explaining that a coastal state’s baseline is the low-tide mark on the beach from which the coastal state measures the respective limits for its territorial sea, Exclusive Economic Zone (EEZ), and the continental shelf).
contention that its construction of the islands does not violate international law—and therefore does not constitute an impediment to freedom of navigation—with its “nine-dash line.” The nine-dash line is based upon a 1940s map, which China uses to support claims that the territory at issue has been a part of Chinese territory “since ancient times.” China’s claim to the majority of the South China Sea also grossly overlaps with the maritime claims of Vietnam and the Philippines. The general consensus among scholars is that China’s nine-dash line “egregiously violate[s] UNCLOS.”

This Essay ultimately argues that the United States’ interpretation and application of UNCLOS is more meritorious than that of China; however, more explicit provisions in UNCLOS concerning the authorization of military operations in a foreign country’s Exclusive Economic Zone (EEZ) and around artificial islands would provide a more robust legal framework to resolve this international dispute.

Part I provides an overview of the provisions of UNCLOS that apply to the permissibility of the U.S. freedom of navigation patrols within China’s EEZ and within twelve nautical miles of its artificial islands. Part II presents the conflicting claims of both the United States and China. Part III suggests certain resolutions that could mitigate the growing dispute. Part IV provides a conclusion.

I. WHAT UNCLOS DOES AND DOES NOT SAY

UNCLOS is the controlling international agreement governing activity in international maritime zones. The version of UNCLOS in effect today was negotiated from 1973 to 1982, making it the longest-running international law negotiation in history. While UNCLOS, the “constitution for the oceans,” addresses a multitude of interests, certain provisions are subject to debate.

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11 Demetri Sevastopulo & Charles Clover, China Accuses US Navy of Illegal Incursion in South China Sea, FIN. TIMES (Oct. 27, 2015), https://www.ft.com/content/8a05582e-7c18-11e5-98fb-5a6d4728f74e.


13 Dominguez, supra note 9.

14 Houck & Anderson, supra note 4, at 442.

15 Bederman, supra note 9, at 125.

16 Id. at 125–26.
China is a party to UNCLOS, but the United States is not; however, the United States has accepted UNCLOS as customary international law, and acts in accordance with its assertions. Most of the provisions in UNCLOS were developed over centuries through their practice and recognition in the international arena, making it customary international law. Article 38 of the Statute of the International Court of Justice states that international custom is “evidence of a general practice accepted as law.” As such, UNCLOS is binding upon the United States.

As a general matter, under the Convention, the closer to the shore of a country that an area of the sea is, the more likely it falls under the jurisdiction of that country. In accordance with the Convention, any coastal state may claim a territorial sea that extends no more than twelve nautical miles from the state’s baseline, which is the state’s “low-water line along the coast.” UNCLOS defines a country’s EEZ as the water beyond and adjacent to a country’s territorial sea that shall not extend more than 200 nautical miles from that country’s baseline. Article 58 grants all countries operating in another country’s EEZ the freedoms referred to in Article 87, which sets forth the freedom of the high seas. The high seas are defined as “all parts of the sea that are not included in the [EEZ], in the territorial sea or in the internal waters of a State.” The freedoms of the high seas explicitly enumerated in Article 87 include, inter alia, the freedom of navigation and the freedom of overflight. The freedom of navigation patrols that the United States continues to conduct are not included in the freedoms granted by Article 87; however, the list of freedoms provided in Article 87 is not exhaustive and the freedom of navigation
patrols are therefore not excluded. UNCLOS further explains that no country may “subject any part of the high seas to its sovereignty.”

In a joint press conference with President Obama, China’s President Xi Jinping conceded that China is constructing artificial islands in the South China Sea. Under Article 60 of the Convention, artificial islands are not granted the legal status of islands. As such, artificial islands are not granted a territorial sea, but rather are limited to a safety zone that may not exceed 500 meters, unless otherwise allowed by customary international law, and may not interfere with international navigation. This list of classifications, which is not exhaustive and vague given the developments in the decades-long dispute between the United States and China, have led to incompatible interpretations of international maritime law.

