

# BLUE SECURITY

## A MARITIME AFFAIRS SERIES

**The use of 'Lawfare' in the South China Sea Disputes:  
Views from the Philippines, Vietnam, and Indonesia**

Leonardo Bernard, Lowell Bautista, Jane Chan, and Nguyen Thi Lan Anh





## BLUE SECURITY

**The Blue Security Program engages with and facilitates high quality research on issues of critical maritime security across the Indo-Pacific. Bringing together leading regional experts in politics, international law and strategic studies, Blue Security focuses on three key pillars of maritime security: order, law and power.**

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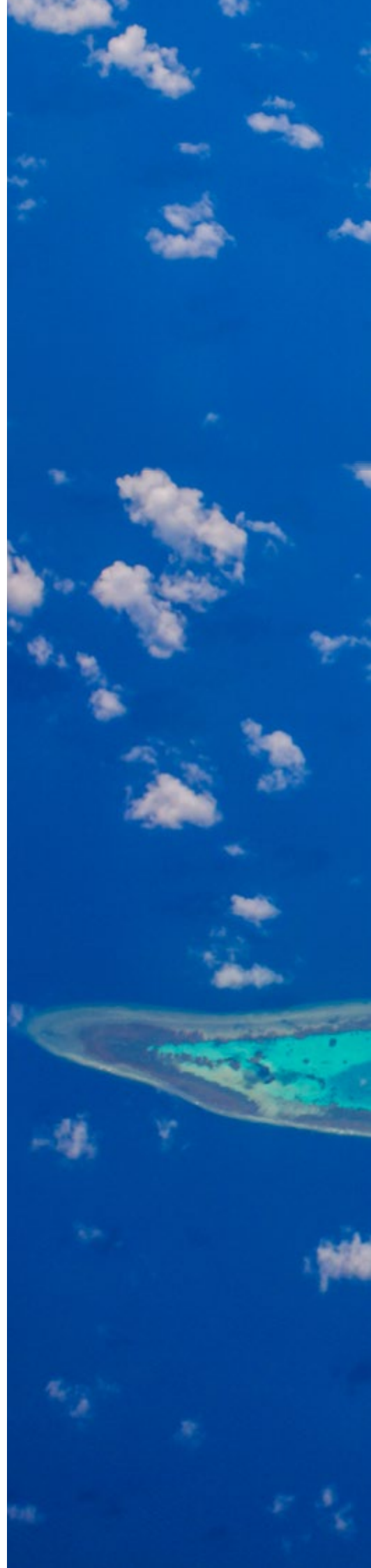
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## INTRODUCTION

This article will discuss several States' use of lawfare – particularly the international judiciary – to achieve a political objective, especially in the context of the South China Sea disputes. The article will first discuss the origin of the term 'lawfare' and its various interpretations before looking at how the Philippines utilised lawfare through the arbitration proceedings it brought against China in the South China Sea. The article will then look at Vietnam, another South China Sea claimant who did not join the arbitration proceedings, but has not closed the option of utilising such a process to strengthen its position in the dispute. The article will then focus on Indonesia, a non-claimant in the South China Sea dispute, but with a jurisdictional dispute with China, to see if it should consider engaging in lawfare to further its position. Finally, based on the experience of these three countries, the article will analyse whether the use of lawfare is a strategic move that improves the geopolitical and security situation in the South China Sea.

# THE USE OF ‘LAWFARE’ IN THE SOUTH CHINA SEA DISPUTES: VIEWS FROM THE PHILIPPINES, VIETNAM, AND INDONESIA

For decades, the South China Sea has been marked by multiple countries’ contentious territorial and jurisdictional assertions, serving as a predominant source of regional tension. The ascent of China as a formidable global entity introduces complexities to the response strategies of other claimant nations. China’s increasingly assertive manoeuvres present challenges for these other nations as they seek to balance the imperative of upholding their national interests with sustaining vital trade ties with the world’s largest market. While these states recognise the significance of maintaining economic relations with China, they find themselves in a position of relative disadvantage in the South China Sea, given China’s substantial economic and military prowess. Consequently, international law has emerged as the primary battleground where disputes over sovereignty concerning island clusters and jurisdiction over adjacent waters are contested.

