



# Disarmament and International Security

Determining the sovereign rights over  
the dispute in the South China Sea

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## **Introduction**

We, your chairs, Hannah Lipow and Nils Midtun, would like to welcome you to the Disarmament and International Security Council. Our topic is going to be “Determining the sovereign rights over the dispute in the South China Sea”. This topic has raised concerns on an international scale.

The South China Sea is an area of great debate where it comes to territorial integrity and sovereignty. Neighbouring countries of this body of water are engaged with severe jurisdictional and territorial disputes with regards to the territory in this body of water located in South East Asia.

This dispute means that the relations between the countries claiming the jurisdiction of the islands is becoming increasingly strenuous. The main areas of dispute is the Spratly islands and the Paracel islands. There are also debates between other geological formations such as rock formations, sandbanks, reefs, sea beds; one notable example is Shoal reef. This dispute also carries significant weight with regards to its possible effects on international trade. As a lot of trade passes through this body of water, China’s claim on the waters could cause disruption with regards to trade. Their claim could possibly affect the sea lines of communication, and greatly disrupt the sea passage that allow trade and the passing of maritime forces.

Another reason for dispute around this territory is its richness where it comes to natural resources. Both the Paracel and Spratly islands are uninhabited, however they have notable natural resources. This and the fact that they are ideal fishing areas mean that it is an area that a lot of people native to the area rely on.

The Republic of China has played its claims over the largest portion of the island, the ninedash line, which demarcates an extensive territory in the South



China Sea. Vietnam, the Philippines and other South East asian countries have contested China's claims to territory in the South China in hopes of reclaiming control of the area. Vietnam states that they have a historical claim, dating back to the 17th century, whilst the Philippines and other southeast asian countries also have extensive reasons to back up their claims to territory in the South China Sea.

## Definition of Key Terms

### **United Nations Convention on the Law of the Sea (UNCLOS)**

UNCLOS (United Nations Convention on the Law of the Sea) is an international treaty that took place in 1973 to 1983. The treaty actually came into force in 1994, after modifications had taken place between 1990 to 1994. The treaty seeks to define the responsibilities and rights of the use of the world's oceans by member states, specifically with regards to the environment, business and the use of its maritime resources. Today 162 countries have ratified the treaty, and the European Union, however, the United States have not ratified it even though they view it as "customary international law".

### **Nine-Dash Line**

The nine-dash line refers to the territory that the Republic of China had claimed to be their own in 1912 to 1949. This is U shaped territory in the South China Sea that includes the Spratly Islands, the Paracel Islands and other areas such as Scarborough Shoal and Macclesfield Bank.

### **Economic Exclusive Zones (EEZ)**

An economic exclusive zone is the territory or land that a country has the sole access to the exploitation of its natural resources and potential energy production. This zone is also an area that the country can establish businesses, artificial islands and conduct scientific research and maritime conservation.

### **South China Sea**

A marginal sea that is in the Pacific Ocean, encompassing an area of around 3.5



million square kilometers. Nations located around this sea include: China, Vietnam, the Philippines, Malaysia, Indonesia, Brunei, and other countries. The sea carries immense importance, considering a third of global shipping passes through it, carrying 3 trillion USD in trade annually. It also contains crucial fisheries for food security in Southeast Asia, as well as large oil and gas reserves.

## **General Overview**

The roots of the conflict can be tracked to the decolonisation period. Before, the area was within the control of several external powers, notably Britain, France, the Netherlands, Japan and the United States of America<sup>2</sup>. Following the Second World War, several factors, such as the defeat of Japan, founding of several new states and the Cold War geopolitics added complexity to claims over the territory. In 1947, China, under the rule of the nationalist Kuomintang party, demarcates its territorial claims (PDF) in the South China Sea with an eleven-dash line on a map<sup>3</sup>. The claim covers the majority of the area. Later, in 1953, the Chinese Communist Party (CCP)-led government simplifies the border to nine dashes. To this day, China invokes this nine-dash line as the historical basis for its territorial claims in the South China Sea.

During 1970s, when the UN Economic Commission for Asia and the Far East finds “substantial energy deposits” in the seabed between Taiwan and Japan, the interest in the region is reignited. This period is marked by numerous conflicts between China, Philippines and South Vietnam, as all these countries begun to occupy strategic islands within the area.

