

China: The Story of a Missed Opportunity. How China Managed to Disregard the South China Sea Ruling

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Abstract: On July 12, 2016 an international tribunal (registered with The Hague Permanent Court of Arbitration) ruled against China's territorial claims in the South China Sea, arguing that the Chinese historic rights within the Nine Dash-Line map have no valid effect under the United Nations Convention on the Law of the Sea (UNCLOS). The tribunal's decision came at a time when tensions in the South China Sea had reached a very high level amid increasing maritime incidents caused by China and the Chinese government's construction of artificial islands in the open sea. What was supposed to be a major victory against China for the US-backed states (Vietnam, Philippines), turned out to be only a symbolic success for the Philippines. China not only rejected the sentence, but continued to conduct provocative naval exercises, harass other foreign ships and build artificial islands for military purposes. Using historical research and comparative analysis, this paper illustrates how China's rejection of the ruling was facilitated by a number of legal, economic and political factors that have diminished international reactions and pressures on the Chinese government: the non-ratification of UNCLOS by the US, the lack of coercive mechanisms to enforce international rulings, the economic interdependence between China and other regional states and the precedents set by other major powers.

Keywords: South China Sea, Permanent Court of Arbitration, UNCLOS, maritime claims, historic rights.

Introduction

One of the most important episodes in the South China Sea territorial disputes took place in July 2016 when, in the international lawsuit filed by the Philippines, the Permanent Court of Arbitration in The Hague ruled against most of the claims brought by the People's Republic of China

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Conflict Studies Quarterly
Issue 41, October 2022, pp. 44–59

DOI: 10.24193/cs.q.41.3
Published First Online: 01 October / 2022

(Permanent Court of Arbitration, 2016). The process began in early 2013 when the Philippines decided to seek international assistance in clarifying the legal status of the islands and adjacent waters. The main topics addressed included the legality of the Nine-Dash Line map, Chinese naval activities in Philippine waters and the legal status of islands claimed under UNCLOS (Department of Foreign Affairs of the Republic of the Philippines, 2013).

Right from the start, the Chinese government condemned the Philippines' decision to internationalize the dispute, believing that territorial differences of this kind should be resolved through bilateral talks and not by appealing to international bodies. Also, it rejected the validity of the arbitral tribunal and the lawsuit filed by the Philippines, refusing to participate in it for its entire duration (Ministry of Foreign Affairs of the People's Republic of China, 2014).

Geopolitical background

Territorial disputes in the South China Sea date back to the mid-20th century, when six of the eight regional states (China, Taiwan, Vietnam, Philippines, Malaysia, Brunei) became increasingly attracted by the strategic and economic importance of the sea. The South China Sea connects the Pacific and Indian Oceans and is one of the world's main maritime trade routes. Annually, this area is transited by goods and commodities worth more than \$5 billion, with each littoral state heavily involved in maritime trade activities (Kaplan, 2011). At the same time, this area contains large quantities of oil and liquefied gas that could pave the way for countries to achieve energy independence (U.S. Energy Information Administration, 2013). As such, the South China Sea is one of the world's most important trading conglomerates.

The main problem, however, lies in the fact that both the trade routes and the location of resources are in the central area of the sea, which is why each state tries to interpret maritime legislation in such a way as to obtain as many economic and strategic advantages as possible. Additionally, with the evolution of the international maritime law, states have also updated their territorial claims and expanded their naval activities. As a consequence, maritime incidents have started to occur and have multiplied particularly in the last decade with the accession to power of Chinese President Xi Jinping. China has been involved in almost every maritime incident since the first UNCLOS conference took place in 1958 and has always taken the first step in these conflicts. The main reasons why the PRC has been consistently involved in these maritime incidents are the development of its naval capabilities and the scale of its claims.

Thus, the Philippines' decision to go to an international court was intended to bring more clarity to the way in which states should apply the UNCLOS provisions and obtain international support in their differences with China.