The most prominent international legal battle concerning the South China Sea is the international arbitration proceedings brought by the Philippines against China, culminating in an award in 2016.<sup>1</sup> This legal course of action was perceived as a calculated utilisation of lawfare, wherein the Philippines strategically invoked established international legal avenues to counteract China’s military encroachment and territorial expansion in the South China Sea. This development prompted an exploration into the viability of similar lawfare tactics for other littoral nations in countering China’s actions. Vietnam, a significant claimant in the South China Sea disputes, emerged as another beneficiary of the 2016 arbitration award, which notably favoured the Philippines. Additionally, Indonesia, the largest state in the region after China, is a potential participant capable of

leveraging lawfare to bolster its position in disputes over maritime jurisdiction with China. This article delves into an examination of how these three states have employed some means of lawfare but have faced different considerations on whether to use the dispute settlement mechanism under Part XV of the 1982 UN Convention on the Law of the Sea [LOS Convention].

Dunlap, in 2001, defined the term ‘lawfare’ as a “strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective”.<sup>2</sup> However, in recent times, the term has undergone a semantic evolution, encompassing various legal applications. Currently, ‘lawfare’ encompasses a spectrum of meanings, from exploiting legal mechanisms to undermine adversaries, to a manoeuvre employed by authoritarian regimes to dissuade civil society from asserting their lawful entitlements.<sup>3</sup> More relevantly, China’s endeavours in the South China Sea, such as issuing official proclamations and establishing domestic legislations, are cited as employing lawfare.<sup>4</sup> For this article, we focus on a specific type of ‘lawfare’: a state’s utilisation of the legal system, specifically the international dispute settlement mechanisms, to accomplish a political objective.<sup>5</sup> This narrow scope is intentional, to foster a more concentrated discussion that pertains closely to the region. Consequently, this article does not discuss instances of litigation initiation by private entities or the promulgation of domestic statutes or governmental declarations within international forums.

# SOUTH CHINA SEA ARBITRATION: THE PHILIPPINES' MULTIFACETED LAWFARE STRATEGY

The Philippines' use of lawfare as a diplomatic, legal, and political strategy in dealing with the South China Sea dispute involved a multifaceted approach to challenging China's claims, garnering international support, and reinforcing its position in the contested waters.<sup>6</sup> This approach has three key elements. First, at the core of the Philippines' lawfare strategy was the initiation of arbitration under the LOS Convention that challenged the validity of China's "nine-dash line" claim, which encompasses most of the South China Sea.<sup>7</sup> This legal manoeuvre was a diplomatic and legal move aimed at seeking a legally binding resolution through an authoritative interpretation of important issues relating to the LOS Convention, including the legal status of maritime features, historic rights, and the duty to preserve the marine environment. The legal strategy provided a means to engage with China without direct military confrontation. By pursuing arbitration, the Philippines sought a mechanism to address its concerns and grievances while minimising the risk of further escalating tensions in the region. In 2016, the LOS Convention Annex VII arbitral tribunal administered by the Permanent Court of Arbitration in The Hague issued a landmark ruling in favour of the Philippines, declaring that China's claims to maritime entitlement in the EEZ of the Philippines were inconsistent with the LOS Convention and that it had violated the Philippines' sovereign rights.<sup>8</sup>

Second is framing the dispute within international law, including advocacy for the rule of law and a rules-based international order. The Philippines consistently framed the South China Sea disputes in terms of international law, particularly the LOS Convention. By doing so, it aimed to legitimise its claims and present itself as a responsible advocate for the rule of law on the global stage. By framing its arguments in the context of established international law, the Philippines has sought to garner support from the international community and present itself as a responsible and law-abiding actor. The Philippines positioned its legal strategy as a defence of the rules-based international order.<sup>9</sup> By emphasising the importance of adherence to international law and established dispute resolution mechanisms, the Philippines aimed to create a narrative that portrayed China's actions as a challenge to the stability and predictability of the international system.<sup>10</sup>

Third is mobilising international support through bilateral and multilateral diplomacy. The Philippines engaged in diplomatic efforts to rally support from other countries with shared concerns about China's assertiveness. This has involved participation in regional forums, such as the Association of Southeast Asian Nations (ASEAN), and strengthening ties with key allies like the United States, Australia, and Japan. In the region, ASEAN presents a united front to resolve South China Sea disputes





peacefully, but cracks appear in the Philippines' arbitration case against China.<sup>11</sup> While most members support the Philippines' legal victory, their primary concern is regional stability. This translates to a cautious approach, where they acknowledge the Philippines' actions but avoid directly confronting China, especially those with close economic ties.<sup>12</sup> The Philippines sought to rally international support for its legal case by actively engaging with the international community. It presented its arguments to international audiences through diplomatic channels, public statements, and media campaigns.<sup>13</sup> This diplomatic aspect of lawfare aimed to build a global consensus that China's assertive actions were inconsistent with international law and norms. By initiating arbitration, the Philippines aimed to alter the strategic calculations of China, forcing it to either comply with the ruling or risk diplomatic and reputational costs.<sup>14</sup>