In 1982, the third and final United Nations Conference on the Law of the Sea culminates in a resolution that defines the rights and responsibilities of nations in their use of surrounding waters based on exclusive economic zones



and continental shelves. The Exclusive Economic Zone (EEZ) is a sea zone over which a state has special rights regarding the exploration and use of marine resources, including energy production from water and wind. The difference between the territorial sea and the exclusive economic zone is that the first confers full sovereignty over the waters, whereas the second is merely a "sovereign right" which refers to the coastal state's rights below the surface of the sea.

This resolution allowed other states to put forward claims of the territory. Its vague wording has, nonetheless, prevented it from serving as a credible body of law in resolving territorial disputes. Just ten years later, China passes a "the Law on the Territorial Sea and the Contiguous Zone"<sup>4</sup>, by which the whole of the Nine-Dashed Line was declared the exclusive territory of the People's Republic of China. This law went completely against the principles of the UNCLOS Convention.

Following several incidents, the organisation ASEAN5 began six years of negotiations, which resulted in a Declaration on the Conduct of Parties in the South China Sea<sup>6</sup>, where China and the ten ASEAN states affirm their committed to exploring ways to build trust and confidence in accordance with the principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea and other universally recognized principles of international law as well as on the basis of equality and mutual respect. This document, however, nicely formulated, has not prevented several actors in the region to act otherwise.

Recently, the South China Sea is becoming more and more militarised, and we can expect incidents between competing countries only to become more frequent throughout the region, increasing the risk of escalation. Despite the dispute's regional setting and origin, it has nevertheless drawn the attention of



many other countries, both within the region and worldwide: Japan, India, the U.S.A, Russia and other States have become, both indirectly and directly involved, further complicating the already sensitive situation.

Among the disputed territories, the most important ones are probably the Spratly Islands, located in the southern end of the South China Sea and containing some 100-230 scattered islands, isles, shoals, banks, atolls, cays, and reefs that spans some 164,000 square miles. The Spratlys are too small and barren to support permanent human settlement independently, and few have fresh water or any significant land-based resources. Yet, these islands are still considered strategic, economic, and political assets for littoral states in the South China Sea, principally because they can serve as legal base points for states to project claims of exclusive jurisdiction over waters and resources in the South China Sea. It must be realised, though, that the Spratlys area holds strategic importance for all states in the region, simply because these islands straddle the sea lanes through which commercial vessels must route to and from South Asian ports. The islands are currently occupied by 6 countries: China, Taiwan, Vietnam, Philippines, Malaysia, and Brunei. The Paracel Islands are an archipelago that includes over 30 islands, and many sandbanks, cays and reefs, over a maritime area of around 5,800 square miles. Like the Spratly's most of the islands are too small for permanent settlement. However, the islands are contested due to possible oil reserves in the seabed near them.

## **Major Parties Involved**

### **China**

As already mentioned, China bases its territorial claims on historical reasons, as it relies on the assertion that many of the disputed islands were discovered by



the Chinese and thus belong to them. In addition, China performs archaeological research aiming to prove Chinese presence in the area even in the antique. Practically, the Chinese government claims the whole territory within the previously mentioned nine-dashed line. China also uses the strategy of building artificial islands throughout the region, with the purpose of establishing tougher control of the area. Additionally, runways or battlefield docks are being built on those islands. Even though there were decisions against Chinese territorial claims several times in the history, China refuses to retreat.

### **Vietnam**

Just like the Chinese one, the Vietnamese claim can be traced back to ancient imperial times. Equally as China, Vietnam performs archaeological research in the region – the results, nonetheless, differ significantly, as according to them, there are no remains of Chinese, but of Vietnamese ancient culture on the island. The Vietnamese currently occupy a large part of the Spratly islands, and have reinforced their military presence in the area to stress their claim.

