24

Failing Rule of Law

The Case of the South China Sea

Agnes Chong

24.1 INTRODUCTION: THE RULE OF LAW

Overlapping claims in the South China Sea (SCS)[1] are at fundamental odds with States complying with their obligations to cooperate to protect the environment and to have due regard for rights and interests in the SCS. This conundrum invites the question 'is the rule of law for the oceans fit for purpose?'[2] Contestations over fishing, oil exploration, land reclamation, freedom of navigation rights and interests in the SCS have not been resolved by the rule of law; but rather have been subjects of political hostilities and confrontations that escalated and eased, and threatened the rule of law.[3] The rule of law was reinstated when the Permanent Court of Arbitration (PCA) adjudicated on the maritime entitlements between the Philippines and China in the *South China Sea Arbitration*. Amid open conflicts in the SCS, the ruling is primarily seen as countering a powerful political campaign initiated by China on its SCS neighbours to accept the legitimacy of China's

[1] The SCS comprises Thailand, Cambodia, Vietnam, China, Taiwan, the Philippines, Singapore, Malaysia, Brunei and Indonesia. Six states have overlapping claims over the SCS namely, China, Taiwan, Vietnam, the Philippines, Malaysia and Brunei.

[2] The theme of The Rule of Law for Oceans Conference 4–5 November 2019 (University of Oslo/Norwegian Institute for Water Research).

[3] For background to the SCS conflict, see Clive Schofield, Untangling a Complex Web: Understanding Competing Maritime Claims in the South China Sea in Cheng-Yi Lin and Ian Storey (eds), *The South China Sea Dispute* (Singapore: ISEAS-Yusof Ishak Institute, 2016), 21–46; Robert C. Beckman, ASEAN and the South China Sea Dispute in Pavin Chachavalpongpun (ed), *Entering Unchartered Waters ASEAN and the South China Sea* (Singapore: Institute of Southeast Asian Studies 2014), 15–35; Kun-Chin Lin and Andres Villar Gertner, China and the Emerging Order in the East and South China Seas (Chatham House, The Royal Institute of International Affairs, Research Paper, July 2015), available at 20150731MaritimeSecurityAsiaPacificLinGertner-0.pdf (chathamhouse.org); and Hayley Roberts, Current Legal Developments South China Sea, Responses to Sovereign Disputes in the South China Sea, 30 *The International Journal of Marine and Coastal Law*, 2015, 199–211.

https://doi.org/10.1017/9781009253741.031 Published online by Cambridge University Press

maritime expansion.[4] It also sets a precedent for SCS States to comply with the rule of law and establish a rules-based order in the SCS.[5] The United Nations Convention on the Law of the Sea (UNCLOS)[6] is the normative framework for a global legal order for the oceans. Its goal is to maintain peace and security and uphold an equitable system of balancing the rights and obligations of coastal States and non-coastal States.[7] UNCLOS essentially shifts a system of unilateralism to multilateralism through the Convention's duties to cooperate, consult and obtain approval from various sea authorities such as the International Maritime Organisation and the International Seabed Authority, as well as mandates to resolve disputes by arbitration or adjudication.[8]

This chapter has four sections, following this opening one. Following this introduction, Section 24.2 discusses the *South China Sea Arbitration* that emphasised the obligations of cooperation and due regard. Section 24.3 highlights the cooperation regime of the SCS, and Section 24.4 discusses the obligation of due regard. Both of these fundamental mechanisms are structurally disabled due to the conflict over maritime claims. Section 24.5 addresses the difficulty of exercising the obligation to cooperate and at the same time have due regard to the rights and obligations of other States and recommends that the ASEAN Code of Conduct (COC) must enable radical action of States to adhere to their international obligations in marine protection of the SCS.

24.2 THE SOUTH CHINA SEA ARBITRATION AND PART XII OF UNCLOS

The PCA ruling is highly significant for marine protection in the SCS: it reinforced Part XII of UNCLOS and determined the legal rights and obligations of States in relation to the SCS.[9] *The South China Sea Arbitration* between the Philippines and China concerned legal maritime entitlements in the SCS and the lawfulness of certain actions by China decided by the PCA in accordance with UNCLOS.[10]

[4] Douglas Guilfoyle, The Rule of Law and Maritime Security in the South China Sea, 95(5) *International Affairs*, 2019, 999–1017, 1016.

[5] The term 'rules-based order' has become politicised and associated with curbing China's expansion in the SCS, which is an incidental outcome of enforcing the rule of law in the SCS, but it is not the main goal. See Hitoshi Nasu and See Seng Tan, A Rules-Based Order in the Asia-Pacific in Prospects for the Rules-Based Global Order, The Australian National University, The Centre of Gravity Series Paper No. 34, 2017.

