# The Role of United Nations Convention on the Laws of the Sea in the South China Sea Disputes

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Interstate conflicts have shaped the destiny of nations since the very beginning of their formation. Wars between and within states have helped to forge the current international system, creating new laws and governments, and solidifying ancient ones. However, conflicts also jeopardize peace and security around the world, especially when they do not receive due attention from the international community. One such conflict is currently underway in the South China Sea (SCS). The tensions are territorial in nature, with some parties claiming the rights to islands based on international law and conventions, and others asserting their claims as historical rights. Overtime, as tensions increased, the parties have attempted to settle their dispute with the help of international bodies, such as the Permanent Court of Arbitration (PCA), and the application of United Nations Convention on the Law of the Sea (UNCLOS). However, little to no success has been achieved in decreasing the conflict in the region. The purpose of this chapter is threefold: (1) to provide a geopolitical and legal overview of the SCS disputes, focusing on the importance of the region and identifying the different territorial claims; (2) to explain the major attempt at conflict resolution in the region made through UNCLOS and the PCA; and (3) to critically analyse the impact of UNCLOS on the SCS disputes, highlighting its merits and shortcomings in the region's main attempt at conflict resolution.

The second section of this chapter provides a background on the SCS conflict, focusing on the reasons and the details for it. It examines the strategic importance of the region, as well as analyses the various territorial claims, explaining the assertions made by the primary claimant states. The third section reflects on the dispute settlement mechanism under the auspices of UNCLOS, providing an overview of the convention to guide the discussion. Then, it investigates the arbitration between the Philippines and China, which was brought before the PCA. The fourth section provides a brief analysis of the UNCLOS conflict resolution mechanism in light of the*South China Sea Arbitration*.

## Dispute Background

The SCS encompasses several hundred small islands, reefs, and atolls, almost all uninhabited and uninhabitable, within a 1.4 million square mile area (Bader 2016). Two island groups – the Spratly and Paracel Islands – have been the primary focus of the disputes for decades due to their significance to the coastal countries surrounding them.

First, the region is rich in oil and natural gas reserves, but accurate estimates are difficult to find. According to the US Energy Information Administration (EIA), the area contains 11 billion barrels of untapped oil and 190-500 trillion cubic feet of natural gas (EIA 2013), while the Ministry of Geological Resources and Mining of the People's Republic of China (PRC) has estimated that the number of barrels may be as high as 130 billion (Kaplan 2015). Second, the area is a major trading route. Namely, it is considered as one of the busiest shipping lanes in the world with an annual trade of US$5.3 trillion passing through the region (CFR 2017). This number represents half of the world's annual merchant fleet tonnage and a third of all maritime traffic globally (Kaplan 2015).

Additionally, the oil transported through the South China Sea coming from the Indian Ocean is three times greater than the amount that transits the Suez Canal and 15 times more than what goes through the Panama Canal. The primary driver for this has been the increase in China's oil consumption, as well as a large part of South Korea, Japan, and Taiwan's energy supplies coming through the region. Hence, it is no surprise that control of the area is of extreme importance. For instance, China has dubbed the South China Sea its Second Persian Gulf: not only does 80% of the country's crude oil imports pass through the region, but also a huge assortment of goods (Kaplan 2015; CFR 2017).

This aspect of the region is one of the major causes for the contentions regarding the islands, since many of them lie in the exclusive economic zones (EEZ) of Vietnam, Malaysia, and the Philippines. Thus, it is not surprising that these coastal states, along with China, Brunei and the Republic of China (ROC) in Taiwan, are pushing forward with their own territorial claims in the area. Each wants to secure its own national interests by asserting their rights to exclusive exploitation of the region through the utilization of international law and other mechanisms to assure those are protected and exercised.