Literature review

Discussions regarding the implementation of the latest international law regulations in the South China Sea gained momentum with the entry into force of UNCLOS in 1994. The main issue was how states would apply UNCLOS, as they were faced with updating their domestic maritime legislation and taking into account both the new provisions of the convention and the old principles of customary maritime law.

Valencia, Van Dyke and Ludwig (1997) found that the intensification of the divergence in the 1990s occurred against the background of China's decision to accelerate the process of collecting oil resources and restricting other states' access to the South China Sea. The authors note how the claimants have been expanding their number of occupied islands every year, even though most of them are uninhabitable and therefore do not generate maritime rights. Based on these observations, Van Dyke and Valenica (2000) proposed several scenarios that focus more on political compromises and less on maritime legislation. Shicun and Keyuan (2013) conducted an analysis of the applicability of UNCLOS at the regional level, highlighting the problem of overlapping maritime boundaries that fails to be resolved through regional forms of cooperation. Military activities in exclusive economic zones and the risks posed by arming states were highlighted among the most important topics. As this was a period marked by the emergence of multilateral regional bodies such as ASEAN, the role that regional cooperation can play in de-emphasizing the different interpretations of UNCLOS was also raised. The former deputy prime minister of Singapore, S. Jayakumar (2005), noted that after two decades since UNCLOS was concluded, numerous opportunities have arisen for cooperation on resource exploitation, biodiversity protection and counter-terrorism. As such, the South China Sea states should use the ASEAN institutional framework to strengthen their regional cooperation.

International academic attention started to shift to the legality of China's claims in the late 2000s. This was because the Chinese government decided to bring the 1947 nine-dash line map back to the forefront to claim the South China Sea on the basis of historical rights. This has created a division among scholars on how to interpret the Chinese claims, with two main strands of opinion being identified: pro-Chinese (confirmed China's historical sovereignty) and anti-Chinese claims (considered that China violates the international maritime law).

To illustrate the validity of Chinese arguments, Guoqiang (2017) showed how the empire's first contact with islands occurred in the 2nd century BC, when the first expeditions to the high seas were made and territories were given local names. Thus, China occupied and carried out socio-economic activities on uninhabited territories, fulfilling the provisions of customary international law regarding the means of acquiring territories. Shicun (2013) illustrated that, until the emergence of the Westphalian concept, the mandala political system predominated in Southeast Asia. It was inspired by the

Confucian culture and stipulated that the power of the emperor was conferred by the number of the peoples rather than the size of the occupied territories. As a result, the islands in the South China Sea were under the control of the imperial court even though it did not have a constant physical presence. Granados (2006) focused on China's post-World War II claims and invoked numerous Chinese expeditions and administrative takeover ceremonies of archipelagos as evidence of historical rights. Samuels (2005) has been more moderate in his views on the validity of the Chinese evidence. He confined himself to outlining the events leading up to China's claims, highlighting the historical arguments put forward by the Chinese state.

On the other side, one of the most vocal critics of the legality of the Chinese claims has been British journalist Bill Hayton (2017). According to him, many Anglo-Saxon scholars who opined in favour of Chinese arguments (Dieter Heinzig, Marwyn Samuels, Bryan Murphy, Stefan Talman) have drawn on local Chinese historiography without consulting alternative sources. Therefore, the degree of objectivity and accuracy of historical events of these works is reduced. He also pointed out problems with the nine-dash line map or the translations of the Chinese names of the archipelagos, revealing that they were inspired by British historiography (2019). Additionally, Hayton (2014) centralized the findings of several historians and anthropologists (Leonard Blussé, Derek Heng, Pierre-Ives Manguin, Roderik Ptak, Angela Schottenhammer, Nicolas Tarling, Geoff Wade sau Li Tana) that mentioned there are no records of the ethnic peoples who occupied the South China Sea archipelagos during the first millennium. Consequently, no nation is entitled to use the historical argument, given that it has not consistently administered the claimed territories. Florian and Pierre-Marrie Dupuy (2013) have used official Chinese government documents and documents issued by international bodies to show that China has taken up in an evasive and ambiguous way the international provisions on customary law, without making a distinction between territories capable of generating exclusive economic rights and those that do not offer any legal privilege. The two also illustrated numerous technical errors in the drawing of the nine-dash line map, such as the lack of geographical coordinates or the incorrect drawing of lines delimiting China's territorial claims. For this, they referred to the *Burkina Faso v. Republic of Mali*, the *Palmas Island* and the *Nicaragua v. Honduras* cases, where the court did not admit as evidence inaccurate maps without exact coordinates.

