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# **MALAYSIA'S POLICIES AND INTERESTS IN THE SOUTH CHINA SEA**

**DEVELOPMENTS, SUCCESSES, AND FAILURES<sup>1</sup>**

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## **Abstract**

Malaysia's management of the South China Sea issue is generally considered to be effective in securing its interests. These are with respect to accessing its hydrocarbon resources, safeguarding its legal claims under international law, maintaining peace and security in its waters and good relations with China and other claimants, and engaging other players as part of its hedging strategy in regional geopolitics. Its policy stances, strategies, and actions have remained fairly consistent over the past few decades. Nevertheless, Malaysia continues to face challenges, particularly in recent years. The ambitious Malaysia-Brunei 40-year joint Commercial Arrangement Area (CAA) for oil and gas exploitation that was signed in 2009 hit a major snag. It was suspended in early 2020 by the Pakatan Harapan administration led by Dr Mahathir Mohamad. Harassment of Malaysian drill-ships by Chinese vessels has disrupted national oil corporation Petronas' operations and risks untoward accidents that could affect overall bilateral relations which Malaysia is keen to preserve. Malaysia's expansive territorial claims have resulted in constant incursions of the China Coast Guard and even aircraft surveillance in the vicinity of its claimed Spratly group of islands and features. Malaysia's military assets have struggled to effectively police its waters. At the ASEAN level, no real progress has been made on the Code of Conduct, whose utility in managing the dispute remains questionable.

## Introduction

This working paper addresses the interests, policies, strategies, and actions of Malaysia in the South China Sea. The paper takes its point of departure from a study of Malaysia's effective positioning in the South China Sea dispute by deploying small state statecraft through a policy of "selective alignment and strategic ambiguity" to achieve limited goals.<sup>2</sup> While there have been some unresolved issues, problems, and possible mishandling of the South China Sea dispute, Malaysia's approach to the dispute has been well managed.

Malaysia's geopolitical positioning as a "maritime nation" was the basis for its control of most of its occupied and claimed features in the South China Sea based on its adherence to UNCLOS principles. It has also succeeded in maintaining a joint approach to South China Sea issues via ASEAN diplomacy, particularly in addressing China's ambitions and actions, while pursuing its own specific unilateral objectives.

While there have been occasions when relations with littoral states and powers have been marginally affected adversely by specific incidents or events, broadly Malaysia's approach has remained consistent and achieved benefits for all its major stakeholders including the national oil corporation, Petronas, and the East Malaysian states of Sabah and Sarawak.

This paper reviews Malaysia's continuing policies in South China Sea with respect to the most recent developments and the status of its territorial claims, occupations, confrontations, incursions, and clashes with other parties. It then delves more deeply into the status of Malaysia's commercial interests through its joint development agreements (JDAs) with Thailand, Vietnam, and Brunei.

The paper also assesses the overall progress and effectiveness of Malaysia's reliance on ASEAN's diplomacy in South China Sea issues in engaging China through the Declaration of Conduct (2002) and Code of Conduct (2017). Finally, it examines domestic concerns and policy implications of recent developments surrounding the dispute.

## Review of Recent Events

Tensions between major players and stakeholders in the South China Sea have flared up over the past few years.<sup>3</sup> Most dramatically, in 2020, China fired two ballistic missiles from separate locations on its mainland into waters between Hainan Island and the Paracels. The United States, on its part continued the annual RIMPAC (Rim of Pacific) exercise from 17-31 August 2020. Earlier in July 2020, China flew four fighter jets to Woody Island in the Paracels in response to the presence of US aircraft carriers there.<sup>4</sup> China established two new administrative districts for the Paracel Islands and Macclesfield

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<sup>2</sup> This was suggested in the first part of an unpublished paper titled "Malaysia's Policies and Interests in the South China Sea: Strategic Perspective and Major Players."

<sup>3</sup> See Thayer, Carlyle. "COVID-19 masks mischief in the South China Sea." *East Asia Forum*, January 13, 2021. <https://www.eastasiaforum.org/2021/01/13/covid-19-masks-mischief-in-the-south-china-sea/>.

<sup>4</sup> See Thayer, *ibid*.

Bank, the other for the Spratly Islands under the jurisdiction of Sansha City on Woody Island amidst protests from Vietnam.<sup>5</sup>

Lawfare continued. Multiple *notes verbales* to the United Nations Commission on the Limits to the Continental Shelf (CLCS) objected to Malaysia's preliminary submission for an extended continental shelf on 12 December 2019. Malaysia's own *note verbale* rejected the legal basis of China's historical claims while China on its part requested the CLCS to outright dismiss Malaysia's submission.<sup>6</sup>

The major maritime security incident involving Malaysia was the West Cappella event when China coast guard vessels harassed a Petronas oil drill ship in Malaysia's Exclusive Economic Zone in late January and February 2020. While there were no new policy developments and issues at the end of 2020, the government conducted an investigation into an allegation involving a US surveillance aircraft. On 10 September 2020, the US-based science magazine *Popular Mechanics* reported that the US Air Force aircraft used a transponder code to impersonate a Malaysian plane while spying on China's military bases. The RC-135W Rivet Joint reconnaissance aircraft flew off China's Hainan Island on 8 September 2020, coming within 55 miles of the Chinese mainland. Transport Minister Wee Ka Siong acknowledged the event and said the government, via the Civil Aviation Authority of Malaysia (CAAM), had probed the accusation.<sup>7</sup> Beyond his statement, nothing else has been reported at the point of writing.

An intrusion by 16 Chinese aircrafts in the Luconia Shoals vicinity on the last day of May in 2021 triggered the scrambling of RMAF BAE Hawk 208 light combat jets from Labuan to investigate the incident.<sup>8</sup> In his press statement, Malaysian Foreign Minister Hishamuddin Hussein said he had summoned the Chinese Ambassador to "provide explanation regarding the breach of Malaysian airspace and sovereignty."<sup>9</sup> In response, the embassy dubbed the event as a "routine flight training."<sup>10</sup>

Perceptions based on the ISEAS-Yusof Ishak Institute 2021 survey showed that China's militarisation in the South China Sea was a major concern for the region (62.4%), as were Chinese encroachments in the exclusive economic zones (EEZs) and continental shelves of other littoral states

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<sup>5</sup> See Panda, Ankit. "Making Sense of China's Latest Bid to Administer Sovereignty in the South China Sea." *The Diplomat*, April 21, 2020. <https://thediplomat.com/2020/04/making-sense-of-chinas-latest-bid-to-administer-sovereignty-in-the-south-china-sea/>.

<sup>6</sup> Thayer, *ibid.*, states the following: "Malaysia's 2019 submission triggered responses by the Philippines (two *notes verbales* on 6 March), Vietnam (30 March and two *notes verbales* on 10 April), Indonesia (26 May), the United States (1 June), Australia (23 July), Malaysia (29 July), and a joint submission by France, Germany, and the United Kingdom (16 September). China lodged a response to every one of these submissions.

<sup>7</sup> See "Putrajaya probed allegation US jet impersonated as M'sian plane." *Malaysiakini*, January 7, 2021. <https://www.malaysiakini.com/news/557914>.