Furthermore, the South China Sea has some of the world's richest reef systems, with more than 3,000 indigenous and migratory fish species. It also constitutes more than 12% of worldwide fishing (Greer 2016). Thus, the region offers abundant fishing opportunities, and whoever has control over its waters will have the potential to support and further develop its fishery sector. This aspect of the SCS has already led to many clashes in the region between the Philippines and Chinese fishing vessels (Kaplan 2015; EIA 2016).

Moreover, competition over fisheries in the area has been escalating, and it tends to increase more over time once fishing in the region becomes more jeopardized. In 2008, it was already estimated that the fishery stocks in the region were becoming depleted, with 25% being over-exploited and 50% fully exploited without any attempts at developing sustainable fishing practices in the region (Greer 2016).

**Territorial Claims**

The claims in the SCS are twofold. While some allegations are based on historical rights, others appeal to provisions of UNCLOS. These multiple territorial claims indicate a lack of agreement among the parties, which resulted in a regional conflict that has been happening for decades. The analysis of these claims (Figures 1.1 and 1.2) will be made in light of UNCLOS guidelines from 1982, since all coastal states in Southeast Asia have ratified it. Thus, an overview of most claimant parties will be conducted, to clarify their allegations and highlight the leading issues in the conflict, focusing on claims made by China and the Philippines, to better establish the case studied in this chapter.

*Vietnam*

Hanoi claims the Spratly and Paracel Islands along with the Gulf of Thailand. However, unlike China, Vietnam has not written its extended claims over the South China Sea in official texts or maps. As far as the Spratly Islands are concerned, in the 1970s, Vietnam established them as an offshore district of the Khanh Hoa Province, occupying several islands. That same decade, China seized the archipelago in a military engagement known as the Battle of the Paracel Islands (EIA 2013; Tonnesson 2000). In a bid to solidify its claims, Vietnam employed archaeologists to provide evidence to support the country's long historic presence in the SCS. It was asserted that the state has actively dominated both the Paracels and the Spratlys since the 17th Century (BBC 2016). Consequently, China, Brunei, Malaysia, and the Philippines oppose Vietnam's claims.

Vietnam and Malaysia jointly submitted their territorial claims in the South China Sea to the UN Commission on the Limits of the Continental Shelf in 2009 (CLCS 2009). The submission was considered legitimate, and the countries had to clarify their positions on the legal status of features and limits of their claims in the region (EIA 2013; Nguyen 2020). Vietnam also adopted a maritime law in 2012 in which it claimed jurisdiction over the Paracel and Spratly Islands, requiring that all naval ships from foreign states register with Vietnamese authorities when passing through the region (EIA 2013).

*Malaysia*

Kuala Lumpur's participation in the SCS disputes started in 1979, when the Malaysian Department of Mapping and Survey unveiled an official map placing the Spratly Islands within the country's continental shelf (Roach 2014). This map overlapped the EEZ and continental shelf of Malaysia and other states, which drew protests from neighbours including China, Indonesia, Vietnam, and the Philippines. Although Malaysia's claim was considered weak by some legal analysts (EIA 2013; Roach 2014), it was not inferior to China or Vietnam's claims to the entire Spratly archipelago.

In 2009, pursuant to Article 76, paragraph 8 of UNCLOS[1], Malaysia and Vietnam jointly submitted to the CLCS information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured in respect of the southern part of the South China Sea (CLCS 2009). To date, the CLCS did not make any recommendations matters related to the establishment of the outer limits of their continental shelf. Nevertheless, the actions of these two countries can be regarded as steps within international law to solidify their claims.

A decade later, in 2019, Malaysia made a partial submission to the CLCS for the remaining portion of states' the continental shelf beyond 200 nautical miles in the northern part of the SCS (Malaysia 2017). Previously, Malaysia's position on the dispute had often been characterised as subdued: practicing quiet diplomacy and demonstrating a willingness to strengthen bilateral ties with China, rather than confronting Beijing publicly (Parameswaran 2016). Following their latest submission, Kuala Lumpur's strategy seemed to change, leaning towards compliance with UNCLOS and departing from an alignment with China's position. Additionally, Malaysia has also used diplomatic, political, and economic measures to sustain its claims by improving its ties with the United States and supporting a united front on the part of the Association of Southeast Asian Nations (ASEAN) (Parameswaran 2016; Nguyen 2020).

*Brunei*

After it gained independence in 1984, Brunei released maps in which it declared a 200-nautical mile EEZ overlapping the Chinese nine-dash line and a continental shelf extending to a hypothetical median with Vietnam. In so doing, the Brunei government claimed part of the Spratly Islands archipelago closer to its EEZ in the north of Borneo (Rüland 2005). Perceived for years as a silent claimant, Brunei bases its claims on UNCLOS (EIA 2013; Putra 2021).

Brunei has often adopted a cooperative, neutral stance regarding the SCS disputes, being in favour of a collective approach to providing maritime security and resolving disagreements (Brunei's Ministry of Defence 2011). At times, however, the sultanate has sided with China's preference for bilateral agreements, due to its weaker military power and dependency on oil reserves to sustain its economy and monarchical rule (Putra 2021).

*China*

The People's Republic of China bases its claim to the Spratly and Paracel Islands on historical naval expeditions dating back to the 15th century (EIA 2013). In 1947, the Kuomintang – then, the party in control of China – drew a line around the aforementioned islands, calling it the nine-dash line map (Figure 1.3). In doing so, China declared its sovereignty over all islands enveloped by this line (Nguyen 2015). After the Communist Party ascended to power in 1949 and established the PRC, the new government continued to use this map in official correspondence and claimed rights to the waters within it. Currently, China maintains its claim over the SCS based on this and other historical evidence (EIA 2013).

In 2009, following the joint submission of Vietnam and Malaysia to the Commission on the Limits of the Continental Shelf (CLCS), China submitted the nine-dash line map to the CLCS, seeking to solidify its claim and legitimize it beyond 200 nautical miles.[2] China's claims resulted in Malaysia, Vietnam, Brunei, and the Philippines also declaring rights over the islands and various zones in the SCS, directly contesting the Chinese claims (EIA 2013). However, the nine-dash line map is not in accordance with the provisions of UNCLOS. Namely, the Convention

stipulates guidelines on baselines, the width of territorial waters, the regime of islands[3], the low-tide elevations, the exclusive economic zone, the continental shelf, the maritime boundary delimitation, and dispute settlement, which are all applicable to the South China Sea (United Nations 1982). Hence, the foundation of the Chinese claims over the islands is unsubstantiated because it fails to follow the Convention's determinations and does not provide sufficient historical evidence.

Nevertheless, aiming to reclaim land in the South China Sea, China has engaged in island-building, increasing the size of islands and turning islets and other features into full-fledged islands in order to produce an EEZ extending 200 nautical miles (CFR 2017). Therefore, PRC is claiming its rights over and around the islands that cannot naturally support habitation, as well as building new ones to expand the area that would be under its sovereignty.

These actions go against UNCLOS, which states in Article 121, paragraph 3 that 'rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.' Unsurprisingly, China's position and operations have complicated Beijing's relationships with its neighbours, which also have claims in the region. As a result, the disputes have escalated tremendously, leading to situations where vessels have been sunk, and military exercises have been performed to assert sovereignty (EIA 2013).

*The Philippines*

Manila's claims are both legal and historical over the Scarborough Shoal and the Kalayaan Island Group (KIG), which is comprised of 50 features of the Spratly islands (Rosen 2014). These claims clash with China's declarations of ownership. In 1956, the Philippine government began explorations in the SCS, legitimizing those by claiming that the islands and the shoal were *terra nullius*, or no man's land, and furthered it by occupying several of the Spratly Islands and naming them the Kalayaan Island Group. In addition, the Philippines declared the aforementioned islands and shoals as a special regime of islands that, in spite of being distinct from the rest of the Philippine archipelago, belongs to Manila (EIA 2013).

