

PREVENTING CONFLICT: CHINA'S CLAIM TO THE SOUTH CHINA SEA AND MECHANISMS FOR PEACE

PREVENINDO O CONFLITO: A PRETENSÃO DA CHINA SOBRE O MAR DO SUL DA CHINA E OS MECANISMOS PARA A PAZ

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Abstract: This paper examines China's claim to the South China Sea, focusing on how to maintain peace in a region with competing claims through codified law or external mechanisms. The first part of the paper examines the different levels of China's claim to ninety percent of the South China Sea, starting from its historical claim to its territorial claim. Additionally, an in-depth look is given to the provisions of the United Nations Convention of the Law of the Seas, and how China's claim conflicts with these provisions. The second part of the paper goes through the section of the dispute settlement provisions of the Convention, addressing the general provisions, procedures, and limitations concerning dispute resolution. The critiques of the dispute settlement provisions are addressed, alongside the lack of an enforcing body. Lastly, the external mechanisms that State parties can take to maintain peace with the region are analyzed, from other conventions to commercial responses.

Keywords: South China Sea; Peaceful Use of the Sea; Freedom of the Sea.

Resumo: Este artigo examina a reivindicação da China ao Mar do Sul da China, com foco em como manter a paz em uma região com reivindicações concorrentes por meio de leis codificadas ou mecanismos externos. A primeira parte do artigo examina os diferentes níveis de reivindicação da China a noventa por cento do Mar do Sul da China, desde sua reivindicação histórica até sua reivindicação territorial. Após, faz-se uma análise aprofundada às disposições da Convenção das Nações Unidas sobre o Direito do Mar e como a

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reivindicação da China entra em conflito com essas disposições. A segunda parte do documento percorre a seção das disposições de solução de controvérsias da Convenção, abordando as disposições gerais, procedimentos e limitações relativas à resolução de disputas. As críticas às disposições de solução de controvérsias são abordadas, juntamente com a falta de um órgão de execução. Por último, são analisados os mecanismos externos que os Estados Partes podem adotar para manter a paz com a região, desde outras convenções até respostas comerciais.

Palavras-chave: Mar do Sul da China; Uso Pacífico dos Mares; Liberdade dos Mares.

Summary: 1. Introduction. 2. China’s claim to the South China Sea and the basis of their claim. 3. The principles of Law of the Seas under risk due China’s claim. 3.1. Freedom of the seas. 3.2. Peaceful use of the sea. 3.3. The risk. 4. Dispute resolution and mechanisms of enforcement. 4.1. Besides UNCLOS III - external mechanisms of enforcement for peace. 5. Conclusion. 6. References.

1 INTRODUCTION

The Law of the Sea (“LoS”) was a consuetudinary arrangement for most of history. However, over the past century great strides have been taken to codify the LoS as technological developments allow nations to extend their reach further into the oceans and occupy them. Additionally, these advances give nations the ability to tap into the resources once hidden in the seabed, creating a race to claim these precious resources. The effort to codify the LoS began in the mid twentieth century and was seemingly a success, putting into written word much of the customary law and making room for rules concerning marine and environmental protection. Enforcement of these rules were also taken into consideration, resulting in mechanisms for dispute resolution, but is it enough when a signatory to these rules blatantly disregards and violates them? This is the case with China? China’s claim to the South China Sea is not legitimate and United Nations Convention on the Law of the Sea, concluded at Montego Bay’1982, well known by the acronym “UNCLOS III”, lack of prompt enforcement risks Freedom of the Seas and Peaceful use of the Sea, but there are mechanisms outside of UNCLOS that can properly be used to prevent conflict between interested states.

The first part of this text looks at all the claims that China makes to the South China Sea and analyzes the legitimacy of their claim within the context of the UNCLOS III. The claim is analyzed in this light because China is a signatory to this Conference and is bound by the rules and obligations of it. The divergence between the Convention and China’s claim will



be addressed. The second part of this article explains two well-known principles of LoSa and how they are at risk by China's continued claims to the South China sea. China's actions in concert with their claims and the effect they have had on neighboring nations, and also on the United States, risks the right of free navigation and peaceful use of the sea. Lastly, this paper will address the pitfalls of UNCLOS III dispute resolution mechanisms, how they are ineffective, and how external mechanisms can be used to bring about a peaceful settlement.

2 CHINA'S CLAIM TO THE SOUTH CHINA SEA AND THE BASIS OF THEIR CLAIM

For much of history, the law of the sea was not codified, instead it was builded on unwritten rules of customary international law.³ The twentieth century was the time of codification of principles of the sea. Four intergovernmental conferences took place during this time, the final one leading to the Third United Nations Convention of the Law of the Sea.⁴ The first of these conferences, the Hague conference in 1930, aimed to codify rules concerning territorial waters, nationality, and state responsibility.⁵

The First UN Conference on the Law of the Seas in 1958 emerged from the heels of War World II, the central issue being control of offshore natural resources.⁶ This Convention divided the seas into three categories: internal waters, territorial sea and high seas. The internal waters and territorial sea are subject to the territorial sovereignty of the coastal states, but the high seas are free.⁷ The Second UN Conference on the Law of the Seas came together to discuss the outer limits of the territorial sea and the fishery zone⁸, but no consensus was made as to the outer limit of the territorial sea.

