

Ear to Asia podcast

Title: All at sea: Contending with maritime disputes in the South China Sea and beyond

Description: While China asserts its right to some 90% of the South China Sea, its claims variously overlap and conflict with those of Vietnam, Malaysia, Indonesia, Brunei, and the Philippines -- themselves no strangers to past maritime disputes. In fact, countries across the Indo-Pacific have had to find ways of resolving or at least learning to live with disputed maritime borders. So how have nations chosen to handle maritime border disagreements? What's worked and how much power do international maritime treaties really have? And what lessons are there for the seemingly intractable situation in the South China Sea, where tensions over China's claims pose a real threat to peace and security? Maritime security expert Assoc Prof Bec Strating joins host Ali Moore to examine maritime disputes in the Indo-Pacific. An Asia Institute podcast. Produced and edited by profactual.com. Music by audionautix.com.

Voiceover:

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Ali Moore:

Hello, I'm Ali Moore. This is Ear to Asia.

Bec Strating:

Some of these examples of dispute resolution have involved self proclaimed maritime democracies, defenders of the rules-based order who are susceptible to those sorts of legitimacy claims that smaller states and their advocates have been making. But for China, it has resisted efforts to use international tribunals to try to resolve some of these issues.

Ali Moore:

In this episode, aggression and arbitration, how countries in the Indo-Pacific manage maritime boundary disputes from the South China Sea to the Bay of Bengal. Ear to Asia is a podcast from Asia Institute, the Asia research specialist at the University of Melbourne.

There is perhaps no greater maritime boundary dispute in our region than the competing claims to the South China Sea led by China, which has become increasingly assertive with its territorial ambition. In return, the United States has led the pushback, citing the imperative of maintaining freedom of navigation in contested waters.

Of course, while China asserts its right to some 90% of the South China Sea, its claims variously overlap and conflict with those of Vietnam, Malaysia, Indonesia, Brunei, and the Philippines, all nations which are no strangers to maritime disputes. In fact, countries across the Indo-Pacific have had to find ways of resolving or at least learning to live with disputed maritime borders.

So how have nations chosen to handle maritime border disagreements? What are the options? What's worked and how much power do international maritime treaties really have, and are there any lessons for the ongoing and apparently intractable situation in the South China Sea, where tensions over China's claims pose a real threat to peace and security?

Joining me to examine maritime disputes in the Indo-Pacific region is maritime security expert Associate Professor Beck Strating, who is also Director of La Trobe Asia at La Trobe University. Bec, good morning and welcome to Ear to Asia.

Bec Strating:

Thank you for having me. It's great to be here.

Ali Moore:

Let's start with, as I said, what you would have to consider to be the most dominant dispute in this region, certainly the one that makes the headlines the most, and that's the South China Sea and China's claims versus those of other nations. How is it that Beijing lays claim to a maritime boundary that's so far in part from its own shores and yet so close to the shores of others?

Bec Strating:

Yes, certainly, the South China Sea is the most consequential dispute across the Asia maritime area, and partly, I think that's because China does lay this claim through its nine-dash line to, as you point out in the introduction, around 90% of that South China Sea maritime area, which really cuts into the claims and entitlements of other coastal states in Southeast Asia.

Partly, the reason why China has made this claim is because it feels a sense of ownership over that area, and it's partly a defensive move. If you think about security and defence planners in Beijing and they're looking out into the world, one of their concerns is that they might be invaded through the seas. So it becomes a security imperative to protect the near seas, and they include the South China Sea, but they also include the East China Sea as well, as well as the Taiwan Strait, but the South China Sea, really, this nine-dash line claim emerges from some maps from the late 1940s, after World War II.

It was actually the Republic of China, what we generally call Taiwan, produced this map, but the claims are actually pretty ambiguous, and it was in 2009 when China attached the map to a note verbal at the UN protesting some claims that some of the Southeast Asian states had made to continental shelves, where we see China start to use this nine-dash line in order to make sovereignty and maritime claims to this maritime area.

It really isn't quite clear what China is actually claiming by using the nine-dash line. There are a number of interpretations that one can make. One is that it symbolises that China owns the land features within this area. So the South China Sea is a maritime area, but it's dotted with hundreds of islands and rocks and low lying features. So one interpretation is that the nine-dash line symbolises that China lays sovereignty claims over these features.