The literature review has thus illustrated that the division in international academia is caused by the way researchers have interpreted the historiography of the region. The studies that have given the Chinese argument the upper hand have predominantly used historical arguments, avoiding to pronounce on the validity in terms of UNCLOS provisions. On the other hand, criticisms of Chinese claims have highlighted numerous incompatibilities between the so called historic rights and the new UNCLOS provisions.

The evolution of international maritime law

International maritime law is the part of public international law that regulates interstate maritime interactions such as freedom of navigation, jurisdiction of states or operating privileges. It consists of *customs*, *general principles* recognized by nations, *treaties*, *court decisions* and *legal research*. Of these, the first three are the primary sources of law, as they have equal legal force and are most commonly used (LL.M. Program in International Law + Fletcher Maritime Studies Program, 2017).

The international maritime law is governed by *the principle of freedom*, *the principle of sovereignty* and *the principle of the common heritage of mankind* (Tanaka, 2012, p. 37). The first one ensures the peaceful use of the seas and oceans for civil, commercial or military purposes, and the second one promotes the interests of states in areas close to shore. The two principles complement each other to ensure that national interests are protected. The third one is designed to ensure that all states participate in the collective effort to protect the maritime environment.

At treaty level, the United Nations Convention on the Law of the Sea (UNCLOS) is the main international agreement governing the legal regime of waters. It is a codification of customs developed over centuries and is considered the modern version of international maritime law or the „constitution of the seas” (United Nations, 1983, p. xxxiv). Jurisprudence is provided by the International Court of Justice in The Hague, the UN judicial body that settles disputes between states and provides advisory opinions that may acquire legal force. Each member country of the organisation is automatically part of the Court’s statute, but may decline its jurisdiction (Crawford, 2012, p. 22).

Customary maritime law

Customary law is made up of the totality of legal rules formed over the centuries by their constant repetition in the actions taken by states. To obtain the status of custom, any principle must constitute the general practice of nations and be accepted by them as a factor of legality (*opinio juris*). The development of the principle is therefore influenced by its uniformity and consistency (Crawford, 2012).

The development of customs in maritime law began in the 15th century, when European rulers divided their oceans to avoid military conflicts and thus denied access to other countries (*mare clausum*). A hundred years later, the concept of free navigation (*mare liberum*) replaced the previous principle and the sea became international territory where any nation could sail and trade. In the early 18th century the first modern maritime delimitations appeared, in which the limit of territorial waters was set at three nautical miles from the mainland. The distance was considered sufficient for ships to be protected from shore guns (LL.M. Program in International Law + Fletcher Maritime Studies Program, 2017). Also, during this period, four ways of acquiring and transferring

sovereignty were developed:

- cession: acquisition by relinquishing another state's rights;
- occupation: acquisition on the basis of the non-existence of any previous sovereignty („terra nullius”);
- prescription: acquisition by tacit acceptance of other states;
- accretion: acquisition by physical annexation of the area claimed by the central territory.

Some of these principles are still valid today and are used in various international agreements (Lindley, 1926, pp. 124–178; Crawford, 2012, p. 220; Sharma, 1997, pp. 36–37).

UNCLOS

The modern regulations of maritime law emerged when it was codified by the UN. The new provisions revised the 17th century principle of free navigation, which simplistically delimited territorial waters and international fisheries.

There were three conferences that preceded the formal adoption of the Treaty. The first one took place in Geneva in 1958, following which the first five official documents were adopted two years later (United Nations, 1958):

- Convention on territorial waters and contiguous zones;
- Convention on International Waters;
- Convention on Fishing and Conservation of Living Resources in International Waters;
- Convention on the Continental Shelf;
- Optional Protocol on the obligation to resolve maritime disputes.