The Third UN Conference on the Law of the Sea re-evaluated four particular issues: control of offshore natural resources, developments of seabed mining technology, protection

³ TANAKA, Yoshifumi. *The International Law of the Sea*. Cambridge: Cambridge University Press, 2012. p. 20.

⁴ SCOVAZZI, Tulio. The evolution of international law of the sea: new issues, new challenges. IN *Collected Courses of the Hague Academy of International Law*. Leiden: Martinus Nijhoff Publishers, 2000. p. 89.

⁵ SCOVAZZI, Tulio. The evolution of international law of the sea: new issues, new challenges. IN *Collected Courses of the Hague Academy of International Law*. Leiden: Martinus Nijhoff Publishers, 2000. p.89.

⁶ SCOVAZZI, Tulio. The evolution of international law of the sea: new issues, new challenges. IN *Collected Courses of the Hague Academy of International Law*. Leiden: Martinus Nijhoff Publishers, 2000. p. 21.

⁷ SCOVAZZI, Tulio. The evolution of international law of the sea: new issues, new challenges. IN *Collected Courses of the Hague Academy of International Law*. Leiden: Martinus Nijhoff Publishers, 2000. p. 23.

⁸ SCOVAZZI, Tulio. The evolution of international law of the sea: new issues, new challenges. IN *Collected Courses of the Hague Academy of International Law*. Leiden: Martinus Nijhoff Publishers, 2000. p. 24.



of marine environment, attention to structural changes in the international community.⁹ Specific aspects of UNCLOS III give insight into the legitimacy of China's claim and the mechanisms available to mitigate conflict as it concerns their claims to the South China Sea.

First, UNCLOS III split the ocean into five categories, as opposed to the basic three categories from the Hague Conference 1930: internal water, territorial sea, archipelagic state, the EEZ and the high seas. In addition to these categories, the Convention provides for the contiguous zone, international straits, and continental shelf, and the Area¹⁰, based on the area of the sea a nation has different rights, duties, and obligations.

Secondly, the breadth of the territorial sea was resolved through Article 3 of UNCLOS III, setting a maximum seaward limit of twelve miles.¹¹

Third, the Convention established compulsory procedures of dispute resolution under Article 286. Under this article, where no settlement has been freely chosen by the parties in the dispute, any dispute concerning interpretations or application of UNCLOS III must be submitted to the international courts and tribunals having jurisdiction under Part XV subsection two.¹² There are exceptions to this obligation, but generally they apply and decisions are binding on signatories.

China lays claim to ninety percent of the South China Sea based on an argument of a historical territory of this State. China's former minister, Yang Jiechi, in 2012, told the U.S. Secretary Hillary Clinton that there is "plenty of historical jurisprudence evidence to show China has sovereignty over the islands in the South China Sea and the adjacent waters".¹³ One of China's historical claims rides on the era of imperialistic actions by the United States and European powers, using that as justification for expanding its control over islets and reefs far from its shores. As to China's historic claims to the Spratly Islands, it disregards the fact China's land boundaries were historically undefined; much less its maritime boundaries.¹⁴

⁹ TANAKA, Yoshifumi. *The International Law of the Sea*. Cambridge: Cambridge University Press, 2012. p. 18 at. 25.

¹⁰ TANAKA, Yoshifumi. *The International Law of the Sea*. Cambridge: Cambridge University Press, 2012. p. 18 at 31.

¹¹ TANAKA, Yoshifumi. *The International Law of the Sea*. Cambridge: Cambridge University Press, 2012. p. 18 at 31.

¹² TANAKA, Yoshifumi. *The International Law of the Sea*. Cambridge: Cambridge University Press, 2012. p. 18 at 31.

¹³ MALIK, Mohan. *Historical fiction: China's South China Sea Claims*. In: World Affairs v. 176, no. 1. London: Sage, 2013. p. 83.

¹⁴ MALIK, Mohan. *Historical fiction: China's South China Sea Claims*. In: World Affairs v. 176, no. 1. London: Sage, 2013. p. 83-87.



China has made a habit of claiming any land conquered in China in the past as land they presently own, such as land conquered by the Mongols, who they claim as Chinese. They have asserted the general rule that any land conquered by “Chinese” at any point in history belongs to them, which appeals to both the communist and nationalistic parties of China. China has a long history as a sovereign state, and with that abundant documents from the past depicting these areas as their possession¹⁵, at least loosely. For example, China has ancient historical documents depicting the Senkaku Islands, and it is possible that the Chinese may have sighted the islands first. Discovery alone may have a legal effect in medieval years, but today it merely can establish inchoate title until it is perfected by an effective occupation.⁶ There is no evidence to show that China as established effective control of the area, like a peaceful display of State authority or sovereignty without protest from foreign states¹⁶, and it is unlikely that this will happen anytime soon. This rule is exemplified in the *Island of Palms* arbitration between the Netherlands and the United States in 1928, stating:

“Discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas)... According to the view that has prevailed at any rate since the 19th century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered.”¹⁷

This rule calls into question a majority of China’s claims as historical territory. Their claims rests on China’s past conquests not literally made by the Chinese or depictions on maps and other ancient documents that evidence pseudo possession based on discovery alone. The above stated rule has been used in multiple decisions.¹⁸ The decisive test that a State has title is not having territory at its disposition, but if the State exercises the functions of State appropriately under the circumstances and to the extent to fulfill State obligations.¹⁹

Though China’s main contention to their right of a vast majority of the islands and waters in the South China sea is based on history it is not the sole reason they have asserted. There are four present levels China bases its claim on: It’s self-characterization as an archipelagic state, its use of baselines to claim internal waters, claim of twelve nautical miles from the Paracel Islands, and two-hundred nautical miles from the end of the territorial sea as

¹⁵ MASAHIRO, Miyoshi. *Peaceful Use of the Sea and the Rule of Law*. In: Asian Yearbook of International Law v. 22. Leiden: Brill, 2016. p. 6.

¹⁶ MASAHIRO, Miyoshi. *Peaceful Use of the Sea and the Rule of Law*. In: Asian Yearbook of International Law v. 22. Leiden: Brill, 2016. p. 8.

¹⁷ UN - UNITED NATIONS. *The Island of Palmas case (Netherlands v. USA)*. In: Recueil de Sentences Arbitrales v. II. New York: United Nations, 2016. p. 829 – 871.

¹⁸ Rule used in *Clipperton island* (1931), *Eastern Greenland* (1933), *Minquiers et Ecrehos* (1953).

¹⁹ MASAHIRO, Miyoshi. *Peaceful Use of the Sea and the Rule of Law*. In: Asian Yearbook of International Law v. 22. Leiden: Brill, 2016. p. 8 at 15.



their exclusive economic zone.²⁰ If no further investigation was done into these claims, it could be said that China's claims have some legitimacy. How could they not when as an archipelagic state they have a right to the internal waters between islands under the Convention. The issue arises from China's misuse of the rules constituted in the Convention.

UNCLOS III defines an archipelagic state as “a State constituted wholly by one or more archipelagos and may include other islands”.²¹ UNCLOS clearly lists all the archipelagic states and gives no nation the authority to characterize themselves as such. China is not listed as an archipelagic state, so their claim to internal waters between islands on this basis is clearly erroneous. As for China's use of straight baselines to claim the internal waters of Paracel Islands, there are strict rules in Article 7 of UNCLOS when straight baselines may be used.¹³ Straight baselines may be drawn where a nation has a deeply indented coastline, or if there are fringe islands long the coast in its immediate vicinity to join the appropriate points.²²

China does not meet either of the two characteristics that would qualify it to draw straight baselines around its coast.²³ The misapplication of the straight baselines allows China to claim nearly 2000 nautical miles in some areas along its coast as territorial sea, normally these areas would be regarded as the high seas if not for this misapplication.²⁴ This distinction between territorial sea and high sea is important, because there are different responsibilities and obligations associated with these areas, which will be addressed later. China can only defend their claim to the South China sea through the “old law”, but they have specifically adopted the Convention and are subject to its provisions.

3 THE PRINCIPLES OF LAW OF THE SEAS UNDER RISK DUE CHINA'S CLAIM

Customary law has resulted in intrinsically understood principles held in law of the seas. Two of these principles, which are given great weight, are Freedom of the Seas and Peaceful Use of the Seas. These principles convey both freedom and boundaries, ensuring peace between a multitude of nations navigating the vast oceans. When nations defy the

²⁰ MASTRO, Oriana Skylar. *How China is Bending the Rules in the South China Sea*. In: The Interpreter. Sidney: Lowy Institute, 2021. Internet: <<<https://www.lowyinstitute.org/the-interpreter/how-china-bending-rules-south-china-sea>>>. Access 31 October 2021.

²¹ United Nations Convention of the Law of the Seas art. 46.

²² United Nations Convention of the Law of the Seas art. 46.

²³ THOMSON, Andrew J.. *Keeping the Routine, Routine: The Operational Risks of Challenging Chinese Excessive Maritime Claims*. Richmond: Naval War College, 2004.

²⁴ THOMSON, Andrew J.. *Keeping the Routine, Routine: The Operational Risks of Challenging Chinese Excessive Maritime Claims*. Richmond: Naval War College, 2004. p. 16.



codified law they are signatories too or push against the customary law, a risk arises that these principles will be abandoned in pursuit of their preservation. Inevitably this results in conflict. Peaceful use of the seas addresses the right of military vessels to navigate the high seas freely.

The phenomenon was described by Dworkin, when analyzing the process of production of a legal norm and its components, as follows.

