

NAVIGATING CHINA'S VIOLATION OF UNCLOS: A LEGAL PERSPECTIVE

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ABSTRACT

The ongoing struggle between China and Southeast Asian countries over the territorial claim over the contentious South China Sea has raised many eyebrows. The conflict is not novel in the present context; however, the volatile geopolitical situation in the world has stoked apprehensions about a potential full-fledged conflict in the region. This could have long-term ramifications for the geopolitics of the world. This paper explores the nuances of the conflict from a legal perspective. The paper aims at demystifying the root cause of the conflict in a bid to unravel the multifaceted conflict, ostensibly the most volatile situation in the 21st century. The predicament highlights the pitfalls of the status quo rule-based world order and how imperative it is to overhaul the present rules and laws. The paper begins by analyzing the importance of the United Nations Convention on the Law of the Seas; later, it delves into the belligerent practices by Beijing in the region that keeps the UNCLOS hostage. Further, the paper critically examines the diplomatic and legal maneuvers that can be used to resolve the tussle. This paper aims to instill a pragmatic discourse in which following the rule-based international maritime system is the cornerstone. Therefore, promoting the philosophy of multilateralism and cooperation among nations across the globe is the ultimate goal.

Keywords: South China Sea, UNCLOS, Maritime Law, Territorial Integrity, Rule-based Order, China.

INTRODUCTION

For centuries the importance and impact of seas and oceans on countries across the world is paramount. In the 21st century, the concept of the "Blue economy" is rapidly evolving and expanding. Today, the international seas support around 90%¹ of the global trade and volume and 40%² of the global trade value. The world economic forum says that oceans on earth are a major "natural capital", contributing around \$70³ trillion to the global gross domestic product

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¹ Factbox: Why oceans are key to the global economy (Reuters, FEBRUARY 24, 2012), <<https://www.reuters.com/article/us-oceans-economy-idINTRE81N09Z20120224>> accessed on 12 May, 2023

² *Ibid*

³ *Ibid*

(GDP) annually. As per the Food and agriculture organization, marine products are a source of food for around 1.5⁴ billion people across the globe. This in itself underlines the glaring impact of oceans and seas on global economic prospects.

Therefore, following rule-based order is a sine qua non for the international maritime system, which further acts as a catalyst in global trade and commerce. Compliance with rule-based international maritime order is often touted as a prerequisite for formulating trade and commerce policies at the same time while fathoming “national security challenges borning from seas and oceans.

The United Nations Convention on the Law of the Sea (UNCLOS) was enacted in the year 1982⁵, also known as the “constitution of oceans”, in a way to establish this rule-based international order in maritime which protects the sovereignty of nations in terms of their coastal area and is considered to be the bedrock of international and civilizational growth. A free, open, rule-based just maritime passage to every country is the philosophy from which the Law of Seas derives its existence.

Over the past two decades, a plethora of activities have been underway, especially in the South China Sea which negates this entire hypothesis. Especially since 2010⁶, Beijing has made advances to claim sovereignty on many islands which violates the international legal system and jeopardize the global community’s efforts in maintaining the rule-based order in oceans and seas. The south china sea is an important water body over which six countries, the Philippines, Brunei, China, Taiwan, Malaysia, and Vietnam lay their sovereign claim. The water body is extremely rich in its potential mineral reserves, with 11 billion barrels⁷ of oil, over 10% of the global fisheries and also the economic providence in the region is massive. The region encompasses around 30%⁸ of global trade and commerce. The rich, developing, and booming economies of Southeast Asia are also in proximity to the South China Sea. The disputed territory of the South China Sea is not new to the international conflict realm,

⁴ *Ibid*

⁵ Nautical Law: What is UNCLOS?, (Marine Insight June 18, 2022) <[⁶ Does China Really Respect Sovereignty? \(The Diplomat, May 23, 2019\) <<https://thediplomat.com/2019/05/does-china-really-respect-sovereignty/>> accessed on 12 May 2023](https://www.marineinsight.com/maritime-law/nautical-law-what-is-unclos/#:~:text=The%20United%20Nations%20Convention%20on%20the%20Law%20of,rules%20governing%20the%20international%20waters%20and%20their%20resources.></p></div><div data-bbox=)