The second conference, held in 1960, did not provide new agreements but rather reflected the ideological rupture generated by the Cold War. Thus, it was not possible to establish a uniform practice in the delimitation of territorial waters, with almost ten distinct methods of calculating them (United Nations, 1960). The last conference was held in 1973 and focused on identifying a procedural consensus on the application of UNCLOS. As such, more than 160 states were involved and discussions continued until 1982, when the new Convention was voted on. It entered into force in 1994, was adopted by 168 states and signed by a further 14 (United Nations, 1984). Although the United States of America was among the proactive supporters of the Convention, it did not ratify it but chose only to retain its status as a signatory party (LL.M. Program in International Law + Fletcher Maritime Studies Program, 2017). The final version incorporated over 400 technical and procedural stipulations and is still the form used today. It covered the issues of States' territorial delimitations, exploitation rights, transitional arrangements, scientific activities, environmental protection and the resolution of disputes (United Nations, 2022).

The most important UNCLOS regulation concerns the delimitation of maritime rights of states and refers to territorial sovereignty and sovereign rights. The first category includes internal, territorial and archipelagic waters and international straits. The second comprises the contiguous zone, the exclusive economic zone and the continental shelf, where legal privileges are limited. The remaining areas are part of international waters that do not belong to any state (Tanaka, 2012).

UNCLOS also regulates the geographical characteristics of the territories, so the maritime rights that these territories generate depend on the possibility that the territories provide socio-economic conditions: islands, rocks (atolls, sandbanks, reefs), artificial islands. Only the islands that remain above the sea during high tides are capable of supporting socio-economic activities, so those are the only ones that generate maritime rights. (Tanaka, 2012).

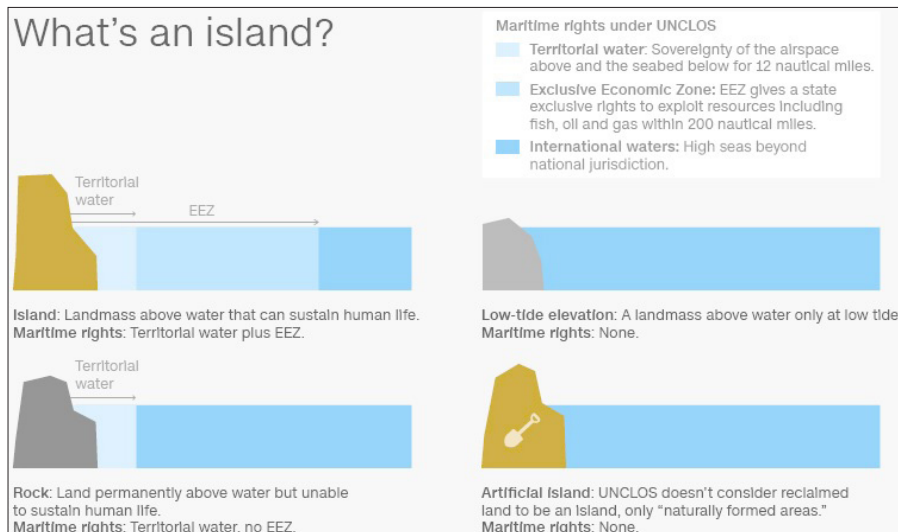


Figure 1: Island classification according to UNCLOS

Source: Canny, 2017.

As with customary law, UNCLOS also contains rules on the settlement of territorial disputes. The International Tribunal for the Law of the Sea is the intergovernmental forum mandated by the UN since 1982 to adjudicate disputes concerning the application of the Law of the Sea Treaty (International Tribunal for the Law of the Sea, 2019). Its jurisdiction applies to all disputes that meet the admissibility conditions laid down in the Convention. The role of the Tribunal is an important one, given that the modalities for amicable settlement of maritime disputes are loosely regulated. However, if the parties do not agree on dispute settlement procedures, the Convention provides that

the case be heard by an Annex VII arbitral tribunal appointed by the Permanent Court of Arbitration.