Principle is a species of the genus "legal norm". As such, it is a mechanism for optimizing the construction of a socially desirable value.²⁵

That is, compliance with this norm is gradient and in accordance with what is possible and socially recognized as a cultivated value. Different from the Rule, whose compliance measurement is binary (either it is complied with, or not; or I stop at a red light, or I break the traffic rule), and from the Policy (based on an objective, instead of a value).²⁶

The construction of the Principle norm, like any other codified norm, is based on a hermeneutic process of the written legal text (precept). This hermeneutic process, in turn, is qualified/conditioned by two important variables: The one who has the final word on the accuracy of the hermeneutical equation (usually a Court or Council); and the social values (called "moral" by Dworkin) that nourish the construction of a norm from a precept.²⁷

In the case of qualified interpreters, the UNCLOS III compulsory dispute settlement system is open and admits two qualified international courts (International Tribunal for the Law of the Sea and International Court of Justice), arbitration and even recognition by a foreign State. validity of a decision of the Court of the other State involved in the dispute.²⁸

In turn, when we talk about informed values, we remember that a written/coded normative text (precept) will be used to compose a legal norm in the future by the hermeneutic process.

Thus, important legal concepts and words that need to be interpreted will do so according to the social values of the time in which they are required²⁹. Example: wedding. It was once seen in most Western societies as an institution devoted to mutual support, family ties, and procreation.

Today, as Giddens notes, the values of procreation have been left aside and, in their place, there is the communion of affection between people, which allowed normative changes

²⁵ DWORKIN, Ronald. *Le Positivisme*. Révue Droit et Société. Paris: L.G.D.J., 1982.

²⁶ DWORKIN, Ronald. *Le Positivisme*. Révue Droit et Société. Paris: L.G.D.J., 1982

²⁷ DWORKIN, Ronald. *Le Positivisme*. Révue Droit et Société. Paris: L.G.D.J., 1982

²⁸ DWORKIN, Ronald. *Le Positivisme*. Révue Droit et Société. Paris: L.G.D.J., 1982

²⁹ "*Verba cum effectu sunt accipienda.*"



quite new to this theme through hermeneutics with new values of the old institution of marriage. In this case, notably, same-sex marriage.³⁰

Law of the Sea is not an exception to this formula. And we shall see further how it occurs.

3.1. Freedom of the Seas

The concept of freedom of the seas was promoted in the late 1800s by Hugo Grotius, a Dutch lawyer and jurist, in work titled *Mare Liberum*. The work was a response by the Dutch because of their lack of recognition for the Portuguese claim of exclusive right to navigate the Indian Ocean due to *Tordesillas Treaty* and *Bulla Inter Coetera*. At the time Portugal had a monopoly on the Molucca spice trade. The concept of freedom of the sea may have been expounded through materialistic means, but it does not change the power of the idea.

Grotius announced in his work that all people and all nations have a right to free and open navigation of all the oceans of the world.³¹ He espoused a simple idea that it is “impossible to occupy and delimit infinite and boundless natural elements, such as air and marine water”, so the sea must be free.³²

However, it was recognized by Grotius that those living adjacent to the ocean shore have a special interest that differs from others, which at the time of his work was not clearly defined. Over time this strip became known as the “territorial sea”, ranging from three to twelve miles in width extending from the shoreline. There was universal acceptance of the principle of freedom of the sea, but this principle has evolved over time because of its clash with another principle, sovereignty of the sea.³³ Additionally, technological developments have given nations more and more reach over the oceans, and the ability to tap into the immense amount of resources located in the seabed. The idea that the ocean is impossible to occupy and delimit has narrowed over time.

Even before these developments, Grotius recognized that this principle did not apply to bays, straits, and water that can be seen from the coast, and conceded regulation of fishing to protect against depletion of fish was necessary.³⁴ Grotius’s main concern was the freedom of navigation of the oceans. It was necessary to recognize a state’s ability to occupy its coastal

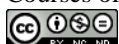
³⁰ GIDDENS, Anthony. Mundo em Descontrole. Rio de Janeiro: Record, 2000. p. 61-76.

³¹ ALLEN, Edward W.. *Freedom of the Sea* In: The American Journal of International Law v. 60. Washington: American Society of International Law, 1966. p. 814-816.

³² GROTIUS, Hugo. The Free Sea. Indianapolis: The Liberty Fund, 2004.

³³ GROTIUS, Hugo. The Free Sea. Indianapolis: The Liberty Fund, 2004.