⁷ Territorial Disputes in the South China Sea (Council of Foreign Relations, May 04, 2022) <<https://www.cfr.org/global-conflict-tracker/conflict/territorial-disputes-south-china-sea>> accessed on 12 May 2023

⁸ *Ibid*

however, the ongoing “latent movements” have heightened the chances of any potential global conflict in the region. In the South China Sea, one of the most complex and contested maritime disputes, countries like Indonesia, the Philippines, Taiwan, Vietnam, Malaysia, and China are embroiled in tense contestation of sovereignty. The South China Sea is near the Strait of Malacca and the Pacific Ocean in the east which makes it a prime strategic location. Over the years, numerous reports have come to the fore highlighting Chinese heavy investment in both technology and altering the geology of the region in a bid to bolster its claim over the islands. The fundamental approach followed by the PRC is the diplomatic maneuvering of the grey area of the United Nations Convention of the Law of Seas to its benefit.

CHINA’S ACTIONS IN THE SOUTH CHINA SEA

China has tried to establish its control over the territorial waters of the South China Sea which has been observed since the 16th Century when the Chinese emperors used to cease the “freedom of navigation” along with the trade and commerce through sea routes by western explorers. The People’s Republic of China (PRC) establishes its control over the territories in the South China Sea through the historical concept of the “nine-dash-line”. This concept emanates from the “nine-dashes” which were drawn on the map by geographer Yang Huarien, as a claim to establish sovereignty over the islands in the South China Sea. The map created by geographer Yang included 11 loosely drawn dashes in the South China Sea (SCS) area, asserting China's territorial claims over disputed regions such as the Paracel Islands, Spratly Islands, Macclesfield Bank, Pratas Islands, and Scarborough Shoal. However, at the command of Mao Zedong, two of the dashes were removed in 1952 when China relinquished control of the Gulf of Tonkin to Vietnam. As a result, the total number of lines on the map was reduced to nine.

BUILDING ARTIFICIAL ISLANDS

In the 21st century, China is dogmatically claiming these islands that fall beyond its territorial jurisdiction as authorized under the United Nations Convention on Law of Seas and thereby blatantly defying maritime laws which are the bedrock of the international maritime setup. In the year 2013⁹, Beijing initiated an unprecedented program of building artificial islands from the reefs that are submerged in the South China Sea. Subsequently, massive sand mining was

⁹ Why Is China Building Islands in the South China Sea? (The Diplomat, September 10, 2014) <<https://thediplomat.com/2014/09/why-is-china-building-islands-in-the-south-china-sea/>> accessed on 12 May 2023

done to create these islands. This step was considered a blatant jeopardization of the coastal rights of other nations in the south china sea. Within two years of the beginning of the ambitious program, there were seven new islands namely, Mischief Islands, Fiery Cross Island, Subi Reef, Gaven Reefs, Huayang, and Johnson South Reefs, which were structured at an astounding average of three, and a half acres of solidification each day. The imperative reason for the buildup of these artificial islands is that these structures will aid China in manipulating and evading the UNCLOS laws and will be a coign of vantage for it.

However, after vetting the Chinese intentions, it becomes conspicuous that, apart from the nefarious claim of sovereignty, the South China Sea has another for Beijing.

As the world's second-largest economy in the world, touted to surpass the USA anytime soon, makes these artificial islands are more beneficial to foster economic growth and development by procuring coal from the off-shore sites and thereby gaining massive access to "black diamond".

Another cognizable reason is the militarization of the water body, China has already established its first foreign military base in the African country of Djibouti in the Horn of Africa and has augmented its military capability by leaps and bounds. The expansion of military bases and airstrips in the region will allow Beijing to have military combatant aircraft, virtually giving it an upper hand in the contested region.

Also, the gamut of international cargo that passes through the region allows China to leverage its position in the South China Sea.