Under the provisions of UNCLOS, Philippine sovereignty appears stronger, because an EEZ can be declared up to 200 nautical miles from the baseline. Both groups of islands are 400 nautical miles closer to the Philippines than to China, are within the Philippine's EEZ and are recognized as such under UNCLOS. In spite of being consistent with the provisions of UNCLOS, China, Malaysia, and Vietnam have objected to the Philippines' claims, which led to an increase of tensions in the SCS (CFR 2017).

**Attempts at Resolution: UNCLOS and *South China Sea Arbitration***

In the attempt to find a peaceful resolution, bilateral and multilateral agreements were pursued by the claimant parties, and some were signed.[4] Due to the scope of this chapter, we will forgo the investigation of such agreements, and hereby examine the UNCLOS mechanism for dispute settlement and its role in the SCS conflict.

*United Nations Convention on the Law of the Sea*

The first call for a 'constitution of the seas' was brought forth on 1 November 1967 by Arvid Pardo, then Ambassador to the United Nations. In his speech at the General Assembly, he addressed the issues of emerging rivalry between states, which was spreading to the oceans; the pollution of the seas; the conflicting legal claims and their collateral effects on stability and order; and the potential richness of the seabed (United Nations 1967; United Nations 1998).

After three UN conferences on the Law of the Sea, UNCLOS was created. The UNCLOS III came into effect on 14 November 1994 precisely 21 years after the first meeting and one year after ratification by the sixtieth state (GRID-Arendal 2014). To date, there are 168 state-parties to the agreement (United Nations 2020). One of the main purposes of UNCLOS III is to strengthen peace, security, cooperation, and friendly relations among all nations in conformity with the principles of justice and equal rights (United Nations 1982). The unique dispute resolution system under UNCLOS is one of the most notable features of the Convention.

*Dispute Resolution Mechanism under UNCLOS*

Professor Natalie Klein, dean of Macquarie Law School in 2014, started her assessment of the 20 years of dispute settlement under UNCLOS stating that one should always reach for the stars, and if one only reaches the rooftops, then at least one had gotten off the ground (Klein 2014). Such ambition can be found in the idealized version of the dispute settlement mechanism of UNCLOS, once it aimed to be compulsory and indispensable to the solution of all maritime disputes. The result was a politically realistic system with various dispute settlement means, exceptions and limitations, but still compulsory and indispensable to some disputes. Thus, it can be argued that 'it is not possible to conclude that UNCLOS dispute settlement regime has reached the stars, but we can have a healthy debate as to what level rooftop has been reached' (Klein 2014, 359).

The limitations and exceptions to compulsory dispute settlement were set out in Part XV, Section 3 of UNCLOS (Churchill 2017). For instance, before resorting to compulsory dispute settlement under Part XV, Section 2, the parties had to first try to resolve their dispute by the means provided in Part XV, Section 1. Articles 279–285 of said Section 1 lay out the obligation to settle disputes by peaceful means. It gives parties the option to settle disputes by any peaceful means[5] they choose; sets out a procedure for when no settlement can be reached by the parties; refers to obligations under general, regional, or bilateral agreements; sets out rules for conciliation; and provides for the application of this section to disputes submitted pursuant to Part XI – the Area (United Nations 1982).[6]

Additionally, under Article 283 of UNCLOS, states have an obligation to exchange views regarding settlement of disputes concerning the interpretation or application of UNCLOS by negotiation or other peaceful means. Furthermore, the parties shall continue to exchange views even where the dispute has not been solved through peaceful means, but it requires consultation on the manner of implementing the settlement (United Nations 1982).