³⁴ SCOVAZZI, Tulio. The evolution of international law of the sea: new issues, new challenges. IN Collected Courses of the Hague Academy of International Law. Leiden: Martinus Nijhoff Publishers, 2000. p. 64.



waters and the activities near it's coast. Overtime different rules arose as to the extent of a coastal nations control to the waters directly adjacent to them. These include the cannon shot rule of the eighteenth century, defining the limits in which naval belligerency by foreign powers were not permitted.³⁵ The cannon shot rule gave way to the three-mile limit, to create a less ambiguous and subjective rule.³⁶ In the nineteenth century, the trend towards geometric stability led to the 3 to 12 mile rule.³⁷

However, there were exceptions to the extent of a nations control where it was useful to a nation's specific needs. For example, in 1811 Great Britain extended their control as far as twenty nautical miles from the coast of the pearl banks of Ceylon.³⁸ Another example is The United States extension of their twelve-mile customs protection zone to sixty-two miles in 1935.³⁹

The sea is free to navigate, but the freedom to use the seas are limited to specific purposes and can be cut-off where excessive use of the sea can lead to depletion of resources. Even though this principle has evolved over the last century, it is still in place today, codified in the Convention.⁴⁰

3.2. Peaceful Use of the Sea

Freedom of the Seas is not interpreted to allow any nation to act in whatever way it pleases, but it gives nations the right to freely sail across the oceans without being assailed. When it comes to the use of the seas, the sea is only free for innocent and inoffensive use. Peaceful use of the seas addresses the right of military vessels to navigate the high seas freely. Article 88 of the UNCLOS III codified this principle stating “[t]he high seas shall be reserved for peaceful use”. This principle is to ensure that resources are not exploited to the point of depletion, and to prevent disagreements between states as to the right use of resources. Additionally, it gives nations who have a peculiar interest in the continued existence of a valuable resource the ability to take measures to protect that resource. China has created a concern because of its military expansion into the “Second Island Chain”³⁵, which is near the frontier of Taiwan.

China's expansion has been concerning because it is not only resource oriented, but the expansion has been led by the Navy of People's Liberation Army as a territorial expansion. The Chinese government has only reinforced this concern by proclaiming they will

³⁵ MASAHIRO, Miyoshi. *Peaceful Use of the Sea and the Rule of Law*. In: Asian Yearbook of International Law v. 22. Leiden: Brill, 2016. p.13.



defend its sovereignty over the islands and islets as its “Core Interest”.³⁶ No matter what China proclaims, they are not automatically entitled to territory they claim under international law. These claims have serious repercussions on the neighboring states. A great number of islands, islets, and smaller insular formations fall under China’s claim, and these areas are surrounded by large areas of sea where there are good fishery grounds and other mineral resources. As stated earlier, all these advances have been taken by the military, affecting not only the neighboring states ability to peacefully navigate the South China Sea, but also security concerns on China using their position as a means of offensive attack.

3.3. The Risk

China puts these two principals at risk because their claims are more than likely to result in conflict with neighboring nations.

Although China uses the right terms to lay claim to these areas, in reality, they are laying claim to areas which are considered high seas or better yet may be rightful territory of another nation. In other words: China’s Claim lacks of proper legal content. China considers much of the South China Sea territorial sea or their exclusive economic zone. They interpret this to mean they have ultimate authority on who can navigate that area and what uses can be taken in that area.

To understand the gravity of China’s claim, the total trade passing through the South China Sea in 2016 was 3.7 trillion and forty percent of natural gas is transported through the South China Sea.³⁷ Other nations China has competing claims with include Brunei, Malaysia, Indonesia, Philippines, Taiwan, and Vietnam.⁵⁰ Not to mention the interest of Australia and the United States in maintaining open and free navigation in the area for trade purposes and military vessel navigation, and the interest of preventing spreading conflict. To understand how China’s claim risks Freedom of the Sea and Peaceful use of the Sea a deeper understanding of the different areas of the sea is necessary.

3.3.1 Territorial Sea and Exclusive Economic Zone

The breadth and limits of the territorial sea is outlined in the Convention extending from the coastal State’s shore not exceeding twelve nautical miles.³⁸ The Territorial sea is

³⁶ MASAHIRO, Miyoshi. *Peaceful Use of the Sea and the Rule of Law*. In: Asian Yearbook of International Law v. 22. Leiden: Brill, 2016. p. 13-15.

³⁷ Council on Foreign Relations, *Territorial Disputes in the South China Sea* (Oct, 20, 2021) <https://www.cfr.org/global-conflict-tracker/conflict/territorial-disputes-south-china-sea>.

³⁸ United Nations Convention of the Law of the Seas art. 3.



measured from the baseline, which is the low-water line along the coast marked on large scale charts that are officially recognized by the coastal state.³⁹ Baselines are measured differently if the island is one situated on an atoll or if the coastline is deeply indented or there are a fringe of islands along the coast in the immediate vicinity.⁴⁰ The exclusive economic zone is an area “beyond and adjacent to the territorial sea...under which the rights and jurisdiction of the coastal State and rights and freedoms of other states are governed by the relevant provisions of this Convention”.⁴¹ In this zone the coastal state has:

- (a) *sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;*
- (b) *jurisdiction as provided for in the relevant provisions of this Convention with regard to:*
 - (i) *the establishment and use of artificial islands, installations and structures;*
 - (ii) *marine scientific research;*
 - (iii) *the protection and preservation of the marine environment;*
- (c) *other rights and duties provided for in this Convention.*⁴²

The EEZ cannot extend beyond 200 nautical miles from the baseline.⁴³ Concerning the rights of other States in the EEZ, Coastal states and landlocked states enjoy the freedoms enumerated in Article 87 of the Convention.⁵⁷ However, Articles 88 to 115 do not apply where it concerns the EEZ.⁴⁴ Lastly, the other states must give due regard to the rights and duties of the coastal State and comply with all laws and regulations adopted by them.