A major role in China's claims has been played by historical rights. The issue of historical rights is a complex one, as they were not codified by UNCLOS, but remained perceived as a separate category of customary law (Kopela, 2017, pp. 185–186). In these circumstances, they have been interpreted differently by states and experts, so the Chinese government has seized this opportunity to argue that, in the case of South China, customary law should take precedence over UNCLOS.

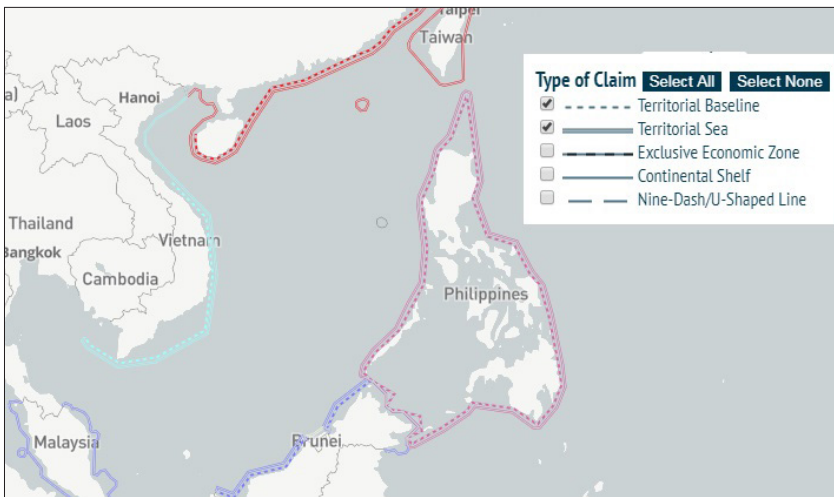


Figure 2: Territorial Sea Delimitation in the South China Sea according to UNCLOS

Source: Asia Maritime Transparency Initiative. (2022b).

Who's Claiming What? Retrieved from <https://amti.csis.org/maritime-claims-map/>.

Summary of the judgment

According to the Note Verbale sent by the Philippines, clarifications have been requested regarding the validity of the historical rights claimed by China, the geographical status of some maritime features and the patrolling and resource exploitation actions carried out by the Chinese state. The Philippines considered that China violated its maritime rights through its activities in the Scarborough Shoal, Spratly area and through the violation of the exclusive economic zone as a result of the South China Sea claim under the nine lines map (Department of Foreign Affairs of the Republic of the Philippines, 2013).

China refused to participate, claiming that only the International Court of Justice can review disputes over the territorial sovereignty of states and considered the Tribunal to be illegally established (Ministry of Foreign Affairs of the People's Republic of China,

2014). Two years after the trial began, the Tribunal, constituted under the authority of the Permanent Court of Arbitration in The Hague, unanimously decided that it met the conditions to hear the case (Permanent Court of Arbitration, 2015).



Figure 3: Photograph from Jurisdictional Hearing — July 2015 — Hearing in Session

Source: Permanent Court of Arbitration (2015). The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China). Retrieved from <https://pcacases.com/web/sendAttach/1490>.

Without ruling on the issue of sovereignty or the delimitation of maritime boundaries between States, the Tribunal ruled on 7 of the 15 points raised by the Philippines, awarding the Philippines a judgment in each case. It concluded that:

- Any alleged pre-existing historical evidence is no longer valid if it contravenes the provisions of UNCLOS. Thus, there is no legal basis for China to claim the South China Sea on the basis of historical arguments and the map of the nine lines.
- No territory in the Spratly archipelago generates EEZ as it cannot support socio-economic development, and part of the territories in the Scarborough Zone does not even generate maritime rights related to territorial waters.
- China has violated the EEZ of the Philippines by building artificial islands, exploiting underground resources and restricting access to Philippine civilian vessels.
- China has contributed to the degradation of the region's marine biodiversity and ecosystem through fishing activities and the construction of artificial islands (Permanent Court of Arbitration, 2016).