Only after such attempts at dispute settlement have proven to be unsuccessful can one resort to Part XV, Section 2 of UNCLOS, which sets out rules for the resolution of disputes between State Parties arising out of the interpretation or application of UNCLOS (Tribunal 2018). Pursuant to Article 287(1) of UNCLOS, when signing, ratifying, or acceding to UNCLOS, a state may make a declaration choosing one or more of the following means for settling such disputes:

- the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, Germany;
- the International Court of Justice in The Hague, The Netherlands;
- ad hoc arbitration (in accordance with Annex VII of UNCLOS); or
- a "special arbitral tribunal" constituted for certain categories of disputes (established under Annex VIII of UNCLOS).

The variety of choices for dispute settlement forums was a necessary precondition for state parties to accept the compulsory jurisdiction, even more so as they were unable to agree on a single forum (Churchill 2017). Additionally, it is set out in Article 287(3) of UNCLOS that arbitration under Annex VII is the default means of dispute settlement in cases where a state has not declared a preference for a dispute resolution mechanism available under Article 287(1) of UNCLOS, or when a state has not made any reservation or optional exceptions pursuant to Article 298 of UNCLOS.

Pursuant to Article 287(5) of UNCLOS, if the parties have not accepted the same procedure for the settlement of disputes, the dispute can only be submitted for arbitration under Annex VII. However, as stated above, there are limitations and exceptions to the compulsory dispute settlement.

In Part XV, Section 3, Article 297, limitations and exceptions to the aforementioned dispute settlement fora leaves a possibility for states when signing, ratifying, or acceding to this Convention – or at any time thereafter – to declare in writing that it does not accept one or more of the provided procedures. Such a statement can be made with respect to one or more disputes concerning maritime boundaries with neighbouring states or those involving historic bays or titles, disputes concerning military activities, and certain kinds of law enforcement activities in an EEZ and/or disputes over which Security Council is exercising its duties under the UN Charter (United Nations 1982; Churchill

2017)[7].

It is also provided in Article 297 that there is no obligation for a coastal state to accept referral by another state to legally binding dispute settlement concerning the exercise of its rights in the fisheries and marine scientific research (Churchill 2017). Nevertheless, some of the disputes that are exempted from compulsory dispute settlement are subject to compulsory conciliation. Hence, the compulsory dispute settlement system under UNCLOS is one of its biggest assets, despite the difficult road travelled to reach it.

*Permanent Court of Arbitration (Tribunal) – South China Sea Arbitration*

As mentioned above, a member state of UNCLOS may choose the ITLOS, the ICJ, an ad hoc arbitration, or a 'special arbitral tribunal' to settle its dispute. After failing to solve the dispute through negotiations, the Philippines elected to bring its dispute against China on the SCS before the Tribunal. The arbitration started on 22 January 2013 under the compulsory dispute settlement provisions of UNCLOS. It is important to stress that UNCLOS does not address the sovereignty of states over land territory which the Tribunal itself has also underlined in the final award brought in the case at hand.

The arbitration deals with disputes between the parties regarding the legal basis of maritime rights and entitlement in the SCS; the status of certain geographic features in the SCS; and the lawfulness of certain actions taken by China in the SCS. The Tribunal in its final award sorted the Philippines' requests into four categories to be resolved:

1. dispute concerning the source of maritime rights and entitlement in the SCS;
2. dispute concerning the entitlement to maritime zones that would be generated under the UNCLOS by Scarborough Shoal and certain maritime features in the Spratly Islands claimed by both the Philippines and China;
3. series of disputes concerning the lawfulness of China's actions in the SCS;
4. to find that China has aggravated and extended the disputes between the parties during the course of this arbitration by restricting access to a detachment of Philippines' marines and by engaging in the large-scale construction of artificial islands and land reclamation at seven reefs in the Spratly Islands.

From the beginning, China made it clear that it refused to participate in the arbitration or to comply with the final award. China communicated this position in public statements and in many diplomatic *Notes Verbales*, both to the Philippines and to the Tribunal.