The territorial sea still gives other states the right to freely navigate the waters in the EEZ and freedom to fly over the EEZ. The other states must comply with any laws or regulations the coastal state has, but they are not barred from peaceful use of the exclusive economic zone. As we've seen, navigation of military vessels and aircrafts is within the

³⁹ United Nations Convention of the Law of the Seas art. 5.

⁴⁰ United Nations Convention of the Law of the Seas art. 6, 7.

⁴¹ United Nations Convention of the Law of the Seas art. 55.

⁴² United Nations Convention of the Law of the Seas art. 56.

⁴³ United Nations Convention of the Law of the Seas art. 57.

⁴⁴ United Nations Convention of the Law of the Seas art. 58.



definition of peaceful use of the seas. China makes the claim that they should be able to regulate the activity in the exclusive economic zone, and that other states do not have the right to navigate their military vessels or aircrafts in their territory.⁴⁵ This is not consistent with the Convention, and these claims are some of the reasons that conflict has arisen. Other states expect to be able to navigate these areas freely, but China's disregard for these rights risks the freedom and use of other states.

3.3.2 The High Seas

The high seas are the waters not in the EEZ, territorial sea, internal waters of a State, or archipelagic waters of an archipelagic state.⁴⁶ All states may freely navigate, fly-over, lay submarine cables and pipelines, construct artificial islands, fish, and conduct scientific research on the high sea.⁴⁷ The states are not subject to the sovereignty of coastal states on the high seas, as the Convention does not allow states to subject any part of the high sea to its sovereignty.⁴⁸ The biggest bridle on states in the high seas is it shall be reserved for peaceful purposes.⁴⁹

The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2; (f) freedom of scientific research, subject to Parts VI and XIII.

Understanding these characteristics of the high sea evidence the risk China poses with their claims. China's expansive claims likely extend into the high sea, and belief they may

⁴⁵ CFR - Council on Foreign Relations. *Territorial Disputes in the South China Sea*. New York: Council on Foreign Relations, 2021. Internet: << <https://www.cfr.org/global-conflict-tracker/conflict/territorial-disputes-south-china-sea>.>> Access 31 October 2021.

⁴⁶ United Nations Convention of the Law of the Seas art. 86.

⁴⁷ United Nations Convention of the Law of the Seas art. 87.

⁴⁸ United Nations Convention of the Law of the Seas art. 89.

⁴⁹ United Nations Convention of the Law of the Seas art. 88.



control all aspects of what they consider their territorial sea is a problem that risks freedom of the sea and peaceful use of the sea.

4 DISPUTE RESOLUTION AND MECHANISMS OF ENFORCEMENT

UNCLOS III is designed to prevent conflict between nations, but not in an overt manner. The purpose of the Convention is to put commonly understood rules and new rules to paper to give nations a uniform set of rules to go by. If nations follow these rules together conflict would not arise, because there would not encroach on another's rightful territory or free spaces. Part XV of the Convention deals with dispute resolution, setting out the general provisions, procedures, limitations, and exceptions.⁵⁰ Article 279 of UNCLOS states:

“States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter”.⁵¹

Section One outlines the preliminary steps to which all disputes are subject, keeping in mind the sovereignty of the signatories.⁵² The section makes clear that disputes resolved by peaceful resolution are desired⁵³, and allows states to choose the means of resolution with this bridle in mind. One general obligation on the State parties is to exchange views in an efficient and speedy manner⁵⁴ about resolution of disputes. This obligation facilitates open lines of communication between parties, and the likelihood of the parties reaching a resolution on their own. This section also addresses forum and conciliation between the State parties, both of which can flexibly be chosen.⁵⁵ Section Two, which concerns compulsory procedures, is only applicable if the State parties fail to settle a dispute by their chosen methods.⁵⁶

Section Two allows the parties to choose one or more of the listed dispute settlement procedures through means of written declaration: The International Tribunal for the Law of the Sea (Tribunal); The International Court of Justice (ICJ); and arbitral tribunal; and a

⁵⁰ United Nations Convention of the Law of the Seas part XV.

⁵¹ United Nations Convention of the Law of the Seas art. 279.

⁵² GAERTNER, Marianne P.. *The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea*. iN: San Diego Law Review v. 19. San Diego: University of San Diego, 1982. p. 577.

⁵³ United Nations Convention of the Law of the Seas art. 279 and 280.

⁵⁴ United Nations Convention of the Law of the Seas art. 279 and 280.

⁵⁵ United Nations Convention of the Law of the Seas art. 282, 284, *opened for signature* Dec. 10.

