International Law in the South China Sea

The Philippines-China Dispute

Luz Danielle O. Bolong
Harvard Law School
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Coverage

- Type of Dispute
- Relevant UNCLOS provisions
- The Philippines-China Maritime Dispute
  - Award on Jurisdiction and Admissibility
  - Discussion of Claims
  - Participation of other States
- What is next?
What disputes?

- **Territorial Disputes**
  - Sovereignty
    - China v. Viet Nam (Paracel)
    - China v. Philippines (Scarborough)
    - China, Philippines, Malaysia, Viet Nam, Brunei, Taiwan (Spratlys)

- **Maritime Disputes**
  - Overlapping maritime zones
  - Interpretation or application of the UNCLOS
    - Philippines v. China
    - What is UNCLOS? “constitution of the oceans”
What are the different zones under UNCLOS?

- Continental Shelf
  - Sea-bed, Subsoil, Sedentary Species
    - (Extended Continental Shelf)
- Exclusive Economic Zone (EEZ)
  - Water Column, Sea-bed, Subsoil
- Contiguous Zone
- 12 M
- 200 M

Internal waters

Terrestrial sea

Animation by Arsana & Schofield, 2012

Schofield's presentation, 2014 Yeosu Academy
What are the qualifications for entitlement to territorial sea, EEZ & continental shelf?

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Island</th>
<th>Rocks</th>
<th>Low-tide Elevations and Submerged banks</th>
<th>Artificial island, installations and structures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Entitlement</td>
<td>TS, EEZ, CS</td>
<td>TS if it cannot sustain human habitation or economic life</td>
<td>None but may be used as baseline if situated within 12 nm from mainland or an island</td>
<td>None but may have safety zone around it not exceeding 500 meters. Do not affect delimitation</td>
</tr>
<tr>
<td>Description</td>
<td>Naturally formed area of land surrounded by water and above water at high tide</td>
<td>Subcategory of islands.</td>
<td>Naturally formed area of land surrounded by and above water at low tide but submerged at high tide</td>
<td>Not naturally formed; with human, mechanical or other unnatural intervention. Not considered as permanent harbor works</td>
</tr>
<tr>
<td>UNCLOS provision</td>
<td>Art. 121</td>
<td>Art. 121(3)</td>
<td>Art. 13</td>
<td>Arts. 60, 11</td>
</tr>
</tbody>
</table>
What is a rock?

Counter-Memorial of Colombia, Figure 2.8 [http://www.cioh.org.co/pruebaderroteropaginas/archipelago/faro_quitasur.html](http://www.cioh.org.co/pruebaderroteropaginas/archipelago/faro_quitasur.html); [http://www.cioh.org.co/pruebaderroteropaginas/archipelago/faro_quitaNorte.html](http://www.cioh.org.co/pruebaderroteropaginas/archipelago/faro_quitaNorte.html)
What is the bottom line? To reduce the nine-dash line claim into donuts.
Maritime Dispute in a gist

<table>
<thead>
<tr>
<th>China</th>
<th>Philippines</th>
<th>UNCLOS</th>
</tr>
</thead>
<tbody>
<tr>
<td>We have sovereignty and sovereign rights over all of South China Sea.</td>
<td>At most, features in South China Sea are all rocks entitled to just 12 nm territorial Sea. We have sovereign rights within our EEZ. Outside those donuts, as long as it is within our 200 nm, you cannot interfere with our UNCLOS rights.</td>
<td>Rights depends on characterization of features—island, rock or low-tide elevation.</td>
</tr>
</tbody>
</table>
Can the tribunal hear the case?

- China’s absence does not bar the proceedings.
- Tribunal considered, although did not confine itself to, issues in China’s position paper.
- China’s Objection 1: Arbitration essentially dwells on territorial sovereignty, outside UNCLOS’ scope.
- Tribunal says:
  - Presence of other aspects to a dispute not ground to decline dispute on another aspect.
  - Jurisdiction over submissions related to environmental harm.
  - Narrow selection of features does not affect China’s sovereignty.
Can the tribunal hear the case?

- China’s Objection 2: Assuming within scope, part of maritime delimitation that China excluded in 2006.

- Tribunal says:
  - Dispute over an issue considered during maritime boundary delimitation does not by itself constitute maritime boundary delimitation.

- China’s Objection 3: The Philippines violated obligation to settle disputes through negotiations.

- Tribunal says:
  - Resort to arbitration not by itself abuse of rights.
Philippines’ position

1. China’s nine-dash line is invalid. China does not have historic rights over the South China Sea.
   a. China’s claims relate to historic rights not to historic title.
   b. Historic rights do not survive UNCLOS.
   c. Even if they survive China fails to meet the 3-fold test.

2. Since the maritime features in the South China Sea are either just rocks or low-tide elevations, none of them are entitled to an EEZ, Continental Shelf.

3. China violates its environmental obligations.

4. China violates the Philippines’ sovereign rights.
#1. China has no Historic Rights

A. China claims historic rights, not historic title

- China’s claims relate to sovereign rights not sovereignty.
- Exclusion of historic bays or titles does not apply.
  - China has not used Art. 298(1)(a) as basis for lack of jurisdiction.

B. Historic rights do not survive UNCLOS

- Even before UNCLOS, no support for historic rights
- Incompatible with UNCLOS (go back to chart)
#1. China has no Historic Rights

C. China fails to meet three-fold test

- Absence of claim for over 900 years.
- Continuous objection from adjacent States

What is the basis of the Philippines to say China has not claimed the South China Sea for over 900 years?

- Maps
- Legislations
- Tolerance of activities of other States
1136: Hua Yi Tu (Map of China and the Barbarians)

- Earliest Chinese map Philippines knows
- Southern most part: Hainan

https://www.loc.gov/resource/g7820.ct000284/
Navigation aversion.

- 14th century ban on long-range navigation
- 1500: capital offense to build two-mastered ships
- 1525: destruction of ships
- 1551: venturing at sea as act of treason
1547-1559: Territorial Atlas of the Great Ming Empire

https://www.loc.gov/resource/g7820m.get00125/?sp=1
Aversion continues.

- 1717: Prohibition to venture into South China Sea places
  - Luzon (Philippines)
  - Java (Indonesia)
1842: Qing Empire’s Complete Map or All Under Heaven

No objection.

- Surveys (including Spratlys)
- Claims on Spratly and Amboyna Cay.
- Anti-piracy measures

East Indian company: other vessels larger and more valuable than Chinese vessels.

https://www.loc.gov/resource/g7820.ct003405/1
1896: Qing’s Empire Complete Map of all Provinces

- Ming to Qing dynasty: no record of China-sanctioned activities in South China Sea
The change begins in 1933: *New Provincial Map of China*

- Taiwan president Ma: China’s claims of "sovereignty over the South China Sea islