

Session 8. Emerging Disrupters to Maritime Order in the South China Sea

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The preamble to the 1982 Convention on the Law of the Sea (UNCLOS) states that it was intended to establish a legal order for the oceans that is universally accepted. This goal was achieved, as UNCLOS now has 168 Parties.

One of the key features of UNCLOS is that it contains a compulsory binding dispute settlement system with very limited exceptions and exclusions. The assumption is that States Parties to UNCLOS will comply in good faith with decisions of courts and tribunals interpreting UNCLOS provisions because it is in their common interest to have a clear and predictable set of rules governing their activities in ocean space.

As a general rule States in practice comply in good faith with decisions of courts and tribunals interpreting UNCLOS provisions. Between 1994 and 2017, 51 law of the sea disputes were brought to courts or tribunals. An overwhelming majority of the decisions have been respected and complied with. There have only been three instances of non-compliance or partial compliance, and in two of those cases, the *South China Sea* case and the *Arctic Sunrise* case, one party declined to appear in the proceedings.

The issue of non-compliance is important to the maintenance of a legal order in the South China Sea. The Arbitral Tribunal in the *South China Sea* case made two important rulings concerning rights to natural resources in the South China Sea. First, it ruled that none of the disputed geographic features in the Spratly Islands are “islands” entitled to an exclusive economic zone or continental shelf of their own. Second, it decided that China has no “historic rights” to explore and exploit natural resources in the South China Sea in the maritime zone of the States bordering the South China Sea. Consequently, the areas of overlapping maritime claims in the southern part of the South China Sea between China and the other bordering States is now limited to the 12 nm territorial sea around the disputed islands in the Spratly Islands. The result is that China has no claim under international law to the natural resources in the EEZ or on the continental shelf of the States bordering the South China Sea.

It is still unclear what impact the Award will have on the sovereignty and maritime disputes in the South China Sea. China has maintained that the Award is null and void and has no legal effect. However, it can be argued that in practice the Award has had and will continue to have an impact on the conduct of China in the South China Sea as well as on the conduct of the ASEAN States bordering the South China Sea.

The South China Sea Case and China’s reaction to it also appears to have had an impact on the conduct of States outside the region. Recent developments suggest that several “outside powers” intend to exercise passage rights and high seas freedoms in the South China Sea in accordance with what they believe is permitted by the legal order established in UNCLOS and confirmed by the Award. This development is also likely to have an impact on the conduct of China as well as the other States bordering the South China Sea.