⁵⁶ United Nations Convention of the Law of the Seas art. 281, 286.



special arbitral tribunal for disputes concerning fisheries, protection and preservation of the marine environment, marine scientific research, or navigation and pollution of vessels.⁵⁷ The applicable law in these disputes is the Convention and other rules of international law that are not incompatible with the convention.⁵⁸ One thing the Convention does provide for is an enforcement mechanism to ensure that State parties keep to the tribunal's binding decision.

Finally, Section Three of Part XV lists the limitation of exceptions to the compulsory dispute settlement provisions. Under this section, certain types of disputes are exempt from the compulsory procedures where they arise from a coastal State's discretionary exercise of sovereignty concerning the use of its exclusive economic zone.⁵⁹ Other disputes that may be exempt include sea boundary delimitations, military activities and certain law enforcement measures that are connected with exercise of sovereignty, and disputes the Security Council of the UN has exercised jurisdiction over it.⁶⁰ Together, these sections make-up the dispute settlement procedures and process under the Convention.

These provisions have been critiqued as not fair or equitable because it favors the group of 77.⁶¹ However, a more pressing concern is the lack of enforcement that flows from Part XV of the Convention. The Convention delineates compulsory procedures and declares that decisions from the listed tribunals are binding. However, no organization or body exists through the Convention to enforce these procedures and decisions where a state refuse follow them. As it concerns China, they are bound as a signatory to follow these provisions where they have disputes with other State parties. China currently has competing claims with Vietnam, Taiwan, Philippines, Malaysia, and Brunei as to the islands and reefs in the South China sea, but no these procedures have not been triggered. Instead, China has decided to act as if they have a rightful claim through expansion without any decision from a recognized tribunal.⁶² And even though the United States has not taken sides as it concerns the competing claims, to ensure freedom of navigation in the area, they have sent military planes and ships near the disputed island to ensure access to key shipping and air routes.

⁵⁷ GAERTNER, Marianne P.. *The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea*. iN: San Diego Law Review v. 19. San Diego: University of San Diego, 1982. p. 577.

⁵⁸ United Nations Convention of the Law of the Seas art. 293.

⁵⁹ United Nations Convention of the Law of the Seas art. 297, *opened for signature* Dec. 10.

⁶⁰ United Nations Convention of the Law of the Seas art. 281, 298, *opened for signature* Dec. 10.

⁶¹ GAERTNER, Marianne P.. *The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea*. iN: San Diego Law Review v. 19. San Diego: University of San Diego, 1982.

⁶² BBC. *Why is the South China Sea Contentious?*. London: BBC, 2016. Internet:

<<<https://www.bbc.com/news/world-asia-pacific13748349>>> Access 31 October 2021.



A concrete example of the Convention's shortfalls is the Philippines filing for arbitration with the UN over China's sovereignty claims. This marked the first time a country had brought a claim against China under UNCLOS regarding the South China Sea.⁶³ The tribunal was forced to go through the process with China present, because China had rejected the process. Without China's collaboration to resolve these disputes, the Peaceful Use of the Sea shall be under menace and the Convention weakens on its very own core.

4.1. Besides UNCLOS III - External Mechanisms of Enforcement for Peace

Outside of the Convention, ten members of the Association of Southeast Asian Nations (ASEAN) and China created a regional arrangement in 2002 through the Declaration on the Conduct of Parties in the South China Sea. The signatories to the Declaration of Conduct (DOC) reaffirmed their commitment to the purposes and principles of the Charter of the U.N and resolution of disputes by peaceful means. Most importantly, the signatories promised to exercise "self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability". Two mechanisms were established in 2005 to implement the declaration: the ASEAN-China Senior Officials Meeting on the Implementation of the DOC, and the ASEAN-China Joint Working Group on the Implementation of the DOC. The first reviews the progress in implementing the DOC, and the second—which gathers twice a year—functions under the direction of the ASEAN-China Senior Officials Meeting.⁶⁴

It would seem that China's willingness to reaffirm peace and stability in DOC would give interested States assurance, especially China's promise to exercise self-restraint. However, China has expressed that the DOC is simply for cooperation and crisis management, and not for resolution of sovereignty or maritime disputes.⁹¹ China's sentiment toward the DOC is an example of empty words and promises from China. Since the implementation of the DOC, China has taken calculated defensive and offensive measures to protect its claim. For example, in 2011 the Philippines recorded at least five incursions by Chinese ships near the Spratly islands and other areas.⁶⁵ Again in 2012, the Philippines dispatched a warship to

⁶³ CFR - Council on Foreign Relations, *China's Maritime Disputes: 1895 – 2020*. New York: CFR, 2021. Internet: <<<https://www.cfr.org/timeline/chinas-maritime-disputes>>> Access 31 October 2021.

⁶⁴ ASEAN - Association of Southeast Asian Nations. DECLARATION ON THE CONDUCT OF PARTIES IN THE SOUTH CHINA SEA. Internet: <<<https://asean.org/declaration-on-the-conduct-of-parties-in-the-south-china-sea-2/>>>. Access 31 October 2021.