II. CONFLICTING CLAIMS

The principal struggle between the United States and China centers around whether the United States is permitted under UNCLOS to conduct freedom of navigation patrols within China’s EEZ and within twelve nautical miles of the artificial islands. The United States asserts that it may conduct freedom of navigation patrols in China’s greater EEZ and around the artificial islands. The official position of the United States is “not to take a position” on the otherwise internationally disputed sovereignty of the artificial islands. Instead, the United States challenges the validity of China’s claim to a twelve-nautical mile territorial sea for the artificial islands in light of the Convention.

30 Id. art. 87.
31 Id. art. 89.
32 See President Barack Obama, U.S. & President Xi Jinping, China, Remarks at Joint Press Conference (Sept. 25, 2015).
33 UNCLOS, supra note 1, art. 60, ¶ 8.
34 Id. art. 60, ¶ 5, 7–8.
35 Houck & Anderson, supra note 4, at 441.
36 See Blanchard & Shalal, supra note 8.
38 See Blanchard & Shalal, supra note 8.
claims that the United States has no right to conduct military operations in China’s EEZ\(^{41}\) or within twelve nautical miles of the artificial islands.\(^{42}\) China claims that because the freedom of navigation patrols conducted by the United States are not deliberately provided for under UNCLOS, they are not permitted.\(^{43}\) Moreover, China claims that its artificial islands are due a twelve-nautical mile territorial sea limit, justified only by its widely unpopular nine-dash line.\(^{44}\)

A. The United States’ Claims

The United States emphasizes the importance of the international law and regional norms to which China should be bound.\(^{45}\) The United States believes that, in accordance with international and customary law, it is authorized to assert its presence through freedom of navigation patrols within twelve nautical miles of China’s artificial islands\(^{46}\) and within China’s EEZ.\(^{47}\) The United States draws support from several UNCLOS provisions, including Articles 58 and 87, which grant the freedom of navigation through a country’s EEZ and across the high seas, respectively.\(^{48}\) The Convention does not expressly prevent the right of the United States, or any other country, to conduct military activities in another country’s EEZ.\(^{49}\) The United States routinely exercises its “right to conduct military activities in EEZs around the world” with support from the “UNCLOS text, [and] international state practice.”\(^{50}\) The United States also garners support from the fact that several other countries have been known to operate military vessels in other states’ EEZs, including Australia, Russia, South

\(^{41}\) Houck & Anderson, supra note 4, at 447.

\(^{42}\) Blanchard & Shalal, supra note 8.

\(^{43}\) Houck & Anderson, supra note 4, at 448.

\(^{44}\) See Julian Ku, While the Courts Have Ruled, China Is Not Leaving the South China Sea, NAT’L INT. (July 15, 2016), http://nationalinterest.org/blog/the-buzz/while-the-courts-have-ruled-china-not-leaving-the-south-16980; Dominguez, supra note 9.

\(^{45}\) See Cronin, supra note 5.


\(^{48}\) UNCLOS, supra note 1, art. 58, 87.

\(^{49}\) See id. art. 58; Gallagher, supra note 39, at 22.

\(^{50}\) Houck & Anderson, supra note 4, at 443.
Africa, the United Kingdom, and China. Most notably, China has admitted that it conducts surveillance in other countries’ EEZs, including that of the United States. This conduct is arguably in defiance of Article 19 of the Convention, which prohibits acts “aimed at collecting information to the prejudice of the defence or security of the coastal State.”

Moreover, it is clear from the UNCLOS text that China cannot even claim maritime zones beyond its 200-nautical mile EEZ limit. Several of China’s artificial islands in the Spratly archipelago are at least approximately 740 miles away from China’s baseline and clearly fall within the Philippines’ EEZ. A maritime law expert for the Chinese government has even admitted that he did not know what the basis was for this boundary. The majority of UNCLOS scholars (with the exception of those from China) agree that China’s nine-dash line, which is China’s only support for its vast claim of the South China Sea, is absurd. It is therefore widely recognized that it is completely unreasonable for a State to claim nearly an entire sea, up to hundreds of miles away from that State’s baseline, as its sovereign waters. While UNCLOS leaves some room for interpretation about activities that may or may not be permitted in foreign countries’ EEZs, it clearly states that the artificial islands are afforded no more than a 500-meter safety zone since they are not granted the status of islands, thereby making the United States’ military activities surrounding the islands permissible.