[6] United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 397.

[7] Preamble to UNCLOS.

[8] Bernard H. Oxman, The Rule of Law and the UN Convention on the Law of the Seas, 7 *EJIL*, 1996, 353–371, 356.

[9] Duncan French, In the Matter of the South China Sea Arbitration: *Republic of Philippines* v. *People's Republic of China*, 19(1) *Environmental Law Review*, 2017, 48–56.

[10] South China Sea Arbitration (*The Philippines* v. *China*) PCA Case No 2013–19 (12 July 2016).

https://doi.org/10.1017/9781009253741.031 Published online by Cambridge University Press

China did not take part in the proceedings, and the hearings continued with China in absentia.[11]

While the arbitration decided the legal issues in the case,[12] it importantly upholds the rule of law for oceans in the face of contemporary challenges and enforcement of global rules. By emphasising UNCLOS as the constitution of the oceans to balance interests, the tribunal disregarded non-legal interests, that is, ultimately extinguishing historical claims in the EEZ[13] to focus on territorial entitlements protected by law. Furthermore, the tribunal upheld the authority of international treaties in respect to the compulsory procedure for dispute settlement in the present case.[14] Not only should there be a governance framework for the management of overlapping maritime claims and integrated management of the environment and marine resources but also any such framework must be rooted in the rule of law.[15]

The tribunal's ruling on maritime entitlements and the status of maritime features through interpretation of Article 121(3)[16] was guided by the notion of 'universalism in the law of the sea' – not only safeguarding the benefit of the local population in the EEZ and protecting the ocean as the common heritage of mankind but also countering unilateralism as demonstrated by China's claim in the SCS.[17] UNCLOS should be an effective constitution for the oceans in the legal sense and not just the political sense.[18]

[11] For discussion on China's non-participation in the proceedings, see Stefan Talmon, The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility, 15(2) *Chinese Journal of International Law*, 2016, 309–391.

[12] Among the issues, the Court determined the obligations on the marine environment in respect of the following activities by China, namely: (i) harmful fishing practices; (ii) construction of artificial islands, structures and installations; and (iii) harvesting endangered species. See *South China Sea Arbitration* (n 11), 386–388.

[13] Vincent P. Cogliati-Bantz, Current Legal Developments: The South China Sea Arbitration, 31 (4) *International Journal of Marine and Coastal Law*, 2016, 759–774, 772.

[14] Alfredo C. Robles Jr, *Endangered Species and Fragile Ecosystems in the South China Sea, The Philippines v. China Arbitration* (London: Palgrave 2020), 139–141. See contrasting view by Tsu-Sung Hsieh, Issue of Non-Participation in the South China Sea Arbitration in Tsu-Sung Hsieh (ed), *The South China Sea Disputes: Historical, Geopolitical and Legal Studies* (Singapore, Hackensack, NJ: World Scientific Publishing Co, 2018), 189–191.

[15] Vu Thanh Ca, A Regional Ocean Governance Framework for the Integrated Management of the Environment and Biological Resources in the South China Sea in Truong T. Tran, John B. Welfield and Thuy T. Le (eds), *Building a Normative Order in the South China Sea: Evolving Disputes and Expanding Options* (Cheltenham: Edward Elgar, 2019), 197.

[16] The definition of maritime features is provided in Art. 121(3) which states 'rocks which cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf.'

[17] Yoshifumi Tanaka, Reflections on the Interpretation and Application of Article 121(3) in the South China Sea Arbitration (Merits), 48(3–4) *Ocean Development and International Law*, 2017, 36–385, 376–379.

[18] Tommy B. Koh, 'A Constitution for the Oceans', Remarks, President of the Third United Nations Conference for the Law of the Sea, 1982, available at Ses1-6.-Tommy-T.B.-Koh-of-Singapore-President-of-the-Third-United-Nations-Conference-on-the-Law-of-the-Sea-_A-Constitution-for-the-Oceans_.pdf (nus.edu.sg).

https://doi.org/10.1017/9781009253741.031 Published online by Cambridge University Press

This is the case for protection of the marine environment as UNCLOS has an integrated and holistic framework to enable application of provisions to protect the marine environment under its Part XII.[19] The provisions that were most relevant in the SCS were UNCLOS Articles 123 (duty to cooperate bordering semi-enclosed seas), 192 (duty to prevent significant harm), 194(5) (duty to protect marine ecosystems) as well as Article 204 (duty to monitor pollution effects), Article 205 (duty to publish monitoring results) and Article 206 (duty to conduct environmental impact assessments).[20] These articles were examined in the tribunal's determination of China's island-building programme where the court emphasised that cooperation may enable States to manage the risks of damage to the environment.[21] The regime supports the requirement to communicate and coordinate development plans under Article 123 where the tribunal effectively ruled that non-communication, non-coordination and non-cooperation were in breach of the substantive and procedural aspects of the obligation to cooperate.