⁶⁵ CFR - Council on Foreign Relations, *China's Maritime Disputes: 1895 – 2020*. New York: CFR, 2021. Internet: <<<https://www.cfr.org/timeline/chinas-maritime-disputes>>> Access 31 October 2021.



confront Chinese fishing boats, known as the “Scarborough Shoal incident”.⁶⁶ The reaffirmed promise to the law of the Convention and the promise of self-restraint is meaningless if China makes claims divergent with the Convention and continues to make advances further into the South China Sea.

If a regional order based on rules is to prevail over the might of China, then a collaboration is necessary beyond the ASEAN.⁶⁷ One possibility is inviting regional and international coastguards to assist in policing the South China Sea, which could provide deterrence if enough regional countries or several strong international countries participate, and force China to readjust their cost-benefit analysis of their current approach.⁶⁸ The different claimant states—Vietnam, Philippines, and Malaysia—should take a more unified position to bolster support from the international community. Currently, the claimants have some regional and international support, but it is not equal. The Philippines, the state that brought a claim before the tribunal, has had the United States, Australia, Japan, and New Zealand issue statements supporting the tribunal's ruling for the Philippines. Japan has provided for the Philippines and Vietnam.

For the Philippines, Japan has provided a dozen patrol vessels, offering training aircrafts, utilizing warships to patrol the area, and port visits among the ASEAN countries. For Vietnam, Tokyo has sold six used maritime vessels and pledged six more, and has raised aid and investment in that region. Other countries like India, Australia, and the United States have also taken steps to support the claimant states.

A more aggressive approach would be for the United States Navy, backed by the U.S. Air Force, to take affirmative actions and closely follow China's actions.⁶⁹ This would give the United States the ability to block attacks on Philippine's fishing fleets, forces, and oil-and-gas research vessel and platforms near the Spratlys.⁷⁰ Advancing the Philippine's rights, and

⁶⁶ CFR - Council on Foreign Relations, *China's Maritime Disputes: 1895 – 2020*. New York: CFR, 2021. Internet: <<<https://www.cfr.org/timeline/chinas-maritime-disputes>>> Access 31 October 2021.

⁶⁷ ROBERTS, Christopher. *The South China Sea: Beijing's Challenge to ASEAN and UNCLOS and the Necessity of a New Multi-Tiered Approach*. In: RSIS Working Paper series. no. 307. Singapore: Nanyang Technological University, 2017. Internet: <<<https://hdl.handle.net/10356/85477>>>. Access 31 October 2021.

⁶⁸ ROBERTS, Christopher. *The South China Sea: Beijing's Challenge to ASEAN and UNCLOS and the Necessity of a New Multi-Tiered Approach*. In: RSIS Working Paper series. no. 307. Singapore: Nanyang Technological University, 2017. Internet: <<<https://hdl.handle.net/10356/85477>>>. Access 31 October 2021. p. 94.

⁶⁹ BURGESS, Stephen. *Confronting China's Maritime Expansion in the South China Sea: A Collective Action Problem* In: Journal of Indo-Pacific Affairs. Fall 2020. Maxwell: Air University, 2020.

⁷⁰ BURGESS, Stephen. *Confronting China's Maritime Expansion in the South China Sea: A Collective Action Problem* In: Journal of Indo-Pacific Affairs. Fall 2020. Maxwell: Air University, 2020. p. 101.



bringing a pause to China's advancement, could give the Philippines the opportunity to regain the Scarborough Shoal.⁷¹

United States is tacitly involved, bolstering the regional states to provide a more unified support to these claimant's. Despite that fact, USA is constantly taking more aggressive actions that could approach indo-pacific region into a conflict. Instead of states acting to individually support the Philippines or Vietnam, there should be an effort to unify this entire region—Malaysia, Taiwan, Philippines, Vietnam, Brunei, and Indonesia—against China's advancements. If all these nations can come to one consensus, the international community will likely join to support not only through strong statements but with their checkbooks and resources. China must be put in a position to reconsider the advancements they've made into the South China sea and stall any future advancements they may be considering.

5 CONCLUSION

China does not show signs of backing down on their claims, despite their divergence with the Convention or the decision of the Hague Tribunal. China stands firm that their claims supersede all others, and they will likely take action to further their reach into the South China Sea. It will take more than treaties and strong statements to convince China they do not have the right to take what they decide is their possession. For peace to prevail, the state's interested in preserving their rights under the Convention must take more unified measures to confront and police the South China Sea. These states cannot sit by and hope that China one day decides to follow the decisions of an arbitral tribunal or keep to the multiple treaties they have signed.

Additionally, the international community must take a more active stance if they want to continue to navigate the South China Sea freely. As long as nations defer to unenforced treaties they will lose more and more of their rightful territory to China.

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⁷¹ BURGESS, Stephen. *Confronting China's Maritime Expansion in the South China Sea: A Collective Action Problem* In: *Journal of Indo-Pacific Affairs*. Fall 2020. Maxwell: Air University, 2020. p. 101.



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