B. China’s Claims

China has asserted its status as a new military power in the region, and claims that the United States cannot conduct any military operations in the

51 Id. at 445. See Kimberly Hsu & Craig Murray, China’s Expanding Military Operations in Foreign Exclusive Economic Zones, U.S.-CHINA ECON. & SECURITY REV. COMMISSION (June 19, 2013), http://www.uscc.gov/sites/default/files/Research/Staff%20Backgrounder_China%20in%20Foreign%20EEZs.pdf.
52 Houck & Anderson, supra note 4, at 445.
53 UNCLOS, supra note 1, art. 19, ¶ 2(c).
54 Dominguez, supra note 9.
55 Cronin, supra note 5. See Dominguez, supra note 9.
56 See Santos, supra note 12.
58 Dominguez, supra note 9.
59 UNCLOS, supra note 1, art. 60.
60 Sevastopulo & Clover, supra note 11.
waters it claims in the South China Sea. Even though China’s artificial islands lie in the high seas well beyond China’s 200-nautical mile EEZ limit, and despite the clear language of the Convention stating that artificial islands receive no more than a 500-meter safety zone, China justifies its claims through its historic nine-dash line. This nine-dash line was first published on a map in 1947, and claims about ninety percent of the 1.35 million-square-mile South China Sea. By extension of the nine-dash line, China claims that the artificial islands are within its jurisdiction and thus are not subject to the 500-meter safety zone delineated in Article 60 of the Convention.

China also claims that military activities are not permitted in a foreign coastal state’s EEZ without that state’s permission because such activity is “not expressly permitted by UNCLOS,” despite the fact that China sails through other countries’ EEZs. The actions of countries that do not have such developed maritime surveillance tools validate China’s position. For example, have their own interests in the South China Sea and have adopted restrictions on military activities in their respective EEZs. However, general state practice and assertions made by most countries provide that coastal states may not regulate foreign military actions in the coastal state’s EEZ. The failure to reconcile these opposing views could have potentially immense implications for future relations between the United States and China.

62 See Dominguez, supra note 9.
63 UNCLOS, supra note 1, art. 60.
64 Gallagher, supra note 39, at 17.
67 Gallagher, supra note 39, at 15–16.
69 Houck & Anderson, supra note 4, at 445-46, 448.
71 Id.
72 Gallagher, supra note 39, at 21–22.
III. SUGGESTED RESOLUTIONS

Various commentators have presented their opinions about how the United States and China could best reach an understanding over the United States’ military presence in the South China Sea. Article 59 of UNCLOS describes the “[b]asis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone.” It states that where the Convention does not specifically grant rights or jurisdiction and a conflict arises, “the conflict should be resolved on the basis of equity . . . taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.” Thus, the dispute over whether the U.S. freedom of navigation patrols are included in the Convention under Article 87 should be resolved equitably.

Even though China does not seem to be concerned with its failure to reach a settlement, an amendment to the Convention may be sufficient to force a new response. Since the United States argues that UNCLOS does not expressly prohibit military activities in China’s EEZ or around the artificial islands, and China argues that UNCLOS does not expressly permit such activities, an amendment to the Convention would resolve that issue. The state practice of countries across the world, including that of China, supports the United States’ stance that military operations are permitted in foreign countries’ EEZs. Adding language reflecting that practice to either Article 58 (“Rights and duties of other States in the exclusive economic zone”), Article 87 (“Freedom of the
high seas”),81 or both, could eliminate any disparity between the countries’
claims.82 UNCLOS also plainly states that artificial islands are not considered
islands for the purpose of having territorial waters, and are therefore not
permitted more than a 500-meter safety zone.83 This provision of UNCLOS does
not seemingly leave any doubt as to the freedom of navigation within twelve
nautical miles of the artificial islands in question, but it begs enforcement.