A second interpretation is that, as you point out earlier, that it's a maritime boundary. So it's not just that China lays claims to the sovereignty of the land features, but it sees that it has sovereignty and sovereign rights within this area. So it has entitlements to things like resources in the water column, as well as resources under the seabed like oil and gas.

There's also a third interpretation, which is that the nine-dash line symbolises China's sovereignty claim over the entirety of that area. So that is quite a problematic claim under international law. I mean, the nine-dash line, regardless, does not conform with the primary international legal treaty governing maritime affairs, which is the United Nations Convention on the Law of the Sea, but this third interpretation that China potentially is laying claim to sovereignty over the entirety of that maritime area really undermines one of the core principles in international law of the sea, that idea that maritime areas are not subject to sovereign appropriation.

So the vast amount of the world's oceans and seas are maritime commons. They can't actually be owned by one state like land can. So that interpretation, that idea that China perhaps wants sovereignty over that whole area is really quite problematic under international law, but it often uses quasi-legal language to try to convince others that this nine-dash line claim is legitimate under international law, but very few states, I think, really recognise the claims that China makes in that area.

Ali Moore:

At the same time, Bec, when you go back to that issue of maritime versus territorial boundaries, China's really sought to reinforce its claims by developing many of those features in the South China Sea, rocky outcrops and sandy shoals in some cases have become full-blown islands, sometimes even with military facilities and landing strips. To what extent does that change that balance between something just being a maritime boundary and something attracting some territorial right?

Bec Strating:

That's an excellent question, Ali, and that's really what I've been calling in my work this process of territorialization. So there is a difference in international law between the land and the sea. As I stated before, the maritime areas, a lot of it is considered to be high seas, so it doesn't fall under the jurisdiction of any particular state, beyond a 12 nautical mile territorial sea that states can claim off their coasts. Really, coastal state rights are limited under international law. There is the exclusive economic zone area where states have limited economic rights to things like fishing, but essentially, international law treats the sea differently from how it treats land, but China's efforts to build artificial islands and to militarise those islands, in my view, is a form of trying to territorialize what has been maritime space.

Now, the United Nations Convention on the Law of the Sea or UNCLOS as we call it is quite clear that artificial islands do not generate maritime entitlements. So if a state like China builds artificial islands in the South China Sea by dredging up sand and coral and all sorts of other natural material, then under the international law of the sea, that doesn't mean that that state then gets a right to claim a territorial sea around that artificial island or an exclusive economic zone, an EEZ around that island either, but this is just one process or one way in which China is seeking to extend control over that area.

So certainly, building up land is one form of territorialization. Another really important form of territorialization that China has promoted in the South China Sea is by trying to extend domestic law by saying that this area, what it tends to call its jurisdictional waters, which doesn't really have a clear meaning under international law, but what it calls its jurisdictional waters is subject to domestic law and that it prioritises this ahead of international laws.

So for example, through the use of domestic laws, it tries to put limits on what navigating states can do within the South China Sea. So it wants other states to get prior authorization for transiting through its territorial sea in a way that international law actually allows for states to do this freely without authorization or without notification through a principle called innocent passage.

So China tries to use domestic law in a way to exert control over that space, but what that does is it prevents other states from accessing their entitlements and their rights through international law, and it also undermines this key concept of a freedom of the seas.

Ali Moore:

Yeah, and this goes, doesn't it, to, as I mentioned in the introduction, that America is leading the pushback and it largely leads the pushback through these freedom of navigation exercises, which China doesn't like, and uses the sorts of what you've just been talking about to argue against them. Can you tell us a little bit about the purpose of those exercises and whether they are achieving what they're aimed at achieving?

Bec Strating:

Yeah. So freedom of navigation operations are quite a US-specific tactic in order to try to protest excessive maritime claims. So the United States has this global freedom of navigation programme. It doesn't just conduct FONOPs against China in the South China Sea, it actually conducts FONOPs

around the world against friend or foe. If a state makes an excessive maritime claim in the eyes of the United States, then chances are the United States will try to protest that claim essentially by transiting in a way that shores up how the United States interprets international law.

So essentially, using freedom of navigation operations in a customary way to try to uphold the rules as the United States sees them. So the United States doesn't just use freedom of navigation operations in the South China Sea, but we have seen over the past 10 or 15 years a real increase in the number of freedom navigation operations that the US is using in the South China Sea because of its concerns about the nature of China's claims and the ways that China is seeking to exert those claims.