<sup>8</sup> The RMAF in a news release said that 16 Xian Y-20 and Ilyushin Il-76 transport aircraft of the People's Liberation Army Air Force (PLAAF) approached to within 112 km of Malaysia's coast, flying at speeds of 537 km/h at between 23,000 and 27,000 ft in a tactical line astern formation. See Yeo, Mike. "Commentary: The trickiness of dealing with stray aircraft when territorial lines are grey." *Channel News Asia*, June 14, 2021. <https://www.channelnewsasia.com/commentary-trickiness-dealing-stray-aircraft-when-territorial-lines-are-grey-1968016>.

<sup>9</sup> The statement was issued on 1 June and produced in his twitter account by the Malaysian foreign minister.

<sup>10</sup> "China says military flight off Malaysia is 'routine training'." *The Straits Times*, June 2, 2021. <https://www.straitstimes.com/asia/se-asia/china-says-military-flight-off-malaysia-was-routine-training>.

(59.1%). The latter was felt more keenly among the Southeast Asian claimant states, namely the Philippines (86.6%), Vietnam (84.6%), Brunei (63.6%), and Malaysia (63.2%). Concerns with US military presence was only felt by 11.1% of the Malaysian respondents. (See [Appendix A](#)).

At the point of writing, there have been no face-to-face meetings between ASEAN members and China via the Joint Working Group to Implement the Declaration of Conduct of Parties in the South China Sea (JWG–DOC) and no real progress was made on the Code of Conduct (COC) in part due to the COVID-19 situation. While tensions in the South China Sea are likely to continue, the new US Biden administration could offer the prospect of reengagement with ASEAN on South China Sea matters vis-à-vis China.<sup>11</sup>

## Status of Malaysia’s Territorial Claims

### Islands, reefs, atolls and rocks of GPS

Based on its 1979 Map, Malaysia claimed 11 to 12 features in the South China Sea, occupied 5 to 8 reefs and atolls, and extended its continental shelf along the Sabah and Sarawak coast into the Spratly group of features. The group of features claimed by Malaysia has been named *Gugusan Semarang Peninjau* (GSP) by the Royal Malaysian Navy. Most significantly, in June 1983, Malaysia occupied Swallow Reef (*Terumbu Layang Layang*) and deployed three F-5 fighters to Labuan to provide military backing to its claims. Subsequently in 2004, Malaysia established the Teluk Sepanggar naval base to house its two Scorpène-class submarines, the KD Tunku Abdul Rahman in September 2009 and KD Tun Razak in July 2010. Challenges for the Royal Malaysian Navy go beyond the South China Sea, including overlapping claims with Indonesia in the Ambalat area. The establishment of the Teluk Sepanggar base could well be seen as an important effort in the navy’s modernisation programme with the broad aim of guarding Malaysia’s overall maritime interests.<sup>12</sup> In January 2017, in an act of “defence diplomacy”, a Chinese submarine docked for the second time at the base.<sup>13</sup>

Malaysia’s military presence in the form of mini-naval stations can be found on four features, namely, Ardasier Reef (*Terumbu Ubi*) since 1986, Mariveles Reef (*Terumbu Mantanani*) since 1986, Erica Reef (*Terumbu Siput*) since 1999, and Investigator Shoal (*Terumbu Peninjau*) since 1999. There are indications that it has also occupied Dallas Reef (*Terumbu Laya*), Royal Charlotte Reef (*Terumbu Semarang Barat Besar*), and Louisa Reef (*Terumbu Semarang Barat Kecil*).<sup>14</sup> Malaysia also claims two

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<sup>11</sup> See Takahashi, Toru. “Biden should seek a new 'Asia rebalance' policy: US administration needs cooperation with Asia to counter China.” *Nikkei Asia*, January 31, 2021. <https://asia.nikkei.com/Spotlight/Comment/Biden-should-look-for-a-new-Asia-rebalance-policy>.

<sup>12</sup> See Foreign Policy Research Institute. “Treading water: Malaysia’s Navy Modernization.” October 21, 2020. <https://www.fpri.org/article/2020/10/treading-water-malaysias-navy-modernization/>.

<sup>13</sup> See “Chinese sub docks at Malaysian port for second time this year.” *Reuters*, September 13, 2017. <https://www.reuters.com/article/us-china-malaysia-southchinasea-idUSKCN1B017P>.

<sup>14</sup> See Vuving, Alexander L. “South China Sea: Who Occupies What in the Spratlys?” *The Diplomat*, May 6, 2016. <https://thediplomat.com/2016/05/south-china-sea-who-claims-what-in-the-spratlys/>. Storey states that Malaysia has occupied only five features, viz. Swallow Reef was occupied 1983; Mariveles Reef and Ardasier Reef in 1986; and Investigator Shoal and Erica Reef in 1999 and has also planted sovereignty markers on two

low-tide elevations and three totally submerged reefs that are on its continental shelf. The analysis of Malaysian claims by a certain Captain J Ashley Roach for the US State Department is worth noting:

- i. The only features that could generate maritime zones are the islands of Swallow Reef, Amboyna Cay (Vietnam occupied), Barque Canada Reef (Vietnam occupied) and Commodore Reef/Rizal Reef (Philippine occupied), and the rocks of Erica Reef, Investigator Shoal, and Mariveles Reef. The islands are entitled to a territorial sea, EEZ, and continental shelf. The rocks are entitled only to a 12-mile territorial sea.
  - ii. Other features are either low-tide elevations lying more than 12 miles from an island or mainland or submerged at low tide and have no maritime zone entitlements and are not subject to appropriation.
  - iii. If the Spratlys are not treated as a single unit for sovereignty purposes, there is insufficient evidence to state definitely which state (Malaysia or Vietnam) has sovereignty over the islands and rocks in the Spratlys claimed by Malaysia.
  - iv. As to the features not subject to appropriation that rise from Malaysia's continental shelf, Malaysia clearly has sovereign rights over them, i.e., the low-tide elevations Dallas Reef and Ardasier Reef, and the submerged features James Shoal, North Luconia Shoals, and South Luconia Shoals.
- V.** While Malaysia and Brunei are minor players compared to the claims of China, Taiwan, Vietnam, and the Philippines, they will both have to be taken into account to achieve a permanent resolution to the overlapping sovereignty claims in the Spratlys.<sup>15</sup>

## Continental shelf extension 2019

On 12 December 2019, Malaysia upped its ante to the United Nations Commission on the Limits of the Continental Shelf (CLCS) in making a new submission on an extended continental shelf (ECS) beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. It was in addition to the Vietnam-Malaysia joint submission of an ECS beyond 200 nautical miles in 2009. China sent an official protest to the UN Secretary-General on the same day, asserting that Malaysia's submission had infringed China's sovereign rights and jurisdiction in the South China Sea.

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unoccupied features, Dallas Reef (close to Ardasier Reef) and Royal Charlotte Reef (close to Swallow Reef). See Storey, Ian. "The South China Sea Dispute in 2020-2021." *ISEAS Perspective* 97 (2020): 2.

[https://www.iseas.edu.sg/wp-content/uploads/2020/08/ISEAS\\_Perspective\\_2020\\_97.pdf](https://www.iseas.edu.sg/wp-content/uploads/2020/08/ISEAS_Perspective_2020_97.pdf) Salleh et al., claim that eight were occupied, viz. Ardasier Reef, Dallas Reef, Erica Reef, Louisa Reef, Marivales Reef, Royal Charlotte Reef, Swallow Reef and Investigator Shoal, while other features claimed by Malaysia but occupied by others were Commodore Reef (*Terumbu Laksamana*) by Philippines, and Amboyna Cay (*Pulau Kecil Amboyna*) Barque Canada Reef (*Terumbu Perahu*) by Vietnam. See Salleh, Asri, Che Hamdan Che Mohd Razali, and Kamaruzaman Jusoff. "Malaysia's policy towards its 1963 - 2008 territorial disputes." *Journal of Law and Conflict Resolution* 1, no. 5 (October 2009): 112.