ILLEGAL FISHING PRACTISES

As per the Illegal, Unreported, and Unregulated (IUU) 2021¹⁰ report China ranked number one in the world on various parameters of the report. In a blatant step, the Chinese Distant Water Fishing fleet is often noticed in the international oceans which keeps the international maritime law hostage. There have been reports of fabricated licenses and documentation and violation of Exclusive economic zones of other nations. According to the Food and Agriculture Organisation (FAO)¹¹, China is one of the top ten consumers of global sea produce captures,

¹⁰ NOAA Issues 2021 Report on Global IUU Fishing and Bycatch of Protected Marine Life Resources, NOAA Fisheries <<https://www.fisheries.noaa.gov/feature-story/noaa-issues-2021-report-global-iuu-fishing-and-bycatch-protected-marine-life-resources>> (August 12, 2021), accessed on 12 May,2023

¹¹ China's illegal fishing worldwide is under scrutiny (The print 24 February 2023) <<https://theprint.in/world/chinas-illegal-fishing-worldwide-is-under->

In an unprecedented measure, China has proliferated fishing activities in the EEZs of around 80 countries from 2019 to 2021, making the matter worse.

RESTRICTING THE FREEDOM OF NAVIGATION.

The United Nations Convention on Laws of Seas as an international agreement ensures that nations are entitled to their rights and fulfill their responsibilities concerning the global laws of oceans. One of the most kernel aspects of the law is the right to innocent passage through territorial waters. However, the law is extremely convoluted in its application there are multiple ambiguities in the “right of navigation” and “freedom of navigation”. Countries such as the Philippines consider “right to navigation” over “freedom of navigation”, owing to the former being restrictive. This ambiguity often brings about apprehensions of “national security”. In the recent past, instances have cropped up where China and USA have been at loggerheads over the passage of military vessels, here Beijing has established “no-sail-zones” even beyond its territorial waters, thereby inviting international backlash considering the gross violation of international law.

UNCLOS LEGAL PROVISIONS

Article 121(1)¹² of the UNCLOS, defines an island that has a legal validity under the law. It states that the island has to be a “terra firma”, above the high tide sea level. This also implies that “man-made” islands are not under the purview of this law. This puts the Chinese “artificial islands” in stark contravention of international maritime law.

Articles 60(8) and 80¹³ of the UN Convention of Law, state that an artificial island that is built in the exclusive economic zone of a country does not have a territorial sea of its own. Thereby this law under UNCLOS rubbishes the claim of China that the disputed territory of the South China Sea falls under the territorial seas of its fabricated artificial islands.

[scrutiny/1394567/#:~:text=From%202019%20to%202021%2C%20China%20fished%20in%20Exclusive,and%20the%20EEZs%20of%20other%20nations%2C%20reported%20LJK.>](https://www.9news.com.au/world/what-are-chinas-artificial-islands-in-the-south-china-sea-and-why-are-there-concerns-about-them/3f0d47ab-1b3a-4a8a-bfc6-7350c5267308) , accessed on 12 MAY 2023)

¹² What are China's 'artificial islands' and why are there concerns about them (9 News, Nov 26, 2021)<<https://www.9news.com.au/world/what-are-chinas-artificial-islands-in-the-south-china-sea-and-why-are-there-concerns-about-them/3f0d47ab-1b3a-4a8a-bfc6-7350c5267308>> accessed on 12May 2023

¹³ Ibid

RESPONSES AND REACTIONS TO THESE VIOLATIVE PRACTISES

Instances started to mushroom in the year 2005¹⁴ when Vietnamese ships were fired upon by Chinese ships, and in 2009¹⁵, reports of Chinese ships harassing international ships. In other similar instances like that of intrusion in the Vietnamese exclusive economic zone, the Chinese ships called in numerous protests from countries across the global sphere. However, on a closer look all these mini instances if looked at in isolation will occur as mere transgressions, on the flip side these are “systematic” steps undertaken by the PRC to bolster their claim on these territories. The ten countries in the South China Sea have over the years become assertive of their rights being usurped by China on numerous international forums. One prime example of this assertiveness is the arbitration proceedings against China initiated by the Philippines in the Permanent Court of Arbitration (PCA), in 2013¹⁶. The PCA led the case in favor of the Philippines and denied China the territorial claims that the latter makes on the islands in the south china sea. The ruling of 2016¹⁷, highlighted that these islands fail to be compatible with the UNCLOS law and that the islands have been rendered in an inhabitable situation. The international tribunal questioned the legitimacy of the arguments raised by Beijing over its exclusive rights over the region.