So we think about the South China Sea as a set of disputes. We have disputes over sovereignty, so different states claiming different bits of land as being their own. You also have those maritime disputes, so disputes over maritime jurisdiction, where exclusive economic zones begin and end, for example, but then on top of that, you have this layer of geopolitics. So the South China Sea has become totemic, really, of China's efforts to undermine what the US and its allies and partners call the rules-based order.

So often in the strategic narratives of the US or Australia or Japan or other partner states, they'll refer to the South China Sea as this example of how China doesn't respect the existing rules, the existing laws that attempt to create an established maritime order, and the South China Sea is that real key example of that.

We have to remember that the United States isn't a claimant state. It doesn't make sovereignty claims in the South China Sea. It doesn't have any maritime boundary disputes in the South China Sea. It's really interested in what the South China Sea says about China as a great power, China as a rising great power and how it might seek to revise some of the key precepts of regional and international order, which the United States has played a significant role in creating, although itself doesn't always abide by either.

It's an interesting element of all of this that while the United States has this programme designed to contest excessive maritime claims and presents itself as a bit of an arbiter on some of these issues, it itself has not ratified UNCLOS. So that can present a bit of a legitimacy issue for the United States because China can say, "Well, at least China has signed up to UNCLOS," which is the constitution for the oceans.

Ali Moore:

So let's look at UNCLOS, the United Nations Convention on the Law of the Sea. As you've pointed out, the US hasn't ratified it. In fact, the one time that China's claims in the South China Sea were tested, they were tested by the Philippines and they were tested under UNCLOS, a tribunal constituted under UNCLOS, and the Philippines won, Beijing lost, but it made absolutely no difference because Beijing didn't acknowledge the outcome.

Bec Strating:

That's right. So the 2016 arbitral tribunal ruling mostly agreed with the Philippines' interpretation, and it did delegitimize that historic rights claim that China makes within the nine-dash line. So the ruling effectively said that there is no real legal basis for the nine-dash line, but China didn't participate in the arbitral tribunal process. It didn't recognise the arbitral tribunal process as being legitimate under UNCLOS. There is a reason for that, and that is that China had excluded itself from compulsory maritime boundary dispute resolution processes, which is a legal thing for states to do. UNCLOS does allow for states to exclude themselves from those processes.

In fact, Australia has excluded itself from those processes, which made it impossible for Timor-Leste to take Australia to court on the specific issue of maritime boundaries in the Timor Sea. But going

back to the original point, I mean, China didn't see the arbitral tribunal process as being legitimate. It didn't see the ruling as being legitimate either.

Ali Moore:

Bec, what does that mean, I guess, for the power of treaties like UNCLOS when you can remove yourself and where you can ignore outcomes or there doesn't seem to be any obvious enforcement of outcomes? I'll come back to the Timor Sea example a little later in our conversation, but what does it mean for just how credible those treaties are?

Bec Strating:

Yeah, it's a really important question. The United Nations Convention on the Law of the Sea, I think we have to acknowledge from the outset, was a remarkable achievement. So this was signed or agreed upon in 1982. It was ratified in 1994. It's one of the most comprehensive treaties in international law in the sense that most states have signed up to UNCLOS, and this gives it some legitimating force as an instrument of international law, but the problem is that in order to get to this agreement where states have to negotiate and then sign themselves up to be bound by the rules in a treaty like UNCLOS, there has to be compromises.

So the exclusion rule that the right of states to exclude themselves specifically on maritime boundary dispute is an example of a compromise that is made in order to be able to get the treaty across the line in the first place. So in the South China Sea, it's clear that China has been able to change the facts on the ground through things like artificial island building, through militarization, which Beijing promised that it wouldn't do, but it did anyway. It has also been able to try and enforce its claims through the use of a militarised coast guard and through the use of fishing vessels, what's called a maritime militia to harass other fishers and to really fill up maritime space.

So China has been able to quite assertively and aggressively in some cases stake its claim in the South China Sea without there being too much pushback. I mean, FONOPs haven't really altered China's ability to do that, to implement this salami slicing strategy as they call it. China's incrementally changed the strategic picture in the South China Sea in a way that the US and other states weren't really able to challenge, but that doesn't necessarily mean that the United Nations Convention on the Law of the Sea is just a weak treaty, it's not able to change anything.