### **The Philippines**

The Philippines have officially designated the South China Sea, or at least its eastern part, as the West Philippine Sea. The Philippine's claim is based on the United Nations Convention on the Law of the Sea (UNCLOS), which includes an Exclusive Economic Zone (EEZ) which extends for 200 nautical miles and, naturally, the territorial waters which extend for 12 nautical miles from the coast's baseline. The waters are extremely valuable to the Philippines, who see in them a presence of oil and gas reserves, rich fishing grounds, and an important



trade hub. The Philippines do not recognise the Chinese claim on the Spratly Islands, and neither the Chinese maritime claims based on it.

### Other actors

Other countries hovering the territorial claims are Malaysia, Indonesia and Brunei. These countries base their claims mainly on their Exclusive Economic Zones, Malaysia has a presence on the southern Spratly Islands, which is contested due to the claims of Vietnam and China. Brunei has claimed its EEZ but has no actual presence in the controversial areas of that zone. Indonesia's EEZ extends into the South China Sea but is relatively uninvolved in the conflict, and because of this particular feature, some have put forward the country's potential as an intermediary.

### Timeline of Events

Month Year	Event
1947	China demarcates territory in the South China Sea in the form of a U shape with a dotted line. Nine dashes mark the territory that China marks as theirs.
1994	The UN convention of the Law of the Sea goes into effect after 60 countries ratify it. China and the Philippines later join the convention, the USA has never ratified it.
1995	China builds huts on the disputed Mischief reef. The Philippines make a complaint through the Association of Southeast Asian nations.
1997	The Philippines block Chinese boats from approaching Scarborough shoal. This causing China to protest. The shoal is 230km from the Philippines and 1,000km from China. In the future the Philippines will detain Chinese fishermen for "Illegal fishing" in the area near the shoal.
2009	Vietnam and Malaysia apply for recognition of several continental shelves, this prompts China to submit their nine-dash line map to the UN stating that it: "has indisputable sovereignty over the islands in the South China Sea and adjacent waters".



2011	Philippines file a diplomatic protest as a result of alleged harassment by Chinese patrol boats of a chartered ship searching for oil and gas near the Spratly Islands.
2012	China takes control of Scarborough shoal after a standoff a Philippine naval vessel had stopped a Chinese fishing boat to inspect it.
2013	The Philippines take their dispute with China to the Permanent Court of Arbitration in the Hague.
2014	China ignores protests made by Philippine government with regards to the firing of a water canon by the Chinese government to drive away Filipino fishermen from Scarborough shoal. China repeats their belief that their “sovereignty is indisputable”. December 2014 China issues a paper stating that the panel has no jurisdiction on the case, as it only concerns boundary and sovereignty definitions that are not covered by the UN convention. They will only settle the dispute through negotiations.
2015	The panel in the Hague rules that it does have jurisdiction on at least 15 claims made by the Philippines.
12th July 2016	The arbitration court rules that China has “no historic claims” to islands in the South China Sea.

## Treaties and Resolutions

The Tribunal has addressed the scope of its jurisdiction to consider the Philippines’ claims both in its Award on Jurisdiction, to the extent that issues of jurisdiction could be decided as a preliminary matter, and in its Award of 12 July 2016, to the extent that issues of jurisdiction were intertwined with the merits of the Philippines’ claims. The Tribunal’s Award of 12 July 2016 also incorporates and reaffirms the decisions on jurisdiction taken in the Award on Jurisdiction.



For completeness, the Tribunal's decisions on jurisdiction in both awards are summarized here together.

a. Preliminary Matters

In its Award on Jurisdiction, the Tribunal considered a number of preliminary matters with respect to its jurisdiction. The Tribunal noted that both the Philippines and China are parties to the Convention and that the Convention does not permit a State to except itself generally from the mechanism for the resolution of disputes set out in the Convention. The Tribunal held that China's non-participation does not deprive the Tribunal of jurisdiction and that the Tribunal had been properly constituted pursuant to the provisions of Annex VII to the Convention, which include a procedure to form a tribunal even in the absence of one party. Finally, the Tribunal rejected an argument set out in China's Position Paper and held that the mere act of unilaterally initiating an arbitration cannot constitute an abuse of the Convention.

b. Existence of a Dispute

Concerning Interpretation and Application of the Convention In its Award on Jurisdiction, the Tribunal considered whether the Parties' disputes concerned the interpretation or application of the Convention, which is a requirement for resort to the dispute settlement mechanisms of the Convention. The Tribunal rejected the argument set out in China's Position Paper that the Parties' dispute is actually about territorial sovereignty and therefore not a matter concerning the Convention. The Tribunal accepted that there is a dispute between the



Parties concerning sovereignty over islands in the South China Sea, but held that the matters submitted to arbitration by the Philippines do not concern sovereignty. The Tribunal considered that it would not need to implicitly decide sovereignty to address the Philippines' Submissions and that doing so would not advance the sovereignty claims of either Party to islands in the South China Sea.