## MOTIVATIONS AND STRATEGIC CALCULATIONS

The Philippines' utilisation of lawfare in the South China Sea disputes stems from a complex interplay of motivations and strategic calculations. By pursuing legal channels, the Philippines endeavoured to validate its territorial claims and project itself as a conscientious and principled participant. The subsequent arbitral ruling fortified the Philippines' moral standing and underscored the significance of upholding the tenets of international law. Lawfare counters power imbalances by offering a means for smaller nations, such as the Philippines, to challenge larger and more powerful actors like China on a

level playing field.<sup>15</sup> The Philippines' lawfare strategy also reinforced its soft power on the global stage. By invoking international law and arbitration, the Philippines projected an image of a responsible nation that seeks to resolve disputes peacefully, in contrast to China's more assertive approach.

The arbitral verdict served as a powerful symbol that, despite prevailing power asymmetries, international law can be a potent instrument for achieving just outcomes.<sup>16</sup> The LOS Convention, one of the most comprehensive treaties in international law, offered a set of clear rules and procedures that the Philippines could leverage to its advantage.<sup>17</sup> The Philippines strategically sought to garner international support and exert diplomatic pressure on China to adhere to the established norms of the rules-based international framework, which it was able to do.<sup>18</sup> This legal approach resonated with powerful extra-regional powers, emphasising the importance of rule-based behaviour and the peaceful settlement of disputes through recognised legal mechanisms.<sup>19</sup> For example, the United States responded to the documents circulated by China following the final award of the arbitral tribunal. The United States responded with a *démarche* and a diplomatic note on 28 December 2016, highlighting contradictions between China's claims and international law, particularly the law of the sea.<sup>20</sup> By rallying international support and engaging major powers like the United States and Japan, the Philippines aimed to establish a stable order that counters China's unilateral actions, emphasising the role of major powers in maintaining regional stability.<sup>21</sup>





## CHALLENGES AND FUTURE CONSIDERATIONS

The Philippines' strategic adoption of lawfare within the South China Sea disputes has undoubtedly yielded significant achievements, yet its path forward is beset with notable challenges that merit thoughtful consideration. Following the arbitration award, several countries beyond the region, including the United States, Australia, France, Germany, and the United Kingdom, formally challenged China's claims through diplomatic notes.<sup>22</sup> The far-reaching resonance of the arbitral ruling drew extensive international focus and contributed to a certain level of diplomatic seclusion for China. Because of China's behaviour in the disputed waters, the U.S.-Philippines alliance is experiencing a resurgence, reaching its closest point in decades. Manila further solidifies its strategic position by deepening security partnerships with Australia and Japan.<sup>23</sup> Nevertheless, foremost among the challenges to the arbitral victory is the issue of implementation and enforcement, which casts a shadow over the effectiveness of the arbitral ruling. While legally binding, the ruling lacks a robust enforcement mechanism, permitting China to contest the decision while simultaneously continuing its assertive actions in the disputed waters, particularly in Second Thomas Shoal and Scarborough Shoal.<sup>24</sup> This conundrum underscores a critical question regarding the potency of legal avenues in catalysing tangible alterations in the ever-evolving geopolitical landscape. The Marcos government is contemplating a second arbitration case against China, focusing on the environmental harm caused by their actions in the disputed South China Sea.<sup>25</sup>

Secondly, the ever-shifting political landscape introduces an intricate layer of uncertainty. The Philippines' steadfast commitment to its legal strategy may be susceptible to the capricious winds of changing leadership or foreign policy realignments.<sup>26</sup> Domestically, the Philippines' lawfare strategy addressed public sentiment and domestic political pressures. The legal approach bolstered national pride and sovereignty claims, aligning with the Philippines' political narrative of defending its territorial integrity. These variations within the domestic and regional political context inject an element of uncertainty, potentially influencing the steadfastness and consistency of the Philippines' legal approach. Domestic politics also played a role in shaping the Philippines' lawfare strategy.<sup>27</sup> The move to invoke arbitration was influenced by domestic pressures to assert sovereignty and uphold national interests. The political leadership's ability to balance these domestic imperatives with regional and global dynamics highlights the intricate nature of foreign policy decision-making. This malleability poses the imperative for the Philippines to adroitly navigate the intricate interplay of internal and external forces to sustain the longevity of its lawfare strategy.