I mean, the first thing that I would say is that China often tries to legitimate its claims using UNCLOS as well, and it tries to delegitimize what the United States does by pointing out that the US hasn't signed UNCLOS. So great powers are concerned about reputation as much as smaller and middle powers are, but it doesn't necessarily stop them from making unilateral actions if they think that they can get away with it.

The second point that I would make is that the South China Sea dispute, it is taken as the key example of one of the weaknesses of international law, but there's lots of examples where UNCLOS has actually assisted in resolving disputes. Over the long run, it's clarified boundaries, it's assisted smaller and middle power states in being able to access marine resources and entitlements within this 200 nautical mile exclusive economic zone if they're able to claim that far out. So that has had a net positive effect on states that otherwise might have struggled to access those entitlements if there weren't rules and laws in place.

Ali Moore:

What about other claimants because, as I said, the claim of China in the South China Sea does overlap and intersect with the claims of a number of other nations and, indeed, they themselves compete? So how have they sought to resolve those differences or have other nations essentially put those differences to one side while they wait for the China claim to in some way be resolved?

Bec Strating:

The first thing I would say to that is that the Southeast Asian states that have sovereignty and maritime disputes with China, they tend to have different approaches themselves to how they manage their disputes with China. So if we think about the Philippines took China to an arbitral tribunal, it didn't make a strong deal out of the successful ruling under the Duterte government, which was a bit of a shame, but it used an international maritime dispute resolution process to try to resolve that dispute. Vietnam, there's been rumours swirling that Vietnam might also try to resolve or to manage some of its issues with China using an international court or arbitration process, but we have yet to really see that.

Ali Moore:

Because, in fact, China actually put an oil rig inside Vietnam's claimed economic exclusion zone, didn't it?

Bec Strating:

Yeah, and that is probably the most, historically, the most testy of all of the relationships on a bilateral level has been Vietnam and China, I would say. There have actually been skirmishes, there have been contests. So in 1988, for example, that have led to actual conflict. So these are not small issues we're talking about, particularly between China and Vietnam, and Vietnam is very good at trying to internationalise the dispute, so trying to bring other states in so that they're invested in a maritime order that's supported by UNCLOS in the South China Sea.

You see a much more cautious approach when we think about Malaysia. Malaysia does try to push back against China in some of its rhetoric, but has been more cautious than the Philippines and Vietnam in doing that, much more of a hedging approach on issues to do with the South China Sea.

Brunei is very quiet because it has quite a strong relationship with China. Then you have Indonesia, which claims to not be a party in the dispute, even though there have been these contests over the seas around the North Natuna, which is in that south part of the South China Sea, and in which China's nine-dash line does overlap with Indonesia's claim. It wants to see itself more as, I guess, a broker of potentially leading the way in finding a solution to managing these disputes.

So I should point out that there's two key issues when it comes to the South China Sea issues and how they're dealt with by Southeast Asia and China, and that is whether or not they're trying to manage the disputes or whether or not they're trying to resolve the disputes. Resolving them is probably, that's quite a difficult task. So at the moment, these states are focused on managing the dispute, so making sure that they don't escalate, making sure that the states are aware of some of the dangers in making provocative manoeuvres or doing things that other states might not like.

So the code of conduct is currently being negotiated, but it's stalled due to COVID and there's a lot of, I guess, scepticism among some about whether or not that's actually going to be a pathway for successfully managing those disputes. The states can't agree on a number of things.

Ali Moore:

Again, that's another issue, isn't it, because all these Southeast Asian nation states, they're all members of ASEAN, which is where the negotiations are being undertaken for a code of conduct? ASEAN works by consensus and by negotiation and essentially has made, is it too harsh to say, no progress in trying to resolve competing claims in the South China Sea?

Bec Strating:

I wouldn't say no progress. I think that watchers of ASEAN, some might see ASEAN as a talk shop, as something that's really hindered by, as you point out, the consensus decision making model where

all 10 ASEAN states have to agree, and that is a problem in the South China Sea because not all ASEAN states have maritime or sovereignty disputes in the South China Sea, and they've all got very different relationships with China.

So when you've got a model based on all 10 states having to agree, that becomes quite problematic in this particular area, but then there are others who would argue that the process of talking itself is part of the ASEAN way, and that as long as these issues are being discussed, there might be pathways to, at least, lowering the temperature on some of these disputes.