The *South China Sea Arbitration* affirmed that China had a duty to cooperate under Articles 123 and 197 in prevention of marine harm, and in this regard international jurisprudence is continually developing to define the obligation.[22] The primary mechanisms to avoid conflicts and keep within the rule of law are: (i) cooperation; and (ii) due regard; these enable States to observe a rules-based oceans governance when exercising rights, interests and obligations in an EEZ.[23]

UNCLOS is crucial to ensure the rule of law for the oceans in managing the challenges of ocean governance and the need to balance concurrent rights and obligations.[24] The tribunal acknowledged

> the articles [governing] the exclusive economic zone were (as with much of the Convention) a compromise and intended to balance the interests of the peoples of coastal developing States with the interests of the traditional maritime States . . . and the Convention [contributes] to the realisation of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole . . . [25]

[19] Nilufer Oral, *The South China Sea Arbitral Award, Part XII of UNCLOS and the Protection and Preservation of the Marine Environment in The South China Sea Arbitration, The Legal Dimension*, edited by S. Jayakumar, Tommy Koh, Robert Beckman, Tara Davenport and Hao D. Phan (Cheltenham: Edward Elgar, 2018), 224.

[20] Ibid., 373–379. The tribunal examined these provisions in deciding on the protection of the marine environment obligations under Part XII of UNCLOS.

[21] Ibid., 394–395.

[22] Chie Kojima, South China Sea Arbitration and the Protection of the Marine Environment: Evolution of UNCLOS Part XII through Interpretation and the Duty to Cooperate, 21 *Asian Yearbook of International Law*, 2015, 178.

[23] Tanaka Yoshifumi, *The South China Sea Arbitration: Toward an International Legal Order in the Oceans* (Oxford: Hart, 2019), 331–333.

[24] Ibid., 319–397 and 399–415.

[25] Note 42, 216. See discussion by Yoshifumi Tanaka, Reflections on the Interpretation and Application of Article 121(3) in the *South China Sea Arbitration* (n 19) 36–385, 376–379.

https://doi.org/10.1017/9781009253741.031 Published online by Cambridge University Press

Under Articles 56(2) and 58(3) of UNCLOS, coastal and non-coastal States are required to have regard to the rights and obligations of other States when utilising the seas in an EEZ.[26] The objective of this balancing mechanism is to ensure conciliation between overlapping rights, interests and obligations.[27] However, the due regard mechanism is not a voluntary undertaking but is an obligation to be complied with when a State exercises its right in an EEZ.[28] Implementation of due regard requires cooperation and willingness of the States in question. Separately, States have an obligation to cooperate to prevent environmental harm and to conserve marine ecosystems.[29] UNCLOS's cooperation provisions provide the measure by which States are required to cooperate in the conservation and management of marine resources through a mechanism of notification and development of contingency plans.[30] This includes exchange of scientific information, monitoring risks as well as agreeing on measures to prevent harm.[31]

24.3 THE INTERNATIONAL COOPERATION REGIME IN THE SCS

UNCLOS contains several provisions on the obligation to cooperate, which provide substantive and procedural obligations implicit in the duty to cooperate.[32] The Convention on Biological Diversity (CBD), an outcome from the Rio Summit held in June 1992, affirms States' commitments to sustainable development.[33] The CBD and its relevant provisions complement the environmental obligations in UNCLOS, which provide for States to cooperate on marine protection (at a general level) and on marine ecosystem and biodiversity preservation (at a specific level).[34]

[26] Arts. 56 and 58 UNCLOS.

[27] Mathias Forteau, The Legal Nature and Content of 'Due Regard' Obligations in Recent International Case Law, 34(1) *The International Journal of Marine and Coastal Law*, 2019, 25–42.

[28] Tullio Scovazzi, 'Due Regard' Obligations, with Particular Emphasis on Fisheries in the Exclusive Economic Zone, 34(1) *The International Journal of Marine and Coastal Law*, 2019, 56–72.