China hides behind its nebulous nine-dash line to legitimize its claims of
sovereignty over the majority of the South China Sea despite the fact that much
of that territory lies hundreds of miles away from the mainland.84 China benefits
more than any other country by maintaining its nine-dash line and interpreting
the imprecise wording of UNCLOS to its advantage.85 An alteration to
UNCLOS should state that a coastal state can neither make maritime claims
beyond that state’s EEZ86 nor infringe on another state’s territory granted under
the Convention.87

China has exempted itself from “compulsory arbitration and other dispute
settlement procedures” in the International Tribunal for the Law of the Sea88 and
has thwarted the Philippines’ attempts to have China submit the issue to
international arbitration.89 In clear defiance of UNCLOS, China has also not
agreed to any of the other dispute settlement options provided in UNCLOS.90
As such, changing the Convention may prove to be ineffective.

Regardless of any potential changes in the Convention, the situation
unquestionably requires realistic foreign policy and a strong showing of the
United States’ proven strength.91 Retired Admiral Dennis Blair noted that his

81 Id. art. 87, ¶ 4.
82 See Houck & Anderson, supra note 4.
83 UNCLOS, supra note 1, art. 60, ¶¶ 4–5.
85 Lague, supra note 57.
86 Dominguez, supra note 9.
88 Vu & Pham, supra note 73.
90 Tiezzi, supra note 89.
experience suggests that China will respect the United States’ position more once the United States does something, instead of continuing to merely voice disapproval and talk about each country’s respective claims.92 The United States should coordinate its military actions with the overall economic and political strategy it adopts moving forward.93 By presenting a cohesive, unified front, the United States and any other countries that hope to assert their claims in the South China Sea could take a significant step in garnering the respect from China needed to change China’s position.94 Ultimately, maintaining the status quo will not bode well for any country’s interests in the South China Sea.

CONCLUSION

There are myriad factors at play in the clash of interests and interpretations between the United States and China. The United States wants to ensure its own security, the security of its allies in the region, and the stability of the region as a whole.95 Trillions of dollars in trade pass through the South China Sea each year, giving the United States a heightened interest in maintaining peace in the area.96 While China shares an interest in maintaining peace, its interests also include maintaining its vast claims over the South China Sea and limiting the activities of other countries, which directly conflicts with U.S. interests.97 While the Convention provides some clarity about the status of the artificial islands in the scheme of international maritime law,98 it inconveniently leaves room for disagreement over whether the freedom of navigation patrols, as military operations of the United States, are permitted both in China’s EEZ and within twelve nautical miles of the artificial islands.99 Even though China argues that

94 Glaser, supra note 37.
98 UNCLOS, supra note 1, art. 60, ¶ 8.
99 Houck & Anderson, supra note 4, at 443.
these activities are not permitted by UNCLOS, it conducts its own military operations in other countries’ EEZs around the world. China nonetheless remains staunchly opposed to negotiating a settlement with the United States, let alone acquiescing to the United States’ position.

While China consenting to any form of settlement seems improbable at this point, an amendment to the Convention could prove quite effective in compelling China to change both its interpretation of UNCLOS and its application of the nine-dash line. Regardless, the United States needs to assert itself as a power in the region and should continue to challenge China’s weak claim based on the nine-dash line. The minimal action taken thus far by the United States has clearly not secured consideration for its interpretation of UNCLOS, leaving some to suggest that more robust action is needed. The United States has nearly boundless resources and to prevent this disagreement from progressing any further, China must feel international pressure to adjust its outdated interpretation of the law. The void left in the wording of UNCLOS has caused tensions to rise between the United States and China, and between China and nearby countries with their own claims to the South China Sea. Since China is disinclined to actively work towards a resolution, it is left to the United States to change the discussion so that China gives the Convention its due respect.

Julie Franki

100 Id. at 447.
101 Id. at 445.
102 Vu & Pham, supra note 73.
108 Chen, supra note 104.

* Executive Administrative Editor, Emory International Law Review; J.D. Candidate, Emory University School of Law (2017); B.A., magna cum laude, University of South Carolina (2012). The author would like to sincerely thank Professor Johan D. van der Vyver for his advice and suggestions on this Essay.