Then of course, the other issue, going back to your earlier question, is that there are disputes between Southeast Asian states. Now, when we think about maritime disputes in Southeast Asia, the South China Sea is the big one, but there are some ongoing maritime disputes between, say, for example, one between Singapore and Malaysia that crops up every now and then. You've got Singapore's land reclamation activities, which are causing a bit of anxiety to Malaysia, and this dispute has led to tit for tat diplomatic protests that crop up every now and again.

There are other examples that we could point to in Southeast Asia where there aren't clear maritime boundaries that these have yet to be decided upon, but these disputes are very different from what China's doing with the nine-dash line. China's nine-dash line is now, we can see after the 2016 arbitrary tribunal ruling, it's a clear violation of UNCLOS. Whereas a lot of what's going on in Southeast Asia between ASEAN states over maritime boundaries is a result of historic legacies. There's actually been a number of positive stories around how these states have used either bilateral negotiations or used maritime dispute resolution processes under international law to try to resolve some of these differences.

Ali Moore:

You're listening to Ear to Asia from Asia Institute at the University of Melbourne, and just a reminder to listeners about Asia Institute's online publication on Asia and its society's politics and cultures, it's called the Melbourne Asia Review. It's free to read and it's open access at melbourneasiareview.edu.au. You'll find articles by some of our regular Ear to Asia guests and by many others. Plus, you can catch recent episodes of Ear to Asia at the Melbourne Asia Review website, which again you can find at melbourneasiareview.edu.au. I'm Ali Moore and I'm joined by maritime security expert Associate Professor Bec Strating. We're discussing maritime disputes in the Indo-Pacific.

So Bec, let's go back to some of those ongoing disputes and positive stories, and we'll look at those that have been resolved or potentially resolved in a moment, but just in terms of ongoing, you mentioned Malaysia and Singapore, for example. How have they sought to resolve their disputes? Have they used UNCLOS? What methods have they looked at?

Bec Strating:

Yeah. So if we think about some of the issues that have arisen in maritime area between Malaysia and Singapore, there was a dispute over who owned Pedra Branca, which is a set of rocks in the Strait of Singapore. This is a sovereignty issue, but it's one that has ramifications for maritime area, maritime boundary. So in 2008, the International Court of Justice actually awarded Singapore sovereignty over Pedra Branca.

Now, since then, Malaysia has been a bit up and down on this ruling. It did file an application to have the case reopened on the basis of new historical records, which was then abandoned, but what we can take from this example is the fact that Malaysia and Singapore were willing to use an international court in order to try to resolve this dispute, which is interesting because China is not willing to use arbitration or courts to try to resolve these issues. There are other states in the region that have been reluctant to use these mechanisms as well.

But you also have, in this particular example, land reclamation activities. In 2018 and 2019, Malaysia issued a notice that it intended to extend its port limits into Singapore's territorial waters. Singapore then responded by asking for clarification and where these port limits are, and this, as I called it before, this diplomatic tit for tat went on for a few months. When claims overlap, they can have an effect on how states view their entitlements and how they might protest the moves of other states, but Southeast Asian states, I think, have been able to manage these issues better between themselves because they're perhaps not as high stakes as what the South China Sea disputes with China is and what the nine-dash line means.

Ali Moore:

Also, the point that you made earlier that in Southeast Asia, many of those claims come from complex geographies and historical realities more than any form of aggression or expansion.

Bec Strating:

Exactly. We're not talking about some new set of claims that states are making to try to extend their jurisdiction or to extend their sovereign rights. Often, they are linked to colonial legacies. Often, particularly when we are thinking about sovereignty disputes, there are historical reasons why states don't necessarily agree on who owns what. There's a complex set of international law around territorial acquisition that governs sovereignty issues because that's the other thing is the international law of the sea isn't supposed to be about sovereignty. It assumes that the ownership questions are settled. Clearly, the South China Sea, they are not settled.

So often, the disputes in the maritime boundary issues might just be about maritime boundary. They might not necessarily be about sovereignty as well. Whereas the nine-dash line is what we might call a mixed dispute because you have those sovereignty and those maritime disputes all mixed in together, which just makes it very complicated, and it really does reflect the fact that the South China Sea is this complex geography, as you say. You've got coastal states, a number of coastal states that are closed in together. It's a semi-enclosed sea, and there are hundreds of these land features that dot it, which make it much more complicated in how maritime claims are then distributed on the basis of land.

Ali Moore:

If we look at ongoing disputes and we move north, China, Japan and South Korea have got a number of ongoing disputes, haven't they? You've got Senkaku or Diaoyu, Takeshima or Dokdo. These are disputes that have been bubbling along for a very long time.