The Tribunal also rejected the argument set out in China's Position Paper that the Parties' dispute is actually about maritime boundary delimitation and therefore excluded from dispute settlement by Article 298 of the Convention and a declaration that China made on 25 August 2006 pursuant to that Article. The Tribunal noted that a dispute concerning whether a State has an entitlement to a maritime zone is a distinct matter from the delimitation of maritime zones in an area in which they overlap. The Tribunal noted that entitlements, together with a wide variety of other issues, are commonly considered in a boundary delimitation, but can also arise in other contexts. The Tribunal held that it does not follow that a dispute over each of these issues is necessarily a dispute over boundary delimitation. Finally, the Tribunal held that each of the Philippines' Submissions reflected a dispute concerning the Convention. In doing so, the Tribunal emphasized (a) that a dispute concerning the interaction between the Convention and other rights (including any Chinese "historic rights") is a dispute concerning the Convention and (b) that where China has not clearly stated its position, the existence of a dispute may be inferred from the conduct of a State or from silence and is a matter to be determined objectively.

#### c. Involvement of Indispensable Third-Parties



In its Award on Jurisdiction, the Tribunal considered whether the absence from this arbitration of other States that have made claims to the islands of the South China Sea would be a bar to the Tribunal's jurisdiction. The Tribunal noted that the rights of other States would not form "the very subject-matter of the decision," the standard for a third-party to be indispensable. The Tribunal further noted that in December 2014, Viet Nam had submitted a statement to the Tribunal, in which Viet Nam asserted that it has "no doubt that the Tribunal has jurisdiction in these proceedings." The Tribunal also noted that Viet Nam, Malaysia, and Indonesia had attended the hearing on jurisdiction as observers, without any State raising the argument that its participation was indispensable. In its Award of 12 July 2016, the Tribunal noted that it had received a communication from Malaysia on 23 June 2016, recalling Malaysia's claims in the South China Sea. The Tribunal compared its decisions on the merits of the Philippines' Submissions with the rights claimed by Malaysia and reaffirmed its decision that Malaysia is not an indispensable party and that Malaysia's interests in the South China Sea do not prevent the Tribunal from addressing the Philippines' Submissions.

#### d. Preconditions to Jurisdiction

In its Award on Jurisdiction, the Tribunal considered the applicability of Articles 281 and 282 of the Convention, which may prevent a State from making use of the mechanisms under the Convention if they have already agreed to another means of dispute resolution. The Tribunal rejected the argument set out in China's Position Paper that the 2002 China-ASEAN Declaration on the Conduct of Parties in the South China Sea prevented the Philippines from initiating



arbitration. The Tribunal held that the Declaration is a political agreement and not legally binding, does not provide a mechanism for binding settlement, does not exclude other means of dispute settlement, and therefore does not restrict the Tribunal's jurisdiction under Articles 281 or 282. The Tribunal also considered the Treaty of Amity and Cooperation in Southeast Asia, and the Convention on Biological Diversity, and a series of joint statements issued by the Philippines and China referring to the resolution of disputes through negotiations and concluded that none of these instruments constitute an agreement that would prevent the Philippines from bringing its claims to arbitration. The Tribunal further held that the Parties had exchanged views regarding the settlement of their disputes, as required by Article 283 of the Convention, before the Philippines initiated the arbitration. The Tribunal concluded that this requirement was met in the record of diplomatic communications between the Philippines and China, in which the Philippines expressed a clear preference for multilateral negotiations involving the other States surrounding the South China Sea, while China insisted that only bilateral talks could be considered.