[29] The South China Sea Arbitration (n 11); ICJ, The Gabcikovo-Nagymaros Project (*Hungary* v. *Slovakia*), Judgment of 25 September 1997, ICJ Reports, 88-119; Pulp Mills on the River Uruguay (*Argentina* v. *Uruguay*), Judgment, ICJ Reports 2010; ITLOS, Mox Plant Case (*Ireland* v. *United Kingdom*), Number 10, ITLOS, Order, November 13, 2001.

[30] Arts. 197, 198, 199.

[31] Arts. 200 and 201.

[32] See Arts. 61, 64–66, 177–120, 198, 199, 200, 201, 242, 243, 244, 246, 247, 268, 269 and 270 and Part XII.

[33] Rio Declaration on Environment and Development, Report of United Nations Conference on Environment & Development (UNCED), Rio de Janeiro, 3–14 June 1992, and UNCED Agenda 21, Rio de Janeiro, Brazil, 3–14 June 1992.

[34] Rudiger Wolfrum, *Means of Ensuring Compliance with and Enforcement of International Environmental Law* (Leiden: Brill, 1998), Vol. 272, 16.

https://doi.org/10.1017/9781009253741.031 Published online by Cambridge University Press

The basis of conservation cooperation can reverse the deteriorating SCS environment[35] – including: Article 3 of the CBD on the obligation to prevent harm to the marine environment; Article 5 of the CBD on the duty to cooperate in the conservation and sustainable utilisation of resources; Article 123 of UNCLOS on cooperation by States in semi-enclosed seas in the exploitation of natural resources and the protection of its marine environment; Article 192 of UNCLOS on the obligation to protect and preserve the marine environment of the seas; Article 194 (1)–(4) of UNCLOS on the obligation to prevent pollution of the marine environment; Article 194(5) of UNCLOS on protection of marine ecosystems; and Article 197 of UNCLOS on the general obligation to cooperate.

International courts are increasingly upholding prevention of environmental harm through cooperation,[36] and are adjudicating on the extent of cooperation required to fulfil the obligation. In *Chagos*, the tribunal decided that the United Kingdom's failure to resume talks after Mauritius called off meetings with the United Kingdom to discuss the development of marine protected areas on Chagos Island did not constitute reasonable cooperation.[37] Furthermore, the United Kingdom failed to comply with its environmental obligations in the circumstances as its actions in the present case fell short of the actions of the United Kingdom cooperating with the United States on similar environmental obligations.[38] Environmental cooperation must not be superficial and must be accompanied by firm policies and action.

Cooperation between semi-enclosed seas as applicable to SCS under Article 123 complements the requirement for parties to make further agreements relating to protection of the marine environment and is consistent with the principles and objectives of Article 237.[39] The complementarity of UNCLOS with CBD (both of which have universal ratification) reinforces the obligation to cooperate on marine protection and is reflected in non-binding regional instruments such as the 1976 ASEAN Treaty of Amity and Cooperation in Southeast Asia (TAC)[40] and the 2002 China–ASEAN Declaration on Conduct of the Parties in the SCS (DOC). These legal instruments establish a regional framework for effective ecological cooperation in the SCS. Notwithstanding the non-bindingness of the TAC and

[35] See also, John W. McManus, Toward Establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan, 41(3) *Ocean Development and International Law*, 2010, 270–280, 273.

[36] See (n 31).

[37] PCA, The Chagos Marine Protected Area Arbitration (*Mauritius* v. *Great Britain*), Award, March 18, 2015, 205–206, para. 525.

[38] Ibid., 209–210, paras. 528–536. For a study of MPAs in the South China Sea, see Vu Hai Dang, *Marine Protected Areas Network in the South China Sea: Charting a Course for Future Cooperation* (Leiden: Martinus Nijhoff, 2014).

[39] Alan Boyle, Further Developments of the Law of the Sea Convention: Mechanisms for Change, 54 *International and Comparative Law Quarterly*, 2005, 563–584, 575.

[40] Treaty of Amity and Cooperation in Southeast Asia, Denpasar, Bali, 26 February 1976, in force 15 July 1976, 1025 UNTS 297.

https://doi.org/10.1017/9781009253741.031 Published online by Cambridge University Press

DOC, ASEAN[41] has a distinctive long history of cooperation that has promoted coordinated resource planning and policymaking.[42] Among regional multilateral fora, ASEAN has historically played a key role in diffusing conflicts in the SCS.[43]