Bec Strating:

Yeah. So Senkaku, Diaoyu, the dispute that China and Japan have over those islands is one that does tend to get some discussion, not as much as the South China Sea, I wouldn't imagine, but that's an important set of disputes as well. Again, we're talking about a sovereignty dispute. Japan currently has possession over Senkaku. It administers Senkaku, but China challenges that claim, and it does so by sending in ships, particularly coastguard, fishing vessels in and around the territorial waters of Japan around Senkaku.

So this has increased particularly since 2012 when Japan made the move to nationalise those islands, which really changed the status quo, but you can see there's been this spike, this increase in China sending these vessels in to try to pressure Japan. It's a sovereignty dispute, but it has distinct maritime implications as well.

The other set of issues in the East China Sea, you have Dokdo, Takeshima, as you mentioned, which South Korea administers that set of rocks at the minute, but Japan contests South Korea's sovereignty. I mean, that's an interesting one because there doesn't appear to be much material

advantage in claiming those rocks, but rather, what you have is a set of historical grievances, I suppose. The Dokdo, particularly in South Korea, has become a symbol of nationalism.

If you walk into the National Museum in Seoul, one of the first things you see is this big poster or cardboard cutout of Dokdo being presented. So it's very clearly a symbol, an anticolonial symbol within South Korea. It's much more about those ideational factors rather than the material gains of owning or possessing Dokdo, Takeshima.

Then you have a variety of different continental shelf disputes or EEZ disputes between China, South Korea, and Japan. What tends to happen is that these states use different methods for coming up with their maritime boundaries depending on what suits their interests. So again, you can go back to that question of international law. There's different ways in which states might use and abuse international law in order to try to defend their national interests.

Ali Moore:

There's another example of we are talking about ongoing disputes. So let's move from the East China Sea and we go all the way west and the Chagos Archipelago, British-controlled, but it includes that US military base on Diego Garcia. Can you tell us about the Chagos Archipelago?

Bec Strating:

Yeah. I mean, this is a really interesting set of disputes. You've got the United Kingdom that administers the Chagos Archipelago under its British Indian Ocean territory. That's what they call the administering area around those atolls in the Indian Ocean. They're very important to the UK because, as you mentioned, they house Diego Garcia, which is one of the most important US military bases in the Indian Ocean region.

The problem for the UK has been that Mauritius doesn't accept that the UK's sovereignty over Chagos archipelago is legitimate. So Mauritius has been engaging in a number of legal and public diplomacy strategies to try to defend its claims to sovereignty over those islands, and it's been quite successful.

One of the things that it did was around 2010, it took the UK to an international court. It lost. I think it lost on the issue of the UK's marine-protected area that it had tried to establish around the Chagos archipelago. What Mauritius was trying to do was to contest the MPA to say that it wasn't valid and that it infringed Mauritius' rights under international law and under treaties that had been signed between the two countries.

Really, what it was trying to do was to try to pressure the UK on that issue of sovereignty. There was an advisory opinion offered by the United Nations, which supported Mauritius' claim. Recently, so it would've been November 2022, the UK actually agreed to enter into negotiations with Mauritius around the sovereignty of the Chagos archipelago.

So this is really interesting in the sense that you have this much smaller state trying to defend its interest by criticising UK colonialism, by saying that the UK's ongoing claim to Chagos is invalid, it violates self-determination rights under international law, and doing this by basically employing an international public relations campaign to put pressure on the United Kingdom.

One of the most effective ways that it's done that is by calling out the UK as being an advocate of the rules-based order by effectively linking the issue to the South China Sea by saying, "Well, the UK claims that it supports a rules-based order. How can the UK support a rules-based order and condemn China for undermining the rules-based order when it itself is violating some of these core precepts in international law?"

Obviously, the UK still claims sovereignty over the Chagos archipelago, and it has a strong interest in maintaining its ownership over that due to those strategic reasons wanting to provide this lease to

the United States, the Diego Garcia military base, but the fact that it was even moved to open negotiations suggests that Mauritius has been quite successful in that pressure campaign.

Ali Moore:

If we look now at disputes that have, to a certain extent, anyway been resolved, and you mentioned yourself earlier, Australia and the Timor Sea, tell us a bit about, I suppose, how far that got towards resolution and the method used.