The third facet encapsulates the delicate art of balance. The Philippines is walking a fine line between assertive legal actions and judicious diplomatic engagement. The challenge lies in preventing the former from inadvertently exacerbating tensions or foreclosing avenues for

negotiation. This intricate juggling act underscores the intricate calculations that underpin the Philippines' efforts to harness lawfare as both a shield and a sword in the South China Sea disputes.

The current Philippine administration is countering China's aggressive actions in the South China Sea by adopting a transparency strategy. They are using videos and eyewitness accounts to expose China's harassment of Philippine personnel and civilians. This approach puts diplomatic and public pressure on China, challenging its claims of peaceful intent in the region. Additionally, by emphasising the illegality of China's actions and presenting factual evidence, the Philippines employs lawfare to delegitimise China's actions globally.<sup>28</sup> Since 2016, the Philippines has officially lodged 461 diplomatic protests against China for its South China Sea actions, as the Department of Foreign Affairs (DFA) reported. Of these, 262 were filed between 2016 and 2021, 195 in 2022, and four in 2023 as of January 26th.<sup>29</sup>

In the symphony of strategic considerations and calculated gambits, the Philippines' recourse to lawfare reflects its agency and response to the region's complexities. As the geopolitical drama unfolds, these challenges cast a critical light on the intersection of international law, domestic politics, and pragmatic manoeuvring, underscoring the intricacy of employing lawfare as a multi-dimensional instrument in contemporary statecraft. While the Philippines' legal strategy was deeply rooted in international law, the underlying power dynamics could not be ignored. This is where realism comes into play. Realist theories acknowledge the significance of power politics in international relations and the limitations of international law in the face of power imbalances.<sup>30</sup> While aiming to challenge China's claims, the Philippines' lawfare strategy reflected a nuanced understanding of its limitations. It recognised that while the arbitral tribunal's ruling was legally binding, its enforcement relied on the willingness of major powers to exert diplomatic and economic pressure on China.

## REFLECTIONS

The Philippines' strategic use of lawfare in the South China Sea disputes underscores the evolving nature of international conflict resolution, where legal processes are intertwined with traditional diplomatic and military strategies. This strategy, exemplified by the arbitral ruling, demonstrates the potential of international law to challenge power imbalances and uphold the rule of law. However, it also reveals challenges: the ruling's lack of enforceability and China's rejection, illustrating smaller states' hurdles against stronger adversaries. The Philippines must bring to light China's aggressive and intimidating actions in the South China Sea, underscoring the necessity of sharing this information with the public.<sup>31</sup> The Philippines' approach is a valuable case study for scholars and policymakers, shedding light on strategic considerations, domestic factors, and international dynamics in conflict resolution.

# VIETNAM'S USE OF INTERNATIONAL LAW AS A FORM OF LAWFARE

In Vietnam, international law is considered an effective tool for helping small and medium countries to safeguard their national interests. This is particularly true in the South China Sea disputes, where Vietnam believes its strong legal arguments under international law provide the best foundation for defending its interests. Vietnam claims *sovereignty* over the Paracel and Spratly Islands in the South China Sea. Vietnam inherited the claims over these island groups from the previous governments and published a map in 1976 that included them.<sup>32</sup> The country had prioritised respecting international law in the South China Sea disputes since 1975, when it became a unified country. As part of its claim, Vietnam based its arguments on international law on territorial acquisition<sup>33</sup> and outlined them in detail in three white papers published in 1979, 1981, and 1988. The legal position of Vietnam was subsequently reaffirmed in its note verbale to the United Nations.<sup>34</sup>

Vietnam's use of lawfare focuses on its adherence to international law through national legislation, using international forums for cooperation, and settling disputes peacefully. As a coastal state, Vietnam recognises the importance of international law of the sea. Vietnam sent a delegation to the third United Nations Conference on the Law of the Sea in 1977 and claimed its maritime zones the same year.<sup>35</sup> This was followed by the 1982 Declaration on the application of straight baselines.<sup>36</sup> The country signed and ratified the LOS Convention in 1994. The Resolution of the National Assembly of Vietnam to ratify the

Convention emphasised the country's commitment to study and revise the relevant provisions of domestic laws to comply with the LOS Convention while ensuring Vietnam's interests.<sup>37</sup> The LOS Convention provisions were later incorporated into the Law of the Sea of Vietnam in 2012.