<https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.942.8472&rep=rep1&type=pdf>

<sup>15</sup> Roach, J. Ashley. "Malaysia and Brunei: An Analysis of their Claims in the South China Sea." *Occasional Paper CNA Corporation* (August 2014). [https://www.cna.org/cna\\_files/pdf/iop-2014-u-008434.pdf](https://www.cna.org/cna_files/pdf/iop-2014-u-008434.pdf).

An observer considered that the submission by Malaysia was a good move.<sup>16</sup> An extension of continental shelf under the United Nations Convention on the Law of the Sea (UNCLOS) allows states to claim territories beyond the 200 nautical miles limit of EEZs. The Malaysian submission extends its continental shelf claim to twice as much territory based on the 1979 Map (See [Appendix B](#)). According to Nguyen Hong Thao, the move is in accordance with the 2016 UN Tribunal's arbitration stipulation of insular features of the Spratlys having only 12 nautical miles territorial sea and no claim to generating their own EEZs and continental shelves, thereby also rejecting the validity of China's nine-dash line assertion. Because the move was made before the end of the COC negotiations, it allows Malaysia to avoid restrictions in the final COC and could encourage the CLCS to reconsider the Vietnam-Malaysia joint submission of 2009.<sup>17</sup>

Malaysia's submission sparked a cascade of diplomatic exchanges from China, Indonesia, the Philippines, Vietnam, the United States, and Australia.<sup>18</sup> Australia, while not a South China Sea claimant, was nonetheless making clear that it did not recognise the claims of China or any other states to these islands and that they were a matter of dispute.<sup>19</sup> Malaysia's 2019 submission acknowledges the possible areas of overlapping claims with Vietnam and the Philippines. The three ASEAN member states have taken the position since 2009 that none of the islands in the Spratlys are entitled to an EEZ or continental shelf of its own. Beckman notes that the practice of the ASEAN states is consistent with the 2016 tribunal award in the South China Sea that all the largest islands in the Spratlys could not sustain human habitation or economic life of their own, and thus under Article 121 of UNCLOS, were not entitled to an EEZ or continental shelf.<sup>20</sup> Finally, it should be stressed that the CLSC is a body that only makes technical or scientific decisions, not legal ones. Thus, disputes are usually resolved by claimants bilaterally and even those among ASEAN states are unlikely to dissipate for a long time.

## Progress of Joint Development Agreements (JDAs)

Malaysia has been an initiator of Joint Development Agreements (JDAs) as a modality of cooperation with claimant countries with overlapping jurisdictions. Its first JDA was with Thailand in 1979 for joint development in the Gulf of Thailand which is administered by the Malaysia-Thailand Joint Authority (MTJA) headquartered in Kuala Lumpur. The extraction of gas and installation of a gas pipeline were accomplished via this JDA, with Petronas being involved in the production-sharing contracts.<sup>21</sup> Another

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<sup>16</sup> Thao, Nguyen Hong. "Malaysia's New Game in the South China Sea." *The Diplomat*, December 21, 2019. <https://thediplomat.com/2019/12/malaysias-new-game-in-the-south-china-sea/>.

<sup>17</sup> Ibid.

<sup>18</sup> Thayer, Carlyle. "COVID-19 masks mischief in the South China Sea." *East Asia Forum*, January 13, 2021. <https://www.eastasiaforum.org/2021/01/13/covid-19-masks-mischief-in-the-south-china-sea/>.

<sup>19</sup> Rothwell, Donald R. "Laying down the law in the South China Sea." *East Asia Forum*, July 30, 2020. <https://www.eastasiaforum.org/2020/07/30/laying-down-the-law-in-the-south-china-sea/>.

<sup>20</sup> Beckman, Robert. "South China Sea disputes arise again." *The Straits Times*, January 6, 2020. [https://www.nus.edu.sg/newshub/news/2020/2020-01-06/DISPUTES-st-6jan-pA16.pdf](https://www.nus.edu.sg/newshub/news/2020/2020-01/2020-01-06/DISPUTES-st-6jan-pA16.pdf).

<sup>21</sup> Saravanamuttu, Johan. "Malaysia's Approach to Cooperation in the South China Sea." In *Non-Traditional Security Issues and the South China Sea; Shaping a New Framework for Cooperation*, edited by Shicun Wu and Kyuan Zou, 80–83. Farnham: Ashgate, 2014.

agreement was signed with Vietnam in an adjoining part of the Gulf of Thailand in 1992, involving Petronas and Vietnam's PetroVietnam for the extraction of oil.<sup>22</sup>

These JDAs may be the only known continuously successfully negotiated agreements to exploit hydrocarbon resources. China, Vietnam, and the Philippines have explored JDAs without coming to any definitive product sharing agreements.<sup>23</sup> China's attempts to engage in JDAs with other claimants have borne little success, as was the case in its attempt with the Philippines. The results of the China-Philippines joint development initiatives proved futile partly because of Philippines state law. In 2005, the Philippine National Oil Company (PNOC) and the China National Offshore Oil Cooperation (CNOOC) inked the controversial Joint Maritime Seismic Undertaking agreement (JMSU), only to see it collapse by 2008.<sup>24</sup>

## Brunei CAA in limbo

Malaysia inked its third JDA in 2009, which was with Brunei via a 40-year joint Commercial Arrangement Area (CAA) for oil and gas exploitation. The CAA encountered a major hurdle when in February 2020 Malaysia suspended this collaboration. This occurred even after a reportedly cordial meeting of Mahathir and Sultan Hassanal Bolkiah in March 2019, when both leaders positively remarked about continued progress made by Petronas and PetroleumBRUNEI towards the commercialisation of hydrocarbon discoveries.<sup>25</sup> The online publication *Energy Voice* cited anonymous industry sources in Malaysia that Petronas had halted discussions in early February regarding unitisation and joint collaboration on several upstream projects located in Blocks CA-1 and CA-2 in the demarcated Malaysia-Brunei CAA. In late 2017, Petronas and Brunei had agreed to preliminary unitisation deals for the Kinabalu West NAG, Maharaja Lela North, Gumusut-Kakap, and Geronggong-Jagus East fields. But with Petronas revoking the deals, Brunei would stop receiving its share of production from the Malaysian side of the border.<sup>26</sup> The Malaysian government appeared to be unhappy with the proposed

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<sup>22</sup> The first extraction of oil was achieved in 1997 (Ibid, p. 84).

<sup>23</sup> China and Vietnam have initiated joint agreements on fisheries cooperation and even oil exploration in the Gulf of Tonkin since early 2000. See Li, Jianwei, and Pingping Chen. "Joint Development in the South China Sea: Is the Time Ripe?" In Vol. 22 (2016), *Asian Yearbook of International Law: Volume 22 (2016)*, edited by Seokwoo Lee, Hee Eun Lee, Lowell Bautista, and Keyuan Zou, 143–145. Brill, 2019. <http://www.jstor.org/stable/10.1163/j.ctvrk3zz.11>. Negotiations appear to be ongoing. See Xiaodong, Xu. "China-Vietnamese fishery co-op needs new perspectives." *China Daily*, February 1, 2021. <https://www.chinadaily.com.cn/a/202102/01/WS601754e3a31024ad0baa655e.html>.