In respect to overlapping claims in the SCS EEZs, the ASEAN forum was utilised by SCS States to enter into a non-binding instrument between ASEAN and China – the DOC. The DOC sets out the commitment to form a future binding COC.[44] This was the culmination of efforts to settle maritime conflicts since 1992 and was a compromise when the parties could not agree on a binding treaty.[45] The DOC reaffirms the purpose of maintaining international peace and security as codified in the UN Charter, UNCLOS and the ASEAN TAC through which is realised in the 'building of trust and confidence … on the basis of equality and mutual respect',[46] that is, the principle of sovereign equality. The TAC promotes cooperation and mutual assistance in areas of economic, social, scientific and technical matters.[47] The broad cooperation requirement is specified in areas such as the economy, society and the environment.[48]

Article 4 of TAC and Article 6(a) of the Draft Negotiation Text of DOC reflect the environmental provisions in UNCLOS and CBD. Article 4 of the TAC provides for the duty of cooperation in broad terms promoting 'economic, social, technical, scientific and administrative fields as well as common ideals and aspirations of international peace and stability in the region and all other matters of common interest'.[49] Cooperation on the environment feasibly falls within Article 4 of TAC and complements the specialised area of cooperation on marine environmental protection in Article 6(a) of the Draft Negotiation Text of DOC, which the latter leaves the specific details of bilateral and multilateral cooperation to be agreed by the parties.[50]

Prevention of marine harm in Article 192 of UNCLOS and Articles 3 and 5 of the CBD complement Article 4 of TAC and Article 6(a) of the Draft Negotiation Text of

[41] ASEAN Member States are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

[42] Jeffrey David Wilson, *International Resource Politics in the Asia-Pacific: The Political Economy of Conflict and Cooperation* (Oxford: Edward Elgar, 2017).

[43] Alan H. Yang, The South China Sea Arbitration and Its Implications for ASEAN Centrality, 21 *Asian Yearbook of International Law*, 2015, 83–95, 86.

[44] Art. 10 Draft Negotiation Text of the DOC. See also, Ramses Amer and Li Jianwei, From DOC to COC, A Regional Rules-Based Order, in Zou Keyuan (ed), *Routledge Handbook of the South China Sea* (Abingdon: Routledge, 1st ed., 2021).

[45] A Blueprint for a South China Sea Code of Conduct, AMTI, 11 October 2018.

[46] Art. 2 Draft Negotiation Text of the DOC 2018.

[47] Art. 4, 1976 ASEAN TAC.

[48] Edward Best and Thomas Christiansen, *Regionalism in International Affairs in the Globalization of World Politics: An Introduction to International Relations*, edited by John Baylis, Steve Smith and Patricia Owens (Oxford: Oxford University Press, 2020), 375.

[49] Art. 4, 1976 ASEAN TAC.

[50] Art. 6 Draft Negotiation Text of the DOC 2018.

https://doi.org/10.1017/9781009253741.031 Published online by Cambridge University Press

the DOC, thus allowing a broad and effective cooperation framework that protects the SCS environment. However, political will is essential to implement cooperation grounded in the international rule of law.[51] Thus, compliance and cooperation is contingent on States agreeing to do so. Hence, the rule of law must be the impetus that functions as a means to achieve the outcome of cooperation and place normative constraints on policies that are contrary to the law.[52] The rule of law is not applied in a vacuum but rather in a 'thick common moral framework' based on values that confirm States' criteria for membership of the international system, that is, are peace-loving States and willing to carry out international obligations under the UN Charter?[53] Hence, the underlying normative requirement to prevent marine harm through cooperation is reinforced through the SCS cooperation regime consisting of UNCLOS, CBD, DOC and TAC, and aligned with progress in international jurisprudence on marine protection.[54] In upholding the rule of law, the cooperation regime must be applied by States bilaterally and multilaterally. Broadly, the international and regional instruments relating to environmental protection of the SCS and developments in international jurisprudence should form the basis of marine protection in a future detailed and binding COC.

24.4 DUE REGARD

International treaty provisions contain the requirement to have due regard to other States, which has an important function of balancing various rights, interests and obligations.[55] Due regard is the substantive and procedural mechanism that balances the rights and duties of States in their use of a shared natural resource to

[51] Robert C. Beckman and Clive H. Schofield, Defining EEZ Claims from Islands: A Potential South China Sea Change, 29 *The International Journal of Marine and Coastal Law*, 2014, 193–243, 194.

[52] This is in line with rule of law's 'equality before the law' that places constraints on a State's exercise of power. See Simon Chesterman, An International Rule of Law, 331 *American Journal of Comparative Law*, 2008, 331–362, 360.