Under the 2012 Law of the Sea, Vietnam claims five maritime zones: internal water, territorial sea, contiguous zone, exclusive economic zone, and continental shelf under its sovereignty, sovereign rights, and jurisdiction. These maritime zones were established following Vietnamese law, the boundary and territory agreements to which Vietnam is a party, and the LOS Convention.<sup>38</sup> In the Law of the Sea of Vietnam, the requirement for prior authorisation has been removed, although the prior notice requirement remains in effect for innocent passages through Vietnam's territorial sea. In drafting the Law of the Sea of Vietnam, attempts were made to modify and complete the straight baselines declared in 1982. However, such attempts failed due to a lack of consensus within domestic opinion. This law was argued to be incompatible with the LOS Convention due to the retention of the requirement of prior notification and the 1982 straight baselines. The Law of the Sea of Vietnam stipulates, however, that where its provisions differ from those of an international treaty to which Vietnam is a party, the provisions of the latter shall prevail.<sup>39</sup> By this provision, Vietnam has endorsed its commitment to respect international law, particularly the LOS Convention.

In 2009, as part of fulfilling its obligations concerning the delineation of the continental shelf beyond 200 M (outer continental shelf),<sup>40</sup> Vietnam submitted information on two locations of outer continental shelves in the South China Sea, one unilaterally and the other jointly with Malaysia, to the Commission on the Limits of the Continental Shelf (CLCS). This pushed the other claimant states in the South China Sea to clarify their maritime claims and opened opportunities for cooperation to jointly delineate their outer continental shelf in the South China Sea.<sup>41</sup> In response to the submission of Vietnam and Malaysia, China included the map of the nine-dash line in its note verbale and implicitly claiming sovereignty, sovereign rights, and jurisdiction over the waters, seabed, and subsoil within the nine-dash line.<sup>42</sup> Following the publication of the nine-dash line map, several diplomatic notes were deposited at the United Nations to protest China's extensive claim.<sup>43</sup> Among them, the diplomatic note of Indonesia opened up the discussion on the legal status of geographical features in the South China Sea,<sup>44</sup> which later was one of the substantial issues submitted by the Philippines to Arbitration under Annex VII.

As a party claiming sovereignty over the Paracels and Spratlys, Vietnam's submissions on its outer continental shelf also implied that Vietnam considered the high tide features of the two island groups as rocks.<sup>45</sup> It should be noted that Vietnam would not have submitted information on its outer continental shelf from the mainland to the CLCS if they had viewed the high tide features of the Paracels and Spratlys as capable of generating a continental shelf. This was in line with Vietnam's statement sent to the South China Sea Tribunal in 2014, saying that none of the maritime features referred to by the Philippines in the proceedings would be capable of generating maritime entitlements over 12 M, since they are low-tide elevations or "rocks which cannot sustain human habitation or economic life of their own" under Article 121(3) of the LOS Convention.<sup>46</sup> Later, in the diplomatic note sent to the CLCS concerning the submission of Malaysia in 2019, Vietnam also reaffirmed its positions that "the maritime entitlement of each high-tide feature in the Hoang Sa Islands and the Truong Sa Islands shall be determined in accordance with Article 121(3) of [the LOS Convention]".<sup>47</sup> As Article 121(3) of the Convention provides that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf", by citing this article Vietnam considered the high tide features of the Paracels and Spratlys to be rocks.<sup>48</sup>

Concerning international dispute settlement, the Resolution of the National Assembly of Vietnam to ratify the LOS Convention stated that Vietnam supported "building a just and equitable legal order for the seas and encouraging marine development and cooperation" and was committed to settling territorial and maritime disputes by peaceful means.<sup>49</sup> The Law of the Sea of Vietnam also reaffirmed that Vietnam settles disputes related to the sea and islands with other countries by peaceful means, in conformity with the Convention, as well as international law and practices.<sup>50</sup> Accordingly, Vietnam has completed delimiting the overlapping maritime zones with three neighbouring

countries, namely China in the Gulf of Tonkin,<sup>51</sup> Thailand,<sup>52</sup> and Indonesia.<sup>53</sup> Furthermore, Vietnam and Malaysia have reached an interim agreement to develop oil and gas on their overlapping continental shelves.<sup>54</sup>