<sup>24</sup> Parameswaran notes that "Philippines' exclusive economic zone, such as the resource-rich Reed Bank which would be a candidate for joint development, would run contrary to the Philippine law. State-to-state joint development with China (as opposed to the kind done with foreign companies) would not work since that would involve sovereignty issues, and the Constitution also requires that the Philippines retain 60 percent of the stake." See Parameswaran, Prashanth. "The Danger of China-Philippines South China Sea Joint Development." *The Diplomat*, July 27, 2017. <https://thediplomat.com/2017/07/the-danger-of-china-philippines-south-china-sea-joint-development/>.

<sup>25</sup> See Abas, Azura. "Slew of cooperation on the cards between Malaysia and Brunei." *New Straits Times*, March 5, 2019. <https://www.nst.com.my/news/nation/2019/03/466161/slew-cooperation-cards-between-malaysia-and-brunei>.

<sup>26</sup> See Evans, Damon. "Exclusive: Shell-Total deal delayed by Malaysia-Brunei spat." *Energy Voice*. February 28, 2020. <https://www.energyvoice.com/oilandgas/asia/225670/shell-total-deal-delayed-by-malaysia-brunei-spat/>.



revenue sharing split which was inked before the Pakatan Harapan government had come to power in the May 2018 general election.<sup>27</sup>

In his official two-day visit to Brunei which ended on 1 March 2021, then Foreign Minister Hishammuddin Hussein evidently discussed the matter with the Brunei Sultan but with no apparent outcome. Touching mainly on collaboration on COVID-19 issues, the Malaysian foreign minister's press statement stated that collaboration between the two traditional allies would "include the way forward on the joint demarcation and survey of our land boundary as well as further cooperation in the oil and gas sector."<sup>28</sup> However, despite no official announcement of a renewal of the CAA, Petronas, in April 2021, formalised a utilisation agreement with Brunei for the operation of the two oil fields located within the area.<sup>29</sup>

## **MTJA's continued success**

The government-to-government Malaysia-Thailand Joint Authority (MTJA) which manages the JDA of 1979 appeared to have encountered no significant problems since its inception some 42 years ago. It received the Royal Assent and was gazetted into Malaysian law in August 1990.<sup>30</sup> Exploration and hydrocarbon extraction has been progressing steadily according to its official website. At the end of December 2018, a total of 80 exploration and appraisal wells had been drilled, along with 290 development wells and some 27 gas fields were also found.<sup>31</sup>

With its motto, "brothers drinking from the same well", the MTJA controls all exploration and exploitation of non-living natural resources in the joint development area including the right to permit operations and conclude transactions or contracts. Arguably, it is the most successful bilateral JDA to date.

## **DOC and COC: A Long Road**

Malaysia positions itself as a maritime nation to navigate South China Sea geopolitics, especially with respect to China. However, Malaysia has had to also rely on the common ASEAN strategy of the Declaration of Conduct (DOC) initiated in 2002, the Code of Conduct (COC) for which a framework was adopted in 2017, and a Single Draft Negotiation Text (SDNT), agreed upon in 2018. While there were no negotiations in 2020 due to the pandemic, the text had undergone three readings and the time frame

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<sup>27</sup> As reported in *Energy Voice* (ibid).

<sup>28</sup> See "Foreign minister: Malaysia, Brunei reaffirm longstanding relations." *Malay Mail*, March 1, 2021. <https://www.malaymail.com/news/malaysia/2021/03/01/foreign-minister-malaysia-brunei-reaffirm-longstanding-relations/1953915>.

<sup>29</sup> See Lepic, Bojan. "Malaysia, Brunei formalise unitisation agreement for two offshore fields." *Offshore Energy*, April 5, 2021. <https://www.offshore-energy.biz/malaysia-brunei-formalise-unitisation-agreement-for-two-offshore-fields/>.

<sup>30</sup> Royal Assent was given on 22 August 1990 and the law was gazetted on 30 August 1990. See Laws of Malaysia (Online Version of Updated Text of Reprint) Act 440, Malaysia-Thailand Joint Authority Act 1990.

<sup>31</sup> Malaysia-Thailand Joint Authority. "Petroleum Potential & Exploration: What you need to know." Accessed September 28, 2021. <https://www.mtja.org/potential.php>.

for negotiations remained as 2018–2021.<sup>32</sup> The progress from DOC to COC was important for the parties as a conflict management process rather than a genuine conflict resolution mechanism given that individual ASEAN members themselves still have their own positions on the COC, as reflected in the SDNT of June 2018. Moreover, if China ultimately banks on a bilateral approach to the South China Sea issue, this makes the ASEAN decision-making, premised on consensus, somewhat ineffectual.

While some progress has been made on the COC, China-ASEAN negotiations invariably encounter stalemates while bilateral disputes remain unresolved. As averred by Viet Hoang, “While there is technically a SDNT that forms the basis for discussions, the parties remain stalemated on the same issues as in the past” as there is no indication that the parties can agree on the scope of the COC.<sup>33</sup> Moreover, all the ASEAN claimant states have invoked the legal ruling handed down by the UN’s Permanent Court of Arbitration in July 2016 that China’s nine-dash line had no validity under UNCLOS.<sup>34</sup> ASEAN as a whole appear to support the Court’s award although only the Philippines, Indonesia, Malaysia, Singapore, and Vietnam have done so.<sup>35</sup> Many questions can be raised regarding COC’s potential benefits and ultimate status and whether it would remain dead in the water as a genuine mechanism for conflict resolution. For now, it seems a necessary but imperfect instrument for the Southeast Asian States to manage relations with China in the South China Sea. Thayer, a specialist on South China Seas issues, takes the view that finding a successful pathway to the COC is a litmus test for ASEAN community building.<sup>36</sup> Writing almost a decade ago, he found that intra-ASEAN dynamics presented considerable difficulties for dealing in a concerted fashion with China. Unfortunately, little seems to have changed.

That said, some developments could be said to have been positive.<sup>37</sup> After the 2016 arbitration, China seemed to be “playing nice” to the Philippines’ red lines by neither reclaiming and occupying any new feature, building structures on Scarborough Shoal nor has it interfered with Philippine resupply missions and was open to cooperative oil and gas exploitation.<sup>38</sup> China has refrained from mentioning the nine-dash line even though its vessels have persistently monitored Vietnam’s and Malaysia’s continental shelf activities in 2019 and 2020. In March 2021, some 220 Chinese vessels docked at Whitsun Reef claimed by the Philippines provoking an angry response from the latter.<sup>39</sup> The stumbling

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<sup>32</sup> “#BruteCast S2E4 - Turning on a DIME: Taking Back the Strategic Initiative in the South China Sea.” Presentation by Carlyle Thayer. Brute Krulak Center, February 7, 2021.

<sup>33</sup> Hoang, Viet. “The Code of Conduct for the South China Sea: A Long and Bumpy Road.” *The Diplomat*, September 28, 2020. <https://thediplomat.com/2020/09/the-code-of-conduct-for-the-south-china-sea-a-long-and-bumpy-road/>.

<sup>34</sup> Ibid.