Bec Strating:

Yeah. So that was a long-running dispute between Australia and Timor-Leste around maritime resources. Basically, the principle part of the dispute is oil and gas. That's the simple way of understanding why these disputes emerged is because the Timor Sea in the area between Timor-Leste and Australia is quite rich in hydrocarbon resources, and that's created a bunch of issues that existed before Timor-Leste even became independent in 2002.

So it was in 1989 when Australia and Indonesia signed a joint development agreement in the Timor Sea to try to exploit the resources within what was called the Timor Gap, this space between Timor and Australia. The reason why this maritime boundary issue emerged and why joint development was seen as necessary rather than just putting a line in the sea is because both states had different ideas about what methods should be used to limit the borders.

So Australia had this claim of natural prolongation, that its maritime boundaries should be at the end of its geomorphic shelf, it's continental shelf. Whereas Indonesia had argued that the boundaries should actually be set according to principles of equidistance, so basically creating a median line.

So what you get is essentially Australia saying the line should be much closer to Indonesia and giving Australia the bulk of those oil and gas resources, and Indonesia saying, "No, wait a minute, the line should be closer to Australia," and that's set out in UNCLOS. So those historical disputes carried forward when Timor-Leste became independent.

So in 2002, on the day of Timor-Leste's independence, Australia and Timor-Leste signed the Timor Sea treaty, which was basically an agreement of joint development. So they agreed to put aside the issue of maritime boundaries in order to be able to exploit the resources together, but that was not ultimately a satisfying resolution for Timor-Leste, and there was this other gas field predicted to be quite lucrative called Greater Sunrise that wasn't covered by the Timor Sea treaty, and there have been a series of negotiations around who gets to possess that field, who gets to decide how it's exploited, and who gets the upstream revenues from that.

So often, it's not just about digging the oil and gas up and selling it off, it can be about how it's processed can be quite lucrative for states. So with the resolution of this dispute, it was quite long-running. Ultimately, Timor-Leste used the world's first United Nations compulsory conciliation process under UNCLOS. While Australia had sought to avoid going to a court on maritime boundary issues, the United Nation at compulsory conciliation decided that it was competent to hear this case.

So Australia, even though it protested it, didn't initially want to be involved, it did end up engaging in the process in good faith, and it really functioned as a facilitated bilateral negotiation. So it wasn't as if there'd be a court or an arbitration hearing the case, hearing the facts, and then making a decision, it was more like the two states had to get together in a room and find a novel solution for these protracted issues around maritime boundaries, which Timor-Leste from 2007 were really keen to settle boundaries rather than leaving them up in the air and really wanted to enact their own plan for how the Greater Sunrise resource would be developed.

So you get a maritime boundary treaty in 2018 as a result of this world first process. Again, like the Chagos case, it was really down to the fact that there was a lot of pressure being placed on Australia. The civil society activists and Timorese, politicians, and people within Australia were arguing if

Australia's going to be complaining about China's actions in the South China Sea, if Australia's going to be talking about the rules-based order, then it needs to conform to it as well. That was quite an effective strategy and it really forced, I think, Australia to change its long-running position on whether or not maritime boundaries should be settled in the Timor Sea.

Ali Moore:

I mean, if you could describe that as the need to look for a novel solution, there's another example where more innovative solutions have been used, and that's going now to the Bay of Bengal. Tell us about India and Bangladesh and how they resolved one of their disputes.

Bec Strating:

Yeah. So there was a long-running dispute in the Bay of Bengal between Bangladesh and India, which was also recently resolved through the use of an arbitrary tribunal. So Bangladesh initiated this proceeding, and India had a bit of a wait and see approach to the whole thing before deciding that it would engage in this process in good faith as well.

What's really interesting about this, I mean, there was this novel solution that was found in mapping out the maritime boundary. The arbitral tribunal created this justification for how it would settle boundaries in a way that was quite creative in the same way that the Timor Sea boundary that was ultimately settled was quite creative. There isn't necessarily a template for it in UNCLOS, but as long as the states agree to it, then that's what matters. So there was this novel solution found to where the boundary might lie.

Bangladesh was able to secure quite a significant increase in maritime jurisdiction out of this process. But the really interesting thing about this case is that India was able to use its participation in this arbitral tribunal process as a way of distinguishing itself from what China is doing in the South China Sea. So in all three of these cases where you have smaller powers trying to shape the interests of bigger powers in order to secure their own interests, in all three of these cases, Timor, Chagos, and the Bay of Bengal, they were all linked in some way to South China Sea in the narratives around those cases.