Furthermore, in 2006, China made a declaration to exclude maritime boundary delimitations from its acceptance of a compulsory dispute settlement. This is one of the objections that China expressed in its Position Paper on the Matter of Jurisdiction in the South China Sea, sent to the Tribunal on 12 July 2014, where it offered an extensive legal analysis of each of its objections and expressed its refusal to comply with the Tribunal's decision (PRC 2014).

In its Award on Jurisdiction and Admissibility, the Tribunal found that it could not agree with China's arguments and concluded that it indeed had jurisdiction over the case. Moreover, even though China insisted that its communication should not be interpreted as participation, the Tribunal, during adjudication, took all this into account.

The Tribunal overwhelmingly ruled in favour of the Philippines in the award released on 12 July 2016. It concluded that, in the matter of China's claims of historical rights and its nine-dash line, China had no legal basis to claim historical rights to resources within the sea areas falling within the nine-dash line. The Tribunal found that China and other states had historically made use of the islands in the SCS, but it found no evidence that China had historically exercised exclusive control over the waters and their resources (Tribunal 2016).

The Tribunal also concluded that the Spratly Islands could not generate its own EEZ because they were not inhabited and it was historically impossible for them to be inhabited, and under the provision of UNCLOS: '[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.' Thus, the Tribunal declared that the areas are within the EEZ of the Philippines, stating that 'those areas are not

overlapped by any possible entitlement of China' (Tribunal 2016, 10).

*Post-Award Developments*

After the award was released, China continued to oppose the ruling and did not recognize the award. The Chinese Ministry of Foreign Affairs stood behind the state's interpretation that since the Tribunal proceeded with the arbitration despite China's refusal to participate, this voided and nullified the award (Philips et al. 2016). As such, the Chinese government stated that China's territorial sovereignty and maritime rights in the region remained unaffected by the ruling.

In the Philippines, meanwhile, there was a reversal of policy. Following the election of Rodrigo Duterte as president in 2016 on an anti-American, pro-China platform, Manila declared that it wanted to 'set the award aside' and renegotiate the dispute settlement directly with China (The Guardian 2016). This capitulation to Beijing was an indication of Duterte's ambition to boost Sino-Filipino ties in a bid to attract Chinese investment (Camba 2018). Duterte also stressed his intention to decrease the Philippines' dependence on the United States, going as far as to no longer consider America an ally, and turning toward China for economic partnership (The Guardian 2016; BBC 2017).

However, in 2019, Duterte began to show signs of standing up to Chinese forays into the Philippine territory, especially after tensions rose due to People's Liberation Army Navy incursions and the gathering of Chinese fishing vessels near the Philippines' Pag-asa Island – the administrative centre of the Kalayaan group and located 932 kilometres southwest of Manila. Duterte declared tensions could escalate to armed conflict to protect the island if necessary (The Guardian 2019). In 2020, Duterte delivered a speech to the 75th UN General Assembly in which he expressed support for the Hague's ruling, stating that the award is 'part of international law, beyond compromise and beyond the reach of passing governments to dilute, diminish, or abandon' (Duterte 2020). Additionally, Duterte asserted that any attempts by China to undermine the award would be rejected and fought off. To support this position, the United States stated that in the event of an armed attack, it would come to the Philippines' aid, notwithstanding the current shaken state of their relationship (Strangio 2020). These developments, and the maintenance of claims by both China and the Philippines, further complicate the chances for peaceful resolution of the dispute.

Thus, the SCS disputes continue to rage on and to draw the attention of the international society. This unresolved territorial feud has the potential to escalate to armed conflict, which would bring insecurity and instability to the region. Having in mind the importance of the region, it is of high priority to settle this dispute peacefully, avoiding any kind of armed conflict.

**Analysing the Dispute Settlement Mechanism under UNCLOS in South China Sea**

States are generally amenable to the UNCLOS system because it enables them to retain control over the dispute and negotiate the conditions of a resolution rather than to find themselves bound by strict rules of law. Furthermore, the unpredictability of international litigation also favours negotiation (Churchill 2017). As such, the choice between diplomatic means of dispute settlement and settlement through litigation is a matter of economic, political, and public reputation strategy. States will rarely choose to litigate when they are aware the chances of losing the dispute are reasonably high. Moreover, dispute resolution through diplomatic means is cheaper, could be faster, and gives states enough space to mitigate the negative publicity that could result from litigation (Churchill 2017).