Even though Vietnam has concluded maritime delimitation agreements with its neighbours through negotiations, it has also expressed support for using the judicial process to settle disputes. In December 2014, Vietnam sent a statement to the Arbitral Tribunal from its Ministry of Foreign Affairs regarding the South China Sea arbitration between the Philippines and China. The statement confirmed Vietnam's position that it has "no doubt that the Tribunal has jurisdiction in the proceedings", as well as noting in detail that the Philippines does not request this Tribunal to consider any issue not subject to its jurisdiction under Article 288 of the Convention (namely, questions of sovereignty and maritime delimitation). In addition, the Tribunal is competent to interpret and apply Articles 60, 80, 194(5), 206, 293(1), and 300 of the Convention.<sup>55</sup>

Along with its views on admissibility, Vietnam resolutely protested and rejected any claim by China based on the 'nine-dash line',<sup>56</sup> and sent its officials to the Hague to observe the hearing of the South China Sea case. During the standoff between China and Vietnam regarding the placement of oil rigs near the Paracels in 2014, the Prime Minister of Vietnam, Nguyen Tan Dung, responded to reporters from Reuters and Bloomberg, suggesting that Vietnam might be considering legal action.<sup>57</sup> Vietnam's support for the use of judicial measures to settle disputes is also evident in the Written Statement that it sent to ITLOS and in its participation in the Oral Hearing in Case 31 regarding the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law.<sup>58</sup>

Therefore, with regard to the use of international judicial mechanisms as a form of lawfare, Vietnam has opened the possibility of using all peaceful dispute settlement measures, including through judicial bodies, especially to settle the South China Sea maritime disputes. However, Vietnam still has room for improvement. First, in light of the 2016 South China Sea arbitration award, Vietnam should limit its sovereignty claims in the Paracels and Spratlys to high tide features.<sup>59</sup> Second, based on the South China Sea arbitration, all of the high tide features of the Spratlys are rocks that cannot generate an exclusive economic zone and continental shelf. Thus, Vietnam should establish normal baselines for the high tide features of the Paracels and Spratlys to delineate its territorial sea. Vietnam should clarify the maritime zone claims from its mainland by revising its straight baseline and updating the exclusive economic zone (EEZ) and the continental shelf regulations, including its outer continental shelf submissions to the CLCS. Third, Vietnam should conclude maritime delimitation with its neighbours. The conclusion of the negotiations between Indonesia and Vietnam in 2022 on their overlapping EEZ was an indication of good faith between the two countries in resolving maritime disputes in accordance with the LOS Convention.<sup>60</sup> Vietnam can follow this model to resolve maritime disputes with neighbours such as the Philippines, Malaysia, and Cambodia.



With regard to sovereignty disputes, any resolution by judicial means, such as through the International Court of Justice (ICJ) or arbitration, would require the consent of the parties involved. In the present situation, China prefers to settle sovereignty disputes by negotiation. Moreover, none of the other parties consented to using judicial bodies, making resolving sovereignty issues through judicial procedures difficult. However, since most of the littoral states in the South China Sea are parties to the LOS Convention, they have already provided their consent in advance at the time of ratification to resolve disputes peacefully, including through judicial means. Consequently, any disputes concerning the interpretation and implementation of the Convention could be resolved by the dispute resolution mechanism outlined in Part XV of the Convention.

According to Part XV of the LOS Convention, disputes relating to its interpretation and implementation must be resolved peacefully. Accordingly, the parties are obliged under Article 283 to exchange views. Should a solution not be reached after a reasonable period, Session 2 shall be applied with compulsory procedures entailing binding decisions. As to compulsory procedures, the parties will have four options: the ICJ, ITLOS, arbitration established under Annex XII, and arbitration established under Annex VIII (in which arbitration under Annex VII becomes the default mechanism should the parties fail to make their choice or have different choices). There are, however, several exceptions to the jurisdiction of the compulsory procedures under Session 2. Disputes concerning maritime delimitation, historic bays or titles, military activities, and the exercise of Security Council functions

may be opted out of if the parties have made a declaration under Article 298. To date, of the littoral states in the South China Sea, China, Thailand, and Singapore have made their declarations under Article 298; China and Thailand have opted out of all disputes provided under Article 298, while Singapore has opted out of maritime delimitation disputes as well as historic bay and title disputes.<sup>61</sup>

The Philippines invoked the mechanism of Arbitration under Annex VII in the South China Sea case, which resulted in the 2016 Award that clarified maritime claims and behaviours in the South China Sea. In this case, the Tribunal addressed the issues of maritime entitlement claimed by China's U shape line and the legal regime of geographical features of the Spratlys, which fall outside the scope of China's Declaration under Article 298. Similarly, Vietnam may consider using Arbitration under Annex VII for disputes concerning the straight baseline of the Paracels, China's nine-dash line, and the legal status of geographical features in the South China Sea.<sup>62</sup>

In light of these perspectives, Vietnam will continue to promote its lawfare strategy as a peaceful means of resolving territorial and maritime disputes. Meanwhile, Vietnam strives to strengthen its legal arguments and position based on international law, particularly the LOS Convention, to gain international support for its claims, thus balancing the asymmetry of hard power with other claimants in the South China Sea.<sup>63</sup> Ultimately, the goal of the lawfare strategy is to serve Vietnam's national interests by providing a stable environment for economic development and sustainable management of the South China Sea.