<sup>35</sup> See “Arbitration Support Tracker.” *Asia Maritime Transparency Initiative*, August 2, 2021. <https://amti.csis.org/arbitration-support-tracker/>.

<sup>36</sup> See Thayer, Carlyle A. “ASEAN’S Code of Conduct in the South China Sea: A Litmus Test for Community-Building?” *The Asia-Pacific Journal* 10, no. 34:4 (August 19, 2012). <https://apjif.org/-Carlyle-A--Thayer/3813/article.pdf>.

<sup>37</sup> See Gupta, Sourabh. “ASEAN in the driver’s seat in the South China Sea.” *East Asia Forum*, December 18, 2020. <https://www.eastasiaforum.org/2020/12/18/asean-in-the-drivers-seat-in-the-south-china-sea/>.

<sup>38</sup> Ibid.

<sup>39</sup> See “China denies incursion as more than 200 ships dock at Philippine reef.” *Channel News Asia*, March 22, 2021. <https://www.channelnewsasia.com/news/asia/china-denies-incursion-200-ships-dock-whitsun-reef-philippines-14464464>.

block is still Beijing's adamant stance about its nine-dash line and provocative actions. Coupled now with its new coast guard law<sup>40</sup> this could well exacerbate China-ASEAN differences.

For Malaysia, China's seemingly increased surveillance of the Spratly group of islands and features (GSP) that it claims and harassment of its oil drilling activities in the vicinity provide the most serious challenge to managing the South China Sea dispute. The spike in surveillance is possibly a reaction to the continuing operations of Petronas since August 2020 in gas-rich Block SK 316 off the Sarawak coast within Malaysia's EEZ but within the nine-dash line. In 2015, the then Minister in the Prime Minister's Department Shahidah Kassim complained of increased intrusions by China Coast Guard vessels especially since 2013. Malaysia on its part had begun oil drilling and, most significantly, built up the low elevation (or submerged) feature known as "Luconia Breakers" in the South Luconia Shoals (*Beting Patinggi Ali*), known for its rich oil and gas deposits. A commentator has gone as far as to say the new developments have put paid to the China-Malaysia "special relationship".<sup>41</sup>

Malaysia demurred western intervention in the West Cappella incident. In April 2020, there appeared to be a "stand-off" between the West Capella, an exploration ship hired by Malaysian national oil firm Petronas, and the Haiyang Dizhi 8, a Chinese government survey vessel at the outer edge of Malaysia's EEZ in the South China Sea. Three days later, the US Navy dispatched two warships to the area, joined by an Australian Navy vessel, in an apparent move to bolster Malaysia. The US maintained a presence in the area for weeks, with the deployment seen by analysts as showing US commitment to international law and to its "allies and partners" in Southeast Asia. The episode ended when the West Capella left after completing its work on May 12. The Haiyang Dizhi 8 left three days later.<sup>42</sup> Malaysia's stance shows that it clearly does not want to be drawn into the strategic rivalry between China and the US.<sup>43</sup>

Soon after the incident, Malaysia's then Foreign Minister Hishammuddin Hussein stated that the South China Sea dispute should not disrupt ASEAN unity, noting that: "If we follow the narrative and succumb to the pressure of superpowers, the potential for ASEAN countries to bend and take sides with certain countries will be high. When facing big superpowers, we must be united, as one bloc, so that our strength will be synergised effectively."<sup>44</sup>

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<sup>40</sup> Darmawan, Aristyo Rizka. "China's New Coast Guard Law: Illegal and Escalatory" *Fulcrum*, January 27, 2021. <https://www.iseas.edu.sg/media/commentaries/chinas-new-coast-guard-law-illegal-and-escalatory/>.

<sup>41</sup> See Bentley, Scott. "Malaysia's 'Special Relationship' with China and the South China Sea: Not So Special Anymore." *The ASAN Forum*, July 31, 2015. <https://theasanforum.org/malaysias-special-relationship-with-china-and-the-south-china-sea-not-so-special-anymore/>.

<sup>42</sup> See "South China Sea: Chinese ship Haiyang Dizhi 8 seen near Malaysian waters, security sources say." *South China Morning Post*, April 18, 2020. <https://www.scmp.com/news/asia/southeast-asia/article/3080510/south-china-sea-chinese-ship-haiyang-dizhi-8-seen-near>. A full account of the incident is provided by Centre for Strategic and International Studies (CSIS, Washington, DC). "Malaysia picks a three-way fight in the South China Sea." *Asia Maritime Transparency Initiative*, February 21, 2020. <https://amti.csis.org/malaysia-picks-a-three-way-fight-in-the-south-china-sea/>.

<sup>43</sup> Cf. *ibid*.

<sup>44</sup> See Evans, Damon. "Petronas to stoke Chinese fury as Transocean drills in South China Sea." *Energy Voice*, August 24, 2020. <https://www.energyvoice.com/oilandgas/asia/260374/petronas-drilling-china-fury/>.

He also said that Malaysia's territorial dispute in the South China Sea was not just with China and that there were overlapping claims with fellow ASEAN nations. Vietnamese vessels have also intruded into Malaysian waters, with the most recent event in August 2020 resulting in the death of a Vietnamese fisherman whose boat had confronted a Malaysian patrol vessel.<sup>45</sup> Conversely, Malaysia's oil drilling activities in the Luconia Shoals is also of concern to Vietnam and not just China.<sup>46</sup>

## Domestic Concerns and Policy Implications

Alarm bells were sounded again when on 14 July 2020, the Auditor-General's office in a report said that there was a total of 89 incursions by China into Malaysian claimed waters near Luconia Shoals. The report stated that the China Coast Guard (CCG) had intruded into Malaysian waters 72 times while the remaining were by the People's Liberation Army Navy (PLAN). It further stated that the CCG and PLAN wanted to assert China's South China Sea claims, especially in the *Beting Patinggi Ali* area which is in Sarawak waters. The report added that five diplomatic protest notes had been issued to China for trespassing into Malaysian waters following 29 reports lodged by the Royal Malaysian Navy from 2018 to 2019.<sup>47</sup> The most serious and worrisome intrusion was the flight over by 16 Chinese aircrafts in formation which we alluded to earlier. The surfacing of the Auditor-General's report came on the heels of a public spat between the Foreign Minister Hishammuddin Hussein Onn and former Foreign Minister Anifah Aman who had held the post from 2009–2018. Anifah had asked that Malaysia shows open and categorical displeasure about the activities of the Chinese survey vessel Haiyang Dizhi 8 in the West Capella incident.<sup>48</sup>

In his statement on 22 April 2020, Hishammuddin Hussein said that Malaysia "must avoid unintended, accidental incidents in these waters .... While international law guarantees the freedom of navigation, the presence of warships and vessels in the South China Sea has the potential to increase tensions that in turn may result in miscalculations which may affect peace, security, and stability in the region." Hishammuddin also stressed Malaysia's stance that "any dispute should be resolved amicably through peaceful means, diplomacy, and mutual trust by all the concerned parties" and that Malaysia had "open and continuous communication with all relevant parties, including the People's Republic of

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<sup>45</sup> See "Malaysian coast guards kill Vietnamese fisherman in South China Sea clash." *The Straits Times*, August 17, 2020. <https://www.straitstimes.com/asia/se-asia/malaysia-coast-guard-kill-vietnamese-fisherman-in-s-china-sea-clash>

<sup>46</sup> For Vietnam, Malaysia's actions may be seen as against the spirit of their joint submission to the UN in 2009 on the Continental Shelf. See "Malaysia picks a three-way fight in the South China Sea." *Asia Maritime Transparency Initiative*, February 21, 2020. <https://amti.csis.org/malaysia-picks-a-three-way-fight-in-the-south-china-sea/>.