Nevertheless, there are cases where negotiations have failed to generate a settlement or to maintain an agreed-upon settlement as such. The disputes in the SCS fall into the latter category[8]. The UNCLOS mechanism gives states, especially weaker ones, comfort and protection in cases where one of the parties to a dispute – like China in the SCS – consistently insists on only addressing disputes through bilateral negotiations, because it enjoys significant advantages over other countries. It is notable that the Tribunal in the award in the *South China Sea Arbitration* acknowledged the importance of negotiation in dispute settlement, stressing that the parties were free to use other methods of dispute settlement but only if those were in accordance with international law (Nguyen 2018).

One of the advantages of compulsory dispute settlement mechanism is the variety of dispute settlement forums from which states can choose, all of which have positive and negative aspects. As seen, arbitration under Part VII is a default dispute settlement mechanism in case disputing parties chose different fora. Furthermore, arbitration is a forum more flexible than, for example, the ICJ or ITLOS, since the appointment of arbitrators and decisions about procedures and rules of arbitration remains under the control of the disputing parties (Singh 2016). One of the main disadvantages is the high financial cost of such arbitration, since both parties must pay high fees to arbitrators and court registrars, pay to rent the premises in which proceedings are held, and pay for secretarial and interpreting services. Another challenge for arbitration than cost is its perceived lower status when compared with other fora. For instance, it has been argued that arbitration does not possess the same prestige as the ICJ does, which is reflected in the higher rates of compliance with ICJ decisions compared to arbitral tribunal awards (Singh 2016).

Such issues of non-compliance can be highlighted in China's declared non-participation, disobedience, and disregard toward the arbitral award issued in the *South China Sea Arbitration*. It is indisputable that the award failed to settle the dispute or mitigate its escalation. Nevertheless, it would be a mistake to completely categorize it as a failure. The award has, for the first time in international jurisprudence, provided clarification on the meaning of historic rights claims and the regime of islands pursuant to Article 121 of UNCLOS (Nguyen 2018, 105). Moreover, by rejecting China's claims based on the nine-dash line, the Tribunal has also showed its stance toward excessive claims and reduced the maritime areas subject to the dispute. By doing so, the Tribunal provided clarification of disputed areas and lawful overlapping claims. This is important because, prior to the award, disputant states in the region had not defined which features they believed were islands and what maritime zones they are entitled to claim from such islands (Nguyen 2018, 104). Therefore, it is reasonable to expect that a significant number of states will clarify their claims based on the definitions provided in the award. Such can already be seen in Malaysia's 2019 partial submission, in which the state defined the extent of its northern and southern continental shelfs (Malaysia 2017). In doing so, Kuala Lumpur showed implicit support to the 2016 Tribunal award and strengthened the Tribunal's stance. This could consequently lead to more states doing the same and, at last, to some form of dispute settlement.

Lastly, enforcement of and compliance with decisions made under international law is not a new challenge. Nevertheless, history has shown that sometimes the non-compliance rhetoric of a state does not always reflect its actions and behaviour in the field, which indicates that lack of an enforcement mechanism does not necessarily translate to non-compliance (Nguyen 2018). Furthermore, even in cases where dispute settlement mechanisms have failed to generate compliance or mitigate the escalation of a dispute, it still provided some clarification on the interpretation and application of the relevant provisions, which could be crucial in a final dispute settlement.