International reactions

Despite the fact that the ruling was a huge victory for the Philippines, its implementation has remained in question to date. Although the Tribunal's decisions are binding under Article 296 of the treaty, China has refused to do so, refusing to accept the involvement of the international forum and maintaining its view of its sovereignty over the disputed islands (Government of the People's Republic of China, 2016; Ministry of Foreign Affairs of the People's Republic of China, 2016). Moreover, the Philippine president adopted an unexpectedly pro-Chinese stance and expressed his willingness to disregard the ruling in favor of strengthening bilateral diplomatic relations with China (De Castro, 2017, pp. 166–167).

Under these circumstances, Vietnam has taken the most vehement position against the implementation of the sentence. Malaysia and Brunei appreciated the Tribunal's involvement but took neutral positions on the implementation of the sentence. Taiwan was the only country to side with China, due to its strategic interests. It occupies the largest island in Spratly, and accepting the settlement would have meant losing the exclusive economic zone, as the archipelago has been declared uninhabitable. (LL.M. Program in International Law + Fletcher Maritime Studies Program, 2017; Asia Maritime Transparency Initiative, 2022a).

The inability to compel China to comply with the judgment illustrated the limitations of the UN procedures. This adds to a list of cases where China has taken advantage of its permanent membership of the UN Security Council to block various resolutions dictated against Beijing's interests (Malik, 2005, pp. 20–21). The Chinese government's hostile attitude towards the internationalisation of South China Sea disputes was therefore predictable, especially as public statements by Chinese leaders have emphasised a preference for bilateral dialogues over multilateral negotiations. At the same time, ASEAN's lack of response has contributed to the continued tension and uncertainty. It was only the second time in the organisation's history that ASEAN member countries did not take an official position on a decision of an international court (Hiep, 2016, p. 3). This situation has encouraged China to offer other countries political and economic favours through bilateral agreements, accentuating ASEAN's institutional gridlock.

The geopolitical context after the ruling

The fact that China was able to so easily overrule the court's decision and continued its artificial island-building operations and aggression against other ships has highlighted several matters. Firstly, there is no international mechanism for enforcing the decisions of international courts. Therefore, the prospect of other countries such as Malaysia or Vietnam using this option in the future has become less feasible. Secondly, the Philippines preferred not to jeopardize its economic and political realities with China, given the major weight that trade between the two countries has for the Philippine

state. Therefore, a major power can successfully use its economic influence for gaining significant political leverage in the region. Thirdly, the reaction of the Western powers, led by the United States, was surprisingly measured. There has been no sustained pressure on China or even an attempt to try to impose economic sanctions on Chinese vessels. Looking back in recent history, however, we note that there have been cases where major powers have taken a similar attitude to that of China when faced with an unfavorable ruling

United States vs. Nicaragua (1986)

In 1986 the International Court of Justice ruled on Nicaragua's complaint about the financial and military support provided by the United States to rebels fighting against the Nicaraguan government. Through its involvement, the US was accused of violating a number of international treaties and conventions, including the provisions of the United Nations Charter relating to respect for territorial integrity and national political independence. The US refused to participate in the trial, citing the lack of jurisdiction of the Court. Moreover, it dissolved the Treaty of Friendship, Commerce and Navigation between the two countries to invalidate the court's legitimacy. The ruling confirmed violations of both treaties and customary law by the US, which was ordered to stop supporting the insurgents and pay moral damages to Nicaragua (International Court of Justice, 1986).

None of the Court's decisions have been respected by the US government, which has also refused to negotiate compromise solutions. For these reasons, Nicaragua appealed to the UN Security Council to take punitive measures against the US. As a permanent member, however, the United States vetoed all resolutions directed against it. The two countries later made peace with the election of a new Nicaraguan president (Nguyen & Vu, 2016). It was the first time that a state refused to participate in the trial and did not enforce the court's sentence.