<sup>47</sup> The report alluded to the lack of coordination between enforcement departments and agencies and insufficient assets as reasons why enforcement operations in the Malaysian Maritime Zone (ZMM) have not reached optimum efficiency. See "A-G's report: 89 incursions into Malaysian waters by Chinese vessels from 2016 to 2019." *Malay Mail*, July 14, 2020. <https://www.malaymail.com/news/malaysia/2020/07/14/a-gs-report-89-incursions-into-malaysian-waters-by-chinese-vessels-enforcem/1884431>.

<sup>48</sup> See Loh, Jason. "South China Sea: Time to Display Firm Resolve." *The ASEAN Post*, July 25, 2020. <https://theaseanpost.com/article/south-china-sea-time-display-firm-resolve>.

China and the United States.”<sup>49</sup> It was evident from his statement that Malaysia wanted to defuse the situation and signal that it was averse to being entangled in big-power conflict in the South China Sea.

Apart from the above developments, the South China Sea dispute has had little impact on politics, or emerged as an electoral issue. That said, China’s increasing economic presence in Malaysia has been of concern and was raised in the 2018 general election. China has been Malaysia’s largest trading partner for the past decade with total trade of RM 319 billion, which is around 18% of Malaysia’s trade.

Under the Pakatan Harapan (PH) government, the East Coast Rail Link (ECRL) was revived in 2019, with a cost reduction of RM 21.5 billion (US\$5.26 billion). After the election, several other BRI projects, such as the Bandar Malaysia, Malaysia-China Kuantan Industrial Park (MCKIP), with its state-of-the-art Alliance Steel company, as well as the Malacca Gateway, were reinstated.<sup>50</sup> The ECRL remains on track under the present government with a new route alignment.<sup>51</sup>

While the South China Sea dispute has not been of great public concern, its policy implications have been well debated and dissected by Malaysian analysts and academics. In questions regarding UNCLOS and the South China Sea, two important think tanks of influence would be Institute of Strategic and International Studies (ISIS) and Malaysian Institute of Maritime Affairs (MIMA).

The perspective of ISIS analysts and thinking on the subject of the South China Sea question could vary marginally depending on each analyst but a recent view (2017) on the subject is ably provided by Elina Noor, its director of foreign policy and security studies.<sup>52</sup> She stated that, officially, Malaysia’s policy towards the South China Sea is premised on: rejecting China’s nine-dash line claim due to its incompatibility with international law; that the South China Sea dispute should be resolved peacefully through negotiations, dialogue, consultations, and via ASEAN’s COC; that the dispute should be resolved within the framework of international law; and that Malaysia remains open to legal mechanisms of third-party dispute resolution as provided for by UNCLOS.<sup>53</sup>

Kuik Cheng-Chwee, from Malaysia’s National University (UKM), was involved in the consultation on the Defence White Paper of MINDEF and has advocated Malaysia deploys hedge diplomacy vis-à-vis major powers in the region and with respect to China in particular.<sup>54</sup> According to Kuik, Malaysia’s China policy illustrates the logic of light-hedgers. Instead of heavy-hedging

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<sup>49</sup> Ngeow (ibid) also noted that maritime security expert Euan Graham, based in Singapore’s Institute of International and Strategic Studies (IISS), said that Malaysia’s apparently unappreciative message to the US “did not go down well in Washington”.

<sup>50</sup> Saravanamuttu, Johan. “Mahathir 2.0 & China: Hedging in a Fluid World.” *RSIS Commentary* No. 001 (January 2, 2020). <https://www.rsis.edu.sg/wp-content/uploads/2020/01/CO20001.pdf>.

<sup>51</sup> See Lee, Annabelle. “Despite S’gor MB statement, ECRL doesn’t cut across Kuala Langat Forest.” *Malaysiakini*, September 14, 2021. <https://www.malaysiakini.com/news/591257>.

<sup>52</sup> Noor, Elina. “Understanding Malaysia’s Approach to the South China Sea Dispute.” In *In the Wake of Arbitration*, edited by Murray Hiebert, Gregory B. Poling, and Conor Cronin, 18–29. Washington: Rowman & Littlefield, 2017.

<sup>53</sup> Elina Noor, 2017, p. 22.

<sup>54</sup> See Cheng-Chwee, Kuik. “The Essence of Hedging: Malaysia and Singapore’s Response to a Rising China.” *Contemporary Southeast Asia* 30, no. 2 (August 2008): 159–185. <https://www.jstor.org/stable/41220503>. And also Cheng-Chwee, Kuik. “Malaysia between the United States and China: What do Weaker States Hedge Against?” *Asian Politics and Policy* 8, no. 1 (January 2016): 155–177. <https://doi.org/10.1111/aspp.12240>.

and balancing, Malaysia “has hedged lightly, downplaying any political or security problems with Beijing (sometimes to the extent of denying them); prioritising diplomacy and consultation over confrontation; focusing on economic pragmatism, while keeping the essential and contingency measures in the background.” He adds that when Malaysia occupied Erica Reef and Investigator Reef in late 1999, China’s response was mild, unlike its strong actions against Vietnam and the Philippines. However, as the region faces a more assertive China and its growing presence in disputed waters, it is apparent that Malaysia’s special relationship with China may not be that special, after all.<sup>55</sup>

## Conclusion

Malaysia’s policy stances, strategies, and actions have remained fairly consistent over the past few decades. Positioning itself as a maritime nation, Malaysia has maintained control of most of its occupied and claimed features in the South China Sea carefully premised on adherence to UNCLOS principles. It has also succeeded in pursuing its own specific unilateral objectives while depending on ASEAN diplomacy in addressing China’s ambitions and actions in the South China Sea by deploying a hedging strategy with China while adopting quiet diplomacy vis-à-vis the United States and its allies. Although there are limits to diplomacy, a multilateral approach via ASEAN’s COC has been a useful stalling tactic, perhaps allowing disputes to be settled either bilaterally or over the long run.

There has been no indication of any major recent change in Malaysia’s foreign policy in the South China Sea. For the most part, Malaysia has successfully maintained the *status quo* of its existing claims and occupations in the Spratlys group of features. Its submission for an extension of its continental shelf beyond the 1979 Map and its joint submission of 2009 with Vietnam has met mainly with legal objections but no physical confrontations. So too has the submission of its 2019 continental shelf extension. The overall assessment by experts seems to be that Malaysia’s move is consistent with UNCLOS and international law.