[53] Douglas Guilfoyle, The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea, 95(5) *International Affairs*, 2019, 1001; James D. Fry and Agnes Chong, Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion [1948] ICJ Rep 57 in *Leading Decisions in the Law of International Organisations*, edited by Cedric Ryngaert, Ige Dekker, Ramses A. Wessel and Jan Wouters (Oxford: Oxford University Press, 2016), 138–155.

[54] See discussion on the progress of marine environmental jurisprudence in Joanna Mossop, Can We Make the Oceans Greener? The Successes and Failures of UNCLOS as an Environmental Treaty, 49 *Victoria University of Wellington Law Review*, 2018, 473–593.

[55] See UNCLOS (n 7), Convention on the Law of the Non-navigational uses of International Watercourses (UN Watercourses Convention), New York, 21 May 1997, in force 17 August 2014, 2999 UNTS 77, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other celestial bodies (the Outer Space Treaty) London/Moscow/Washington, 19 December 1966, in force 10 October 1967, 610 UNTS 205and Convention on International Civil Aviation (Chicago Convention), Chicago, 7 December 1944, in force 4 April 1947, 15 UNTS 295.

https://doi.org/10.1017/9781009253741.031 Published online by Cambridge University Press

ensure that States as sovereign equals may enforce their rights and duties within the international legal regime.[56] There is no definition of due regard. However, in UNCLOS it exists as a legal obligation for coastal States and non-coastal States to pay due regard to each other's rights and obligations in the exercise of their own rights and freedoms. States carrying out their due regard obligations when exercising their rights and freedoms forms the basis of a type of 'mandatory multilateralism enshrined in UNCLOS.[57] Under Article 87 of UNCLOS the high seas are open and free to both coastal and non-coastal States but their right to the freedom of the high seas is subject to other freedoms provided in UNCLOS including those in Article 87(1) of UNCLOS.[58] States must have due regard to the interests of other States when exercising the freedom of the high seas and the rights in the convention.[59]

SCS States are obliged under UNCLOS to have due regard for the rights and obligations of both coastal States and non-coastal States when using exclusive economic zones (EEZs), which incidentally are the areas of contention in the SCS.[60] The due regard obligation obliges States to balance their interests with the interests of other States in the use of shared sea resources. As the majority of the SCS constitutes EEZs, which are neither sovereign territories nor the high seas, the due regard regime contained in Articles 56(2) and 58(3) applies.[61] Article 56(2) provides that when exercising its rights and performing its duties, a coastal State must have due regard for the rights and duties of other States.[62] The rights and duties of other States are laid out in Article 58 such as the freedoms of navigation, overflight, laying submarine cables and pipelines and other lawful freedoms associated with ships, aircraft and submarine cables.[63] When exercising their rights, States must have due regard for the rights and duties of coastal States.[64]

International jurisprudence on 'due regard' includes environmental protection of EEZs, thus bringing in greater regulation of activities in EEZs.[65] Sea activities of coastal States in EEZs under Article 56(1)(b)(iii) (protection and preservation of the marine environment) and non-coastal States under Article 58(3), must have due regard for the protection, preservation and sustainability of the seas.[66] The

[56] ICJ, Fisheries Jurisdiction Case (*UK* v. *Iceland*), Merits, Judgment of 25 July 1974, paras. 67–68; and Chagos Marine Protected Area Arbitration (n 38), 517; and South China Sea Arbitration (n 11), 515.

[57] Evan J. Criddle and Evan Fox-Decent, Mandatory Multilateralism, 3 *AJIL*, 2019, 272–375, 303.

[58] Art. 87(1) provides the freedom of navigation; overflight; lay submarine cables and pipelines; construct artificial islands and other installations; fishing; and scientific research.

[59] Art. 87(2) UNCLOS.

[60] Beckman and Schofield (n 52) 193–243, 198.

[61] Art. 55 UNCLOS.

[62] Art. 56(2) UNCLOS.

[63] Art. 58(1) UNCLOS.

[64] Art. 58(3) UNCLOS.

[65] See South China Sea Arbitration (n 11) 319–397 and 399–415.

[66] See international case law (n 57).

https://doi.org/10.1017/9781009253741.031 Published online by Cambridge University Press

jurisprudence to date reinforces the principle that due regard is both a substantive and procedural obligation.

Enforcing a due regard regime requires a degree of cooperation and compliance. The EU's framework for Maritime Spatial Planning (MSP) requires States to have due regard to the particularities of marine regions, relevant activities and their impacts and land–sea interactions under Article 4(5) and 8 of the MSP Directive EC 2014, and in this regard States must cooperate when considering the relevant interactions required under the Directive.[67] In *Whaling in the Antarctic* the ICJ considered the obligation of due regard within the framework of the duty to cooperate and ruled that Japan's duty to cooperate should include paying due regard to the International Whaling Commission (IWC) and the Scientific Committee's recommendations on non-lethal research methods.[68] The intrinsic link between due regard and cooperation is demonstrated by the fact that the obligation of due regard is not fulfilled without cooperation and compliance by the State parties.