Image credit: Leonid Andronov



# INDONESIA'S INDIRECT APPROACH TO LAWFARE

Along the South China Sea coastline, Indonesia asserts its rights over the EEZ and continental shelf in the southwestern sector of this maritime region, known as the North Natuna Sea. It is important to note that Indonesia does not make any sovereignty claims over the offshore features in the South China Sea itself. However, there is a notable concern due to the apparent overlap between China's expansive nine-dash line claim in the southern part of the South China Sea<sup>64</sup> and Indonesia's defined EEZ and continental shelf in the North Natuna Sea.<sup>65</sup> This tension is further complicated by Indonesia's ongoing efforts to address a multitude of illegal fishing vessels operating within this area, most of which are Chinese,<sup>66</sup> which has led to the controversial sinking of several of those found to engage in illegal fishing activities.<sup>67</sup>

Since 2009, when China included its map featuring the nine-dash line in a Note Verbale submitted to the UN Secretary-General,<sup>68</sup> Indonesia has consistently relied on international law to counter China's position. Indonesia stated that any assertion of sovereign rights and jurisdiction within the waters encompassed by the nine-dash line would conflict with the LOS Convention unless such claims were limited to maritime zones originating from the islands.<sup>69</sup> In 2015, Indonesia's Coordinating Minister for Political, Legal, and Security Affairs, Luhut Pandjaitan, suggested that Indonesia consider taking the dispute to an international court as an alternative resolution.<sup>70</sup> However, during that period, Indonesia appeared content to allow the arbitration case initiated by the Philippines against China to play out.

When the Award was issued in 2016, Indonesia welcomed the Tribunal's affirmation that China's nine-dash line cannot be used as a basis for any rights over the resources in the South China Sea.<sup>71</sup> Rather than embarking on a direct international legal confrontation with China, Indonesia opted for a diplomatic approach, urging China to respect the Tribunal's decision and align its claims in the South

China Sea with international law and the LOS Convention.<sup>72</sup> This, of course, does not preclude Indonesia from potentially bringing its claim against China in the future under the dispute settlement procedure outlined in the LOS Convention. However, presently, several factors make such a scenario unlikely.

Firstly, any relief or remedy that Indonesia might have sought in such a case had already been granted against China in the arbitration case initiated by the Philippines. In a legal setting, to contest China's fishing activities within the North Natuna Sea (an area within Indonesia's claimed EEZ), Indonesia would need to demonstrate that China does not have any historical rights based on the nine-dash line.<sup>73</sup> This was the Tribunal's ruling in the Philippines arbitration case, which declared that China's assertion of such rights lacked international legal support and contradicted the LOS Convention. Consequently, there is currently no imperative for Indonesia to pursue legal action against China concerning the nine-dash line.

Secondly, much like the situation in the Philippines' arbitration case, it is very likely that China would decline to participate and would disregard any ruling from such a case. While most of the international community respects the decision of the Tribunal in the South China Sea Arbitration case, China's refusal to participate in the proceedings raises questions about the Tribunal's legitimacy. This pattern would likely persist in any future case brought by Indonesia against China. Moreover, China has managed to disregard the arbitration award without experiencing significant repercussions, aside from some damage to its international standing. Indonesia can also observe that the legal victory achieved by the Philippines through the arbitration case did not lead to any substantial changes in the South China Sea disputes. Given these considerations, it is understandable for Indonesia to conclude that there are more effective courses of action to resolve their dispute than pursuing legal action against China.