India presented itself as a regional leader. So it was able to demonstrate its leadership credentials by saying, "Well, we engaged in good faith in this process in contrast to China, which has ignored the arbitral tribunal ruling." So again, you have that sense in which the geopolitics around maritime disputes, what's going on in the South China Sea as a symbol for destabilising the rules-based order, actually has an impact on how other disputes are being resolved, which is a bit counterintuitive. We think of the South China Sea as being this destabilising region, but it has had, you could say, a positive effect on how other maritime disputes have been resolved.

Ali Moore:

Is there any indication that, in turn, the resolution of those other disputes would in some way provide lessons back to the issues in the South China Sea?

Bec Strating:

Ah, see, that's a much more difficult question, and as I've argued in my research before, narratives like the rules-based order, the states that use those narratives are more likely to find themselves having to conform with those narratives than the targets of the rules-based order, which, of course, is China when we think about Indo-Pacific.

So China, I think, in the South China Sea, it's a different case. So some of these other examples of dispute resolution have involved self-proclaimed maritime democracies, defenders of the rules-based order, who are susceptible to those legitimacy claims that smaller states and their

advocates have been making, but for China, I think it's been less susceptible. It does use lawfare strategies, so it does try to use existing international law to its own advantage through the use of/abuse of law, through strategic narratives, but ultimately, it has resisted efforts to use international courts and tribunals to try to resolve some of these issues.

So the first problem is that you've got an authoritarian state that sees the South China Sea in a very particular way as it's near sea, and it really is trying to territorialize that sea and to assert much more control over that sea, and it has a special place in China's strategic imagination, which makes dispute resolution prospects quite difficult.

The second set of issues is that they don't just involve two states. They involve a number of states. They are mixed in that they involve sovereignty and maritime issues. When you think about the Timor Sea, for example, it's much more straightforward. You have two states. You could say that Indonesia was an interested party, two in a lesser extent, but essentially, you've got two states and it's a maritime boundary issue. There was no sovereignty issue, so you don't have the same complexity as what you get with the South China Sea where you have multiple coastal states and you have this great power who is really asserting its claims and its interests in quite aggressive ways.

Ali Moore:

Given that, to finish this podcast where we started, what is the hope? Is there any hope for a resolution in the South China Sea or, indeed, is the best hope the status quo?

Bec Strating:

I think resolution is probably a way off. I think what the states are focusing on is the management of those disputes, and if states in the region and even beyond the region, so the United States as well, if they can come up with some agreements around code of conduct or around things like freedom of navigation, how it's interpreted, if they can come up with some better strategies, confidence building measures, for example, for dealing with or managing these issues, I think that's about as good as we can hope for at this stage.

It doesn't look to me like resolving these disputes is going to come about anytime soon, but what needs to happen is really lowering the temperature around these disputes and making sure that they don't lead to unintended incidents at sea, that they don't lead to flaring up of conflict accidentally, and that Southeast Asian states, that they are able to access their rights under international law.

Ali Moore:

Are you optimistic? You've looked at this area for a very long time. Are you optimistic about the ability to manage these disputes? In the end, boils down to China, doesn't it?

Bec Strating:

Yes, it does boil down to China, but China's not going to get into a fight by itself. So I think it's going to be less likely to be Southeast Asian states wanting to get into direct fights with China. I think, to be honest, if we are thinking about it in terms of conflict and the likelihood of conflict, particularly great power conflict, I'm much more worried about Taiwan and more worried about Senkaku, Diaoyu than I am about the South China Sea as being a site of potential great power conflict. That's not particularly optimistic, I know, but it's just that I think the risk factors are greater elsewhere.

Ali Moore:

Well, that, of course, is probably another two podcasts worth of discussion there.

Bec Strating:

Exactly.

Ali Moore:

Bec Strating, thank you so much for your time and your insights and for talking to Ear to Asia.

Bec Strating:

Thank you so much for having me.

Ali Moore:

Our guest has been Associate Professor Bec Strating from La Trobe University. Ear to Asia is brought to you by Asia Institute of the University of Melbourne, Australia. You can find more information about this and all our other episodes at the Asia Institute website. Be sure to keep up with every episode of Ear to Asia by following us on the Apple Podcast app, Stitcher, Spotify or Google Podcast. Please rate and review us. It helps new listeners find the show and put a good word in for us some social media.

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