The due regard mechanism is vital to balance concurrent rights, interests and obligations within any cooperation arrangement in practice, and to reverse the effects of the deteriorating SCS marine environment.[69] The ensuing maritime conflicts and competition for resources are worsening the prospects of cooperation in protecting and preserving the SCS marine environment.

Various ongoing issues in the SCS include the legal status of the EEZ arising from overlapping claims, the legality of foreign military activities in EEZs and freedom of navigation in the SCS,[70] all of which may affect the willingness not to view interests in the SCS as a zero-sum game making it difficult to comply with due regard. The enforcement jurisdiction in the EEZ also relies on compliance and cooperation among individual coastal States. However, any resolution for greater cooperation must be centred on marine conservation.[71] A future ASEAN COC should place a moratorium over the claims in the SCS in order to urgently address marine preservation as a collective security matter and place legal and institutional

[67] Lynne McGowan, Stephen Jay and Sue Kidd, *Scenario-Building for Marine Spatial Planning in Maritime Spatial Planning, Past, Present and Future*, edited by Jacek Zaucha and Kira Gee (Oxford: Palgrave, 2018), 327–351, 330.

[68] ICJ, Whaling in the Antarctic (*Australia* v. *Japan*: New Zealand intervening), Judgment, ICJ Reports 2014, 35.

[69] United Nations, UNEP Project to Reverse Environmental Degradation Trend in South China Sea and the Gulf of Thailand, UNEP/87, March 29, 2001; *South China Sea Arbitration* (n 11), 823; Camilo Mora, Iain R. Caldwell, Charles Birkeland, and John W. McManus, Dredging in the Spratly Islands: Gaining Land but Losing Reefs, 14(6) *PLOS Biology*, 2016; and S. Tiezzi, South China Sea Ruling: China Caused 'Irreparable Harm' to Environment, *The Diplomat*, 15 July 2016.

[70] U.S.–China Strategic Competition in South and East China Seas: Background and Issues for Congress, Congressional Research Service, updated 6 February 2020.

[71] Aldo Chircop, Regional Cooperation in Marine Environmental Protection in the South China Sea: A Reflection on New Directions for Marine Conservation, 41(4) *Ocean Development & International Law*, 2010, 334–356.

https://doi.org/10.1017/9781009253741.031 Published online by Cambridge University Press

frameworks for implementing the level of cooperation required to effectively reduce marine harm and restore the health of the SCS.

24.5 RESORT TO THE RULE OF LAW: COOPERATION AND DUE REGARD

The foundation of the international legal order to have due regard for other States' rights and duties is to ensure sovereign equality and ability to enforce all (not a few) States' rights and duties within a system.[72] The rule of law for the seas rejects unilateral actions (as with China's nine-dash line claim in the *South China Sea Arbitration*, Iceland's legislation that denies the UK its fishing rights in the *Fisheries Case (UK* v. *Iceland)*).[73] The legal order requires equitable balancing – hence, due regard is an obligation – which is not void of content.[74] UNCLOS, as a binding framework convention, provides the substantive and procedural rules as well as the framework for future agreements to cooperate on the marine environment of the SCS. The due regard mechanism for equitable balancing '[lacks] the precision of bright-line rules',[75] and requires cooperation among the parties to negotiate in good faith and conform to their agreement in upholding the rule of law. In the fragile geopolitical climate in the SCS, resorting to rule of law compliance may be the best way to diffuse tensions.[76]

Koskenniemi notes '[t]he fight for an international Rule of Law is a fight against politics, understood as a matter of furthering subjective desires and leading into an international anarchy. Though some measure of politics is inevitable, it should be constrained by non-political rules'.[77] The state of affairs in the SCS where the dominant trend is to repudiate or avoid rules is reminiscent of John Locke's phrase 'wherever law ends, tyranny begins'.[78] Failures to enforce the SCS Arbitral Award weaken bona fide attempts to cooperate in good faith, and moreover, challenge the underlying foundations of the rule of law ideal in undermining the legal equality of States by disregarding other States' rights and freedoms of the seas.[79]

Notwithstanding that cooperation and competition are polar opposites, scholars have recommended strategies of cooperation amidst overlapping maritime claims. One strategy is to establish a network of marine protected areas (MPAs) in the SCS

[72] Brad Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* (Oxford: Oxford University Press, 2011), 273–274.