The Great Britain vs. Mauritius (2010)

In 2010 Mauritius applied UNLCOS procedures to challenge the UK's Marine Protected Area status of the Chagos Islands in the British Indian Ocean Territory. The British move was perceived by the Mauritian government as an attempt to prevent the long-term return of the indigenous population to the region. As such, the illegality of the British administrative separation of the archipelago from the rest of the territory was invoked. Although Britain has shown itself willing to cede sovereignty of the territory once it no longer serves defensive military purposes, the lack of diplomatic progress has led to the internationalisation of the dispute (Permanent Court of Arbitration, 2015).

The Permanent Court of Arbitration invalidated the UK's claim in 2015, as Mauritius has maritime rights in the area under UNCLOS. The UN General Assembly also called

in 2019 for the release of the Chagos Islands by the end of the year. The request was made after the International Court of Justice also ruled against the UK, deeming its approach unlawful. In both cases, the British government ignored the courts' orders and challenged their jurisdiction (Bowcott & Borger, 2019).

Russia vs. The Netherlands (2013)

A Dutch-flagged Greenpeace ship sailed to the Arctic in 2013 to protest against regional resource exploitation. After tensions escalated in the area of a Russian oil rig, all protesters were arrested on charges of piracy and illegal entry into Russia's exclusive economic zone. The Dutch request that the entire crew be released was not met, so the Dutch state went to court. Russia refused to participate in the trial, citing its failure to ratify provisions on court involvement in cases involving violations of sovereign rights (Nguyen & Vu, 2016).

ITLOS has ordered the release of the detainees for the sum of €3.5 million, pending a final sentence. The Russian government initially opposed this decision but released all prisoners after two months under the auspices of internal ordinances. Subsequently, the Permanent Court of Arbitration ruled that Russia's actions violated UNCLOS and ordered it to pay compensation to the Dutch state. Again, Russia ignored the ruling and did not recognise the Court's jurisdiction (Permanent Court of Arbitration, 2017). The two countries reached an agreement in 2019 in which Russia pledged to pay €2.7 million in damages (The Ministry of Foreign Affairs of the Russian Federation, 2019).

All these examples illustrate that when a great power is involved in an international trial, there is a good chance that it will reject an unfavourable ruling. None of these powers have respected the decisions of the courts and have defied their authority by adopting official positions. At the same time, they have used diplomatic channels to resolve differences: the US has supported Nicaragua's new president, Russia has finally released Dutch activists, Britain has promised to return territory as soon as it is no longer used for military purposes, and China has offered economic favours to the South China Sea states (Allison, 2016; Llamzon, 2008). The effectiveness of the international legal system is therefore a matter of debate, since its current form favours differing interpretations and insufficiently regulates the means of enforcement of judgments (Donoghue, 2014).

On the China-Philippines case, Chinese leaders blamed their US counterparts for repeated pressure to comply with the ruling, as the US has not ratified UNCLOS. (The Embassy of the People's Republic of China in New Zealand, 2022). The non-ratification of UNCLOS was criticized even by several US officials during the last decade, including the US Secretary of Defense, who stated that the situation has weakened the international credibility of the United States. (US Department of Defense, 2012). Representatives of the Democratic and Republican parties, together with members of the naval forces also drew attention to the need for a firm stance on international maritime law in the

context of increasing Chinese assertiveness in the South China Sea (Office of the Staff Judge Advocate, 2021, p. 86).

In the light of these considerations, it can be argued that China's decision not to comply with the South China Sea maritime rights ruling was facilitated by previous examples of other powers and the lack of clear legal mechanisms governing how such cases are resolved. The US decision not to ratify UNCLOS has also been used by the Chinese government to motivate its decision of not complying with the ruling.

Conclusion

The rejection of the 2016 ruling confirmed China's unwillingness to accept the involvement of any international body in the South China Sea maritime dispute. At the same time, it illustrated that there is no coercive mechanism to force China to comply with the ruling, especially as other major powers have taken a similar attitude to international court decisions. However, in order to maintain their image as a benign power, Chinese leaders have declared their readiness to hold bilateral negotiations with the other countries bordering China, focusing on points of economic and cultural convergence. The implementation of this strategy coincided with the paradigm shift at the White House in 2016, which, through a foreign policy less focused on the Asia-Pacific region, allowed China to avoid the international pressure generated after the ruling.

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