Finally, taking this action would potentially jeopardise Indonesia's trade relationship with China. It is important to emphasise that no financial gain should ever come at the cost of a country's sovereignty or sovereign rights. However, the North Natuna Sea dispute has not escalated to such a critical level. Notwithstanding ongoing tensions between the coast guards of both nations in the area, Indonesia and China have consistently worked to de-escalate situations. For instance, in 2020, despite multiple incursions by Chinese vessels into the North Natuna Sea and condemnation from the Indonesian parliament, Indonesian Defense Minister Prabowo Subianto urged calm, and emphasised that China remained a friend of Indonesia.<sup>74</sup> Similarly, China's Foreign Ministry spokesperson also called

for restraint and expressed a desire to resolve their differences while preserving their bilateral relationship.<sup>75</sup> Despite maintaining a diplomatic approach, Indonesia has strengthened its naval presence in the Natuna waters. The archipelago has also seen visits from top Indonesian officials, including President Joko Widodo and the Minister of Maritime and Fisheries Affairs.<sup>76</sup>

While Indonesia is not inclined to enter a direct legal confrontation with China, it has not refrained from employing legal tactics to bolster its position in the South China Sea. Instead of a direct approach, Indonesia has pursued an indirect strategy by urging China to adhere to the 2016 ruling of the Arbitral Tribunal and questioning the legitimacy of China's claims based on that ruling.





# CONCLUSION

The Philippines', Vietnam's, and Indonesia's practices show that lawfare can be a strategic choice for countries with asymmetric dependence.<sup>77</sup> Even though not all three countries were assessed to have directly employed the specific means of lawfare – i.e. international judiciary – as the determining yardstick for this paper, each has demonstrated the use of legal norms and international law more broadly as a tool for change<sup>78</sup> – to manage their respective problems in the South China Sea, either independently or through regional institutions such as ASEAN and the various ASEAN-led mechanisms. The practice of lawfare, direct or indirect, has been intimately associated with each country's diplomatic and strategic calculations thus far.<sup>79</sup>

The obvious convergence is that the Philippines, Vietnam and Indonesia consider international law an important tool to help safeguard their national interest, and this article detailed how all three countries invoke international law either to promote the legitimacy of their actions or to dispute China's. All three countries had different strategies when operationalising their respective legal approach.

The Philippines' use of lawfare as a diplomatic, legal, and political strategy in dealing with the South China Sea dispute involved a multifaceted approach to challenging China's claims. The arbitration proceedings were part of the strategy, to use a legal forum for political gain not available to the Philippines by other means.<sup>80</sup> The main aim, as iterated earlier, is to emphasise on the importance of the rules-based international order and of relying on international support to put pressure on China. However, it is still being determined whether doing so has increased

regional stability. China's assertive actions in the South China Sea have not waned since the arbitral award and have observably trended upwards in the last few years.<sup>81</sup> However, that is not to say that the Philippine's legal strategy failed. On the contrary, it illustrated the importance of having a multi-pronged approach. Philippines's 'assertive transparency' approach<sup>82</sup> in the last year or so demonstrated that having the law on one's side – including effectively using the arbitration award to show that China's actions were contrary to the LOS Convention – only forms part of a strategy.

Although Vietnam has not instituted legal proceedings against China concerning their disputes in the South China Sea, Vietnam has left options open, especially in the use of international judicial mechanisms as a form of lawfare and in all peaceful dispute settlement measures. More than anything else, Vietnam understood that strengthening its legal arguments based on international law, particularly the LOS Convention, is part of this legal strategy. This is particularly important as international law is also evolving.<sup>83</sup> The South China Sea arbitral award has brought about some clarification on the interpretation and application of international law, for example with regard to the treatment of the features and the relevant maritime zones each is entitled to. It is important for the claimants in the South China Sea disputes to continuously examine their own legal position to ensure that their arguments are always aligned and consistent with international law. As the rest of the world tries to understand China's strategy in the South China Sea and how it has evolved<sup>84</sup>, consistent and universal interpretation and application of international law will always prevail in the battle for the moral high ground.

Indonesia, while not a party to the maritime and territorial claims in the South China Sea, has had to manage China and its nine-dash line claims, which overlap with Indonesia's EEZ and continental shelf within the Natuna Sea. Indonesia's case is interesting as it best illustrates that even when one is not a claimant, development in the South China Sea and the actions and treatments of international law by the claimant matter. Inconsistent treatment of international law will directly affect the interests of non-claimant states and other stakeholders within and outside the region.

Of course, international law is all but one of the many tools in the respective policy tool kit of states. It is not within the ambit of this article to study the impact of each exercise of lawfare on the bilateral relations between these three countries and China. The Philippines, Vietnam and Indonesia made considered choices in their respective evolving strategies, hence the different approaches discussed above. The means and approach to which the three Southeast Asian states opted to manage their respective South China Sea 'dispute' are considered strategies rooted in sustained commitment to international law and the universal application of the rule of law.



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