[73] Fisheries Jurisdiction (*United Kingdom* v. *Iceland*) (Merits, Judgment) [1974] ICJ Rep. 3 (n 57).

[74] See South China Sea Arbitration (n 11) 312.

[75] Ibid.

[76] Katherine Morton, China's Ambition in the South China Sea: Is a Legitimate Maritime Order Possible? 92(4) *International Affairs*, 2016, 909–940, 912–914.

[77] Martti Koskenniemi, The Politics of International Law, 1 *EJIL*, 1990, 4–32, 5.

[78] John Locke quoted in Tom Bingham, *The Rule of Law* (London: Penguin, 2011).

[79] Douglas Guilfoyle, The Rule of Law and Maritime Security in the South China Sea, 95(5) *International Affairs*, 2019, 999–1017, 1015–1016.

https://doi.org/10.1017/9781009253741.031 Published online by Cambridge University Press

that may support different ecosystems as well as preserve areas from human impact to allow natural resources to recover from stress.[80] This strategy requires cooperation and political will to suspend maritime claims.[81] A less ambitious suggestion is for China and Vietnam to establish an MPA in the same location in the Paracel Islands under their respective national laws.[82]

Another recommendation is to resolve uncertainties over the parties' overlapping EEZ claims, following which joint development areas could be established.[83] It has been suggested that China declare an EEZ from the largest islands in the Spratly Islands and Paracel Islands and issue charts setting out the outer limit of its EEZ claims so that other ASEAN claimants would be able to clarify their claims.[84] These recommendations are dependent on setting aside territorial disputes, which requires cooperation and mutual trust. These strategies, however, are feasible where there is a moratorium over claims, at the very least, an urgent collective focus on marine protection that takes precedence over State claims in the SCS.

24.6 CONCLUSION: LOOKING TO THE FUTURE

The SCS illustrates that the rule of law is failing to protect the marine environment. Competing claims and antagonistic behaviour hinder the SCS States from cooperating and carrying out their obligations to conserve and protect the marine environment. Competition for maritime claims is at odds with the requirement to cooperate in good faith and to pay due regard to other States' rights and freedoms in the EEZs. Failure to uphold marine protection and preservation obligations has caused the SCS marine environment to deteriorate drastically. Legal mechanisms relying on State-to-State cooperation are unlikely to be successful. However, there are steps that can be taken by the parties to ameliorate the parlous state of the rule of law in the SCS, potentially leading to better outcomes for the environment.

The *South China Sea Arbitration* ruling has implications for all SCS States. It reflects the environmental standard expected of States in carrying out sea-related activities, as highlighted in other international cases.

The present regime incorporates environmental principles and balances the freedom of utilisation of marine resources with the requirement to preserve and

[80] Hai Dang Vu, Towards a Regional MPA Network in the South China Sea: General Perspectives and Specific Challenges, 26 *Ocean Yearbook*, 2012, 291–316, 292–293.

[81] David L. VanderZwaag and Hai Dang Vu, Regional Cooperation in the South China Sea and the Arctic: Lessons to Be Learned? in *The Regulation of International Shipping: International and Comparative Perspectives* (2012), 171–205; and Donald R. Rothwell, The Polar Regions and the Law of the Sea in Polar Geopolitics, edited by Richard Powell and Klaus Dodds (Oxford: Edward Elgar, 2014), 19–37.

[82] Vu (n 80) 207–244, 216.

[83] Beckman and Schofield (n 52) 193–243, 235.

[84] Ibid.

https://doi.org/10.1017/9781009253741.031 Published online by Cambridge University Press

protect the marine environment implicit in the term 'sustainable use'.[85] The COC must address the fundamental challenges of marine environmental protection and incorporate a requirement to cooperate reflecting the standard in international jurisprudence. A legally binding COC ensures compliance and counters the predominance of *realpolitik* in the SCS.[86] A moratorium over the claims in the SCS is the best chance for real cooperation.

Through some combination of these initiatives, the rule of law order may be restored with the hope that this may bring the benefits of the rule of law and stability to the SCS States, and ultimately result in more effective protection of the marine environment.

[85] Kjell Griip, International Marine Environmental Governance: A Review, 46(4) *Springer Ambio*, 2017, 413–427.

[86] Leszek Buszynski, Law and Realpolitik: The Arbitral Tribunal's Ruling and the South China Sea, 21 *Asian Yearbook of International Law*, 2015.

https://doi.org/10.1017/9781009253741.031 Published online by Cambridge University Press