## Conclusion

The South China Sea disputes have been shaping relationships among nations for various decades. Not only are the states directly involved in the disputes impacted, but also those outside of it, who have been trying to reduce the tensions and find agreements on the multiple overlapping claims. The abundant natural resources in the area and its strategic geography put the disputes at the very centre of the states' national interests. As presented, the disputes are territorial, and the parties used historical (mostly China) and legal arguments (Philippines, Brunei, Malaysia and Vietnam) to support their claims.

Throughout the years, there have been attempts to decrease tensions and solve the SCS conflicts through bilateral and multilateral agreements. Due to failure in the maintenance of such agreements, the Philippines took their dispute with China to the Permanent Court of Arbitration, one of the UNCLOS dispute settlement mechanism. The Tribunal found that the disputed area fell within the Philippines EEZ, which made China's claims legally and historically unsubstantiated. However, China's refusal to recognize the Tribunal's jurisdiction and final award highlighted the struggle of international law to resolve the dispute. Nevertheless, this chapter presented that compulsory adherence to the dispute settlement system and the multiple fora are two of the advantages of the UNCLOS. However, such are challenged by non-compliance and the lack of enforcing apparatuses international law.

Additionally, when negotiations are the preferred method of settling disputes, such dispute resolution should

definitely have a priority. However, it is important to ensure that this kind of mechanism is used properly to give voice and security to smaller states in the international arena. Hence, it provides a balance to the power dynamics of the international system, once less-influential states have the option of resorting to compulsory dispute settlement fora under UNCLOS to resolve conflicts. Moreover, it was shown that even when an attempt to settle a dispute through a judicial forum fails, it may still create a significant legacy in form of interpretation and clarification, which could lead to conflict resolution within and without such legal settings.

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[1] In Article 76, paragraph 8 of the UNCLOS it is provided that information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. Further, the Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf and such established limits shall be final and binding (United Nations 1982).

[2] UNCLOS gives states the right to declare EEZs that extend 200 nautical miles from a continental shoreline or around islands that can be habitable. In the South China Sea, the application of this provision resulted in the overlapping of EEZs of other coastal states. In this kind of situation, Article 74 of UNCLOS offers a solution: the demarcation of EEZs between States with opposite or adjacent coasts shall be affected by agreement on the basis of international law in order to achieve an equitable solution (United Nations 1982).

[3] UNCLOS in Article 121 defines an island as a naturally formed area of land, surrounded by water, which is above water at high tide. It further provides that the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory. The exception of the latter are rocks which cannot sustain human habitation or economic life of their own and which, therefore, have no exclusive economic zone or continental shelf (United Nations 1982).

[4] In most cases, the parties involved were China and ASEAN. Agreements regarding peaceful coexistence in the region were attempted. One of them was the 2002 Declaration on the Conduct of the parties in the South China Sea, in which the parties reaffirmed their goal to commit to the principles and purposes of the UN and UNCLOS Charters and recognized such principles as guidelines to the relationship among states (ASEAN and PRC 2002, 1). It was expected that tensions would decrease and that the conflict would end if all parties had followed the provisions of the Declaration. However, this did not happen, as the states continued to press their territorial claims and continued to seize each other's fishing vessels (Bader 2014).

[5] Namely, Article 279 of UNCLOS clarifies that 'peaceful means' refers to settling any dispute concerning the interpretation or application of UNCLOS in accordance with Article 2.3 of the Charter of the United Nations where disputing parties shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

[6] Which under Article 1 of UNCLOS means 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.'

[7] To date, only 54 of the 168 states parties to UNCLOS made such a declaration: China, in 2006, and Malaysia, in 2009, are two of them. Their declarations excluded disputes concerning interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, and by non-acceptance of any of the procedures provided for in Part XV, Section 2 of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention (United Nations 2021).

[8] Negotiations failed in maintaining bilateral agreements, such as the 2002 Declaration on the Conduct of the Parties in the South China Sea at the 8th ASEAN Summit in Phnom Penh, Cambodia, on 4 November 2002 (for more information, see ASEAN and PRC, 2002; Bader 2014; Khoo 2016).

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## About the author:

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