Malaysia has continued to make progress in joint development agreements or JDAs, particularly with Thailand in the Gulf of Thailand and with Vietnam in an adjoining area, as mentioned earlier. However, Malaysia’s ambitious 2009 JDA with Brunei witnessed a collapse in early 2020. For reasons best known to then premier Mahathir Mohamad, his Pakatan Harapan government revoked the 40-year Commercial Arrangement Area (CAA) for oil and gas exploitation with Brunei. At the point of writing, although the CAA has yet to be resurrected formally by the newly installed Malaysian

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<sup>55</sup> Cheng-Chwee, Kuik. “Hedging in Post-Pandemic Asia: What, How, and Why?” *The Asan Forum*, June 6, 2020. <http://www.theasanforum.org/hedging-in-post-pandemic-asia-what-how-and-why>.

government of August 2021, there were some signs of actual renewal by the previous Perikatan Nasional government.<sup>56</sup>

It has been noted by some analysts that there is a mismatch between Malaysia's rather expansive territorial claims and its military capabilities. The Defence Ministry received an allocation of RM 15.86 billion in 2021, an increase of some RM 200 million compared with 2020<sup>57</sup> but the record shows that acquisitions of hardware have been carried out at a snail's pace. Only one of four littoral mission ships contracted in 2016 has been commissioned due to red tape and financial constraints. As of December 2020, even with RM 6 billion paid out, the ship was only 59.79% complete.<sup>58</sup> The problem is that the Royal Malaysian Navy is saddled with ageing assets: "All of its combat and patrol vessels are from the 1970s and 1980s, and the majority of these ships are reaching the point of diminishing returns in terms of maintenance."<sup>59</sup> Improving the quantity and quality of military assets is an imperative for the Malaysian Maritime Enforcement Agency (MMEA) to carry out its duties in the South China Sea.

However, Malaysia's ability to effectively defend its territorial claims is limited while diplomacy can perhaps yield temporary advantages.<sup>60</sup> Vietnam has suffered considerable losses from the halting oil contracts due to China's aggressive coast guard operations.<sup>61</sup> One could infer similar financial losses of China's harassment on Petronas operations although Malaysia has yet to issue any report on this.<sup>62</sup> The situation could easily escalate with the promulgation of China's new coast guard law which allows the use of force to defend its jurisdictions.<sup>63</sup> As of now, there does not seem to be any appetite by China for such an option but its putative show of force in flying 16 aircrafts over Luconia Shoals in tactical

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<sup>56</sup> See "Foreign minister: Malaysia, Brunei reaffirm longstanding relations." *Malay Mail*, March 1, 2021. <https://www.malaymail.com/news/malaysia/2021/03/01/foreign-minister-malaysia-brunei-reaffirm-longstanding-relations/1953915>.

<sup>57</sup> The emphasis of Budget 21 was naturally on the pandemic with the Covid Fund increased from RM 20 billion to RM 65 billion and it should also be noted that besides the acquisition of new assets, defence allocations were also for maintenance, housing and special assistance to veterans. See "Budget 2021: Defence Ministry's allocation increase shows govt's commitment to national security, says senior minister." *Malay Mail*, November 7, 2020. <https://www.malaymail.com/news/malaysia/2020/11/07/budget-2021-defence-ministrys-allocation-increase-shows-govts-commitment-to/1920422>.

<sup>58</sup> See Zurin, Nik Mohamed Rashid Nik, and Liew Chin Tong. "Littoral combat ship programme at difficult crossroads." *The Edge Markets*, March 9, 2021. <https://www.theedgemarkets.com/article/littoral-combat-ship-programme-difficult-crossroads>.

<sup>59</sup> *Ibid.*

<sup>60</sup> See Krishnan, Tharishini. "Malaysia in the South China Sea: A Growing Mismatch between Threat and Capabilities." *Asia Maritime Transparency Initiative*, November 12, 2020. <https://amti.csis.org/malaysia-in-the-south-china-sea-a-growing-mismatch-between-threat-and-capabilities/>.

<sup>61</sup> See Hayton, Bill. "China's Pressure Costs Vietnam \$1 Billion in the South China Sea." *The Diplomat*, July 22, 2020. <https://thediplomat.com/2020/07/chinas-pressure-costs-vietnam-1-billion-in-the-south-china-sea/>. Also see "Budget 2021: Defence Ministry's allocation increase shows govt's commitment to national security, says senior minister." *Malay Mail*, November 7, 2020. <https://www.malaymail.com/news/malaysia/2020/11/07/budget-2021-defence-ministrys-allocation-increase-shows-govts-commitment-to/1920422>.

<sup>62</sup> 2020 was not a good year for Petronas although its losses contracted in the third quarter to RM 3.37 billion compared to a massive RM 21.4 billion in the second quarter. See "Petronas posts narrower net loss of RM3.4b q-o-q on easing of lockdowns." *The Edge Markets*, November 27, 2020. <https://www.theedgemarkets.com/article/petronas-posts-narrower-net-loss-rm34b-qoq-easing-lockdowns>. A major factor was the mounting cost of the impairment of assets and wells. See Petroliaam Nasional Berhad (PETRONAS). "Petronas Group Interim Financial Report for Second Quarter 2020." September 4, 2020. <https://www.petronas.com/sites/default/files/downloads/Interim%20Financial%20Report%20Quarter%202%20FY2020.pdf>.

<sup>63</sup> Darmawan, Aristyo Rizka. "China's New Coast Guard Law: Illegal and Escalatory." *Fulcrum*, January 27, 2021. <https://www.iseas.edu.sg/media/commentaries/chinas-new-coast-guard-law-illegal-and-escalatory/>.

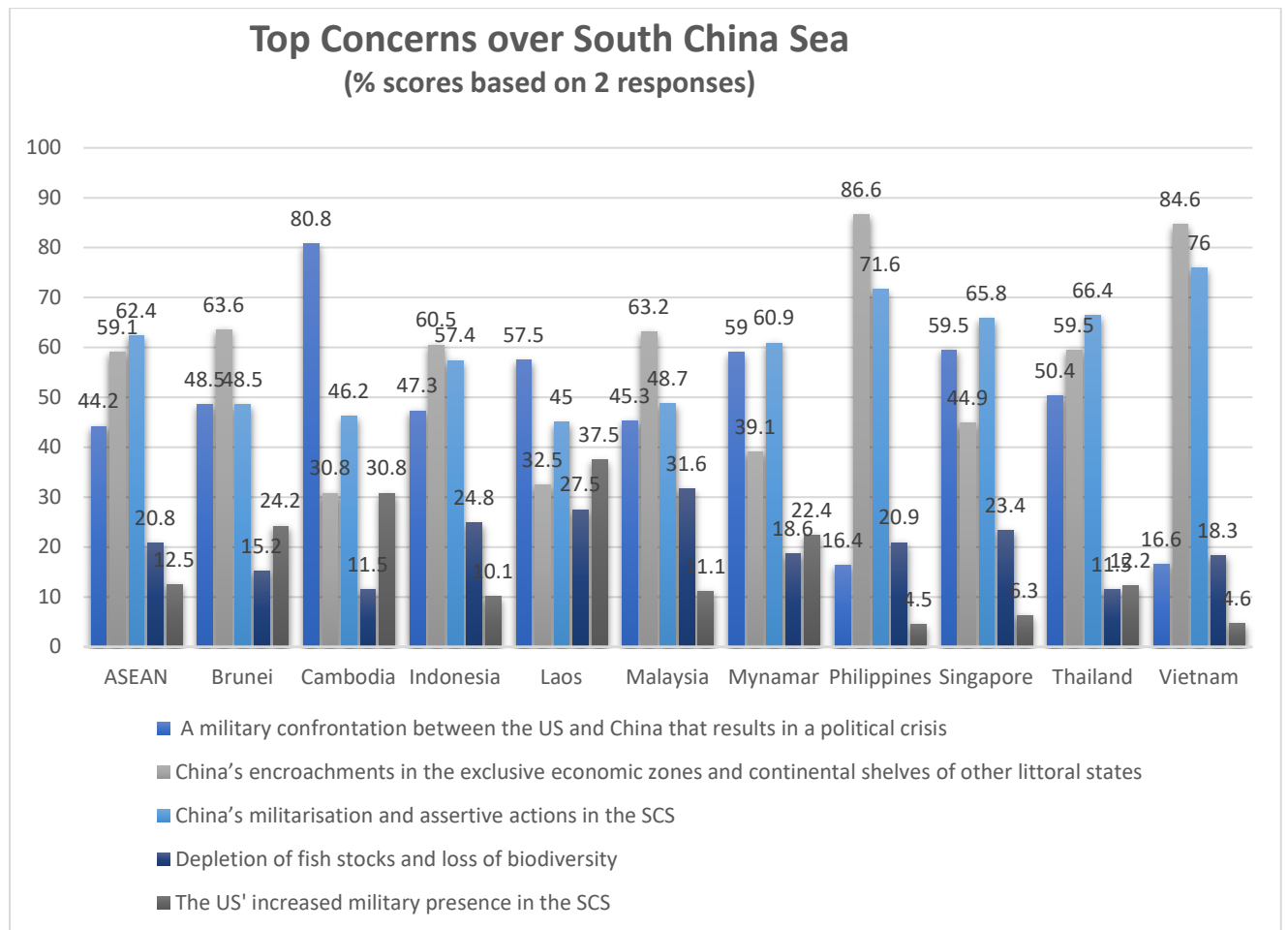
formation indicates its desire and ability to assert hegemony in the South China Sea. As noted by a Malaysian academic in a recent forum, this is cause for concern particularly in a period when Malaysian internal politics has become highly fractious.<sup>64</sup>