#### e. Exceptions and Limitations to Jurisdiction

In its Award of 12 July 2016, the Tribunal considered whether the Philippines' Submissions concerning Chinese historic rights and the 'nine-dash line' were affected by the exception from jurisdiction for disputes concerning "historic title" in Article 298 of the Convention. The Tribunal reviewed the meaning of "historic title" in the law of the sea and held that this refers to claims of historic sovereignty over bays and other near-shore waters. Reviewing China's claims and conduct in the South China Sea, the Tribunal concluded that China claims



historic rights to resources within the 'nine-dash line', but does not claim historic title over the waters of the South China Sea. Accordingly, the Tribunal concluded that it had jurisdiction to consider the Philippines' claims concerning historic rights and, as between the Philippines and China, the 'nine-dash line'. In its Award of 12 July 2016, the Tribunal also considered whether the Philippines' Submissions were affected by the exception from jurisdiction in Article 298 for disputes concerning sea boundary delimitation. The Tribunal had already found in its Award on Jurisdiction that the Philippines' Submissions do not concern boundary delimitation as such, but noted that several of the Philippines' Submissions were dependent on certain areas forming part of the Philippines' exclusive economic zone. The Tribunal held that it could only address such submissions if there was no possibility that China could have an entitlement to an exclusive economic zone overlapping that of the Philippines and deferred a final decision on its jurisdiction. In its Award of 12 July 2016, the Tribunal reviewed evidence about the reefs and islands claimed by China in the South China Sea and concluded that none is capable of generating an entitlement to an exclusive economic zone. Because China has no possible entitlement to an exclusive economic zone overlapping that of the Philippines in the Spratly Islands, the Tribunal held that the Philippines' submissions were not dependent on a prior delimitation of a boundary. In its Award of 12 July 2016, the Tribunal also considered whether the Philippines' Submissions were affected by the exception from jurisdiction in Article 298 for disputes concerning law enforcement activities in the exclusive economic zone. The Tribunal recalled that the exception in Article 298 would apply only if the Philippines' Submissions related to law enforcement activities in China's exclusive economic zone. Because, however, the Philippines' Submissions related to events in the



Philippines' own exclusive economic zone or in the territorial sea, the Tribunal concluded that Article 298 did not pose an obstacle to its jurisdiction. Lastly, in its Award of 12 July 2016, the Tribunal considered whether the Philippines' submissions were affected by the exception from jurisdiction in Article 298 for disputes concerning military activities. The Tribunal considered that the stand-off between Philippine marines on Second Thomas Shoal and Chinese naval and law enforcement vessels constituted military activities and concluded that it lacked jurisdiction over the Philippines' Submission No. 14(a)-(c). The Tribunal also considered whether China's land reclamation and construction of artificial islands at seven features in the Spratly Islands constituted military activities, but noted that China had repeatedly emphasized the non-military nature of its actions and had stated at the highest level that it would not militarize its presence in the Spratlys. The Tribunal decided that it would not deem activities to be military in nature when China itself had repeatedly affirmed the opposite. Accordingly, the Tribunal concluded that Article 298 did not pose an obstacle to its jurisdiction



### **Possible Solutions**

An obvious, yet extremely taxing solution would be the redivision of the territory between the member states that are disputing the territory. Doing this equitably through the appropriate redivision of resources, both militarily and economically, whilst bearing in mind the historical claims to the land. This will allow the countries hopefully to dissolve the dispute within the area. It is important to bear in mind the importance of paperwork, such as the creation of a treaty so that the guidelines and redistribution of territory is clear and for future reference in possible disputes regarding resources and territory in respective EEZ's. Highlighting the importance of finding a solution with regards to the maritime passageway that the disputed territory allows. The ownership of the waterway should be carefully clarified and acknowledged by member states as this passageway as previously stated creates a large revenue to the country, with regards to taxes and the distribution of trade. A clear division of the territory will allow for more clarity with regards to the dispute with over the territory and it will also give more stability that can allow debate and discussion with member states towards a more permanent solution. It is also important to stress the need of regulations of the creation of artificial islands and military activities in EEZ's by countries that are passing through the body of water. In order for the solution to be clear and have a permanent effect it is important that another treaty or clarification on the UNCLOS is made. This will also allow for guidelines of any other future dispute like this should come up.



## Important Links

<https://www.youtube.com/watch?v=luTPMHC7zHY>

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