Over the years the southeast Asian nations have beefed up the maritime security forces in the region as retaliatory measures to confront Beijing. In 2012¹⁸, the Philippines renamed a little portion of the south china sea within its exclusive economic zone to strengthen its position in the region.

RECOMMENDATIONS ON ADDRESSING THE ISSUES

Chinese authorities have always mentioned these “artificial islands” as mere constructions, and have never accepted the allegations of violating international rule-based order. On numerous occasions, it has “flogged the dead horse” by asserting its “historical rights” over the islands of the South China Sea. China in the 21st century is the world’s second-largest economy, a major

¹⁴ China accuses Vietnam of ramming its ships in South China, (The Guardian, 8 May 2014) <<https://www.theguardian.com/world/2014/may/08/china-accuses-vietnam-ships-south-china-sea-oil-rig>> accessed on 12 May 2023

¹⁵ Ibid

¹⁶ Factbox: Why the Philippines' South China Sea legal case matters (Reuters, JULY 11, 2016) <<https://www.reuters.com/article/us-southchinasea-ruling-factbox-idUSKCN0ZR283>> accessed on 12 May 2023

¹⁷ In the South China Sea, even the name is disputed, (Radio Free Asia, 2022.02.07) <<https://www.rfa.org/english/news/vietnam/southchinasea-name-02072022145513.html>> accessed on 12 May 2023

¹⁸ Ibid

player in the global supply, and a mighty military power, the situation is embroiled in multifarious issues. The current situation warrants a practical solution to be initiated. At the very onset, clarity in the legal framework of the United Nations Convention on the Law of Seas is imperative. The scope of “grey areas” are simply conspicuous making the law to be vulnerable to all these diplomatic maneuvering tactics. The current fissures need to be mitigated and for that, an overhaul in the legal framework that maintains the rule-based world order should be deliberated upon. Another crucial aspect of the plausible solution is the clarity in the roles and responsibilities of the international tribunals. The PCA verdict of 2016¹⁹ was called into question by Beijing over the jurisdiction of the tribunal. This is a major impediment to the proper implementation of the verdict. It is due to this lacuna that there seems no respite in the provocative activities undertaken by China in the South China Sea. Probably, resolving these interpretational enigmas²⁰ in the legal framework, a properly vetted solution that negates the scope of “rights and responsibilities” of the coastal states is the need of the hour. In this manner, unilateral violations of international rules can be avoided by attaching requisite accountability on the defaulting parties irrespective of their global standing.

CONCLUSION

The world today is marred with a plethora of tussles and power struggles. Each country in its way is establishing itself without coming into the shadow of dominant players. The world today is posturing toward a multipolar world that is free, open, and rule-based. The PRC in no way will be easily backtracking on its claim on territorial claims in the south china sea, however, perpetual diplomatic nudges can open sufficient windows for quelling the stiff situation and at the same time assuage the apprehensions of other neighboring countries. The world cannot afford a major conflict and the 21st century belongs to peace, stability, growth, and development that is not centric to a few powers but rather is universally visible.

¹⁹ Tribunal Rejects Beijing’s Claims in the South China Sea, (The New York Times, July 12, 2016) <<https://www.nytimes.com/2016/07/13/world/asia/south-china-sea-hague-ruling-philippines.html>> accessed on 12 May 2023

²⁰ Five years of PCA ruling and tensions in South China Sea (Modern Diplomacy, July 11, 2021) <<https://moderndiplomacy.eu/2021/07/11/five-years-of-pca-ruling-and-tensions-in-south-china-sea/>> accessed on 12 May 2023