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<sup>64</sup> Thomas, Jason. "Malaysia's political uncertainties will impact China policy, says academic." *Free Malaysia Today*, July 8, 2021. <https://www.freemalaysiatoday.com/category/nation/2021/07/08/malaysias-political-uncertainties-will-impact-china-policy-says-academic/>. The forum is accessible at Facebook. "South China Sea Disputes: What it means to Malaysia-China Relations." Accessed September 28, 2021. <https://www.facebook.com/baitalamanah/videos/597241367928688>.

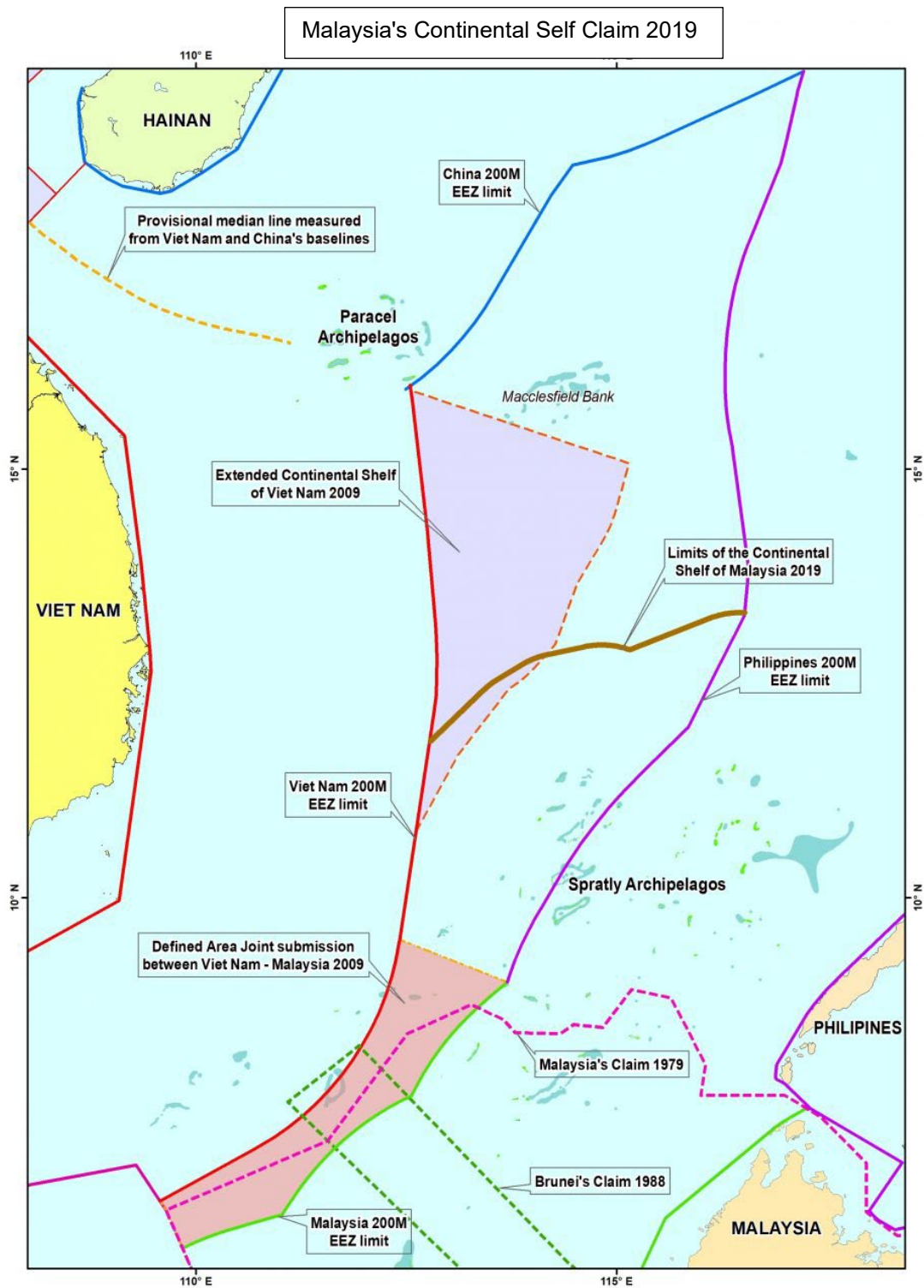


## Appendix A:



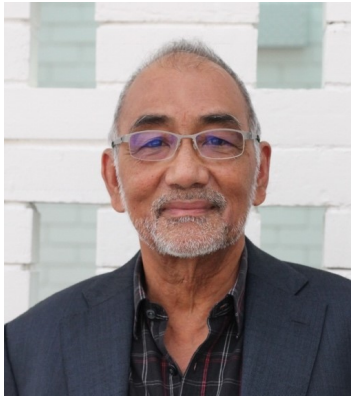
Source: *The State of Southeast Asia 2021*, ASEAN Studies Centre, ISEAS-Yusof Ishak Institute.

## Appendix B:



Source: Thao, Nguyen Hong. "Malaysia's New Game in the South China Sea." *The Diplomat*, December 21, 2019. <https://thediplomat.com/2019/12/malysias-new-game-in-the-south-china-sea/>.

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*Sharing in a Divided Nation: Mediated Communalism and New Politics over Six Decades of Elections in Malaysia* (ISEAS-Yusof Ishak Institute, 2016), *The New Economic Policy in Malaysia: Affirmative Action, Ethnic Inequalities and Social Justice* (NUS Press 2012, co-editor), *Islam and Politics in Southeast Asia* (Routledge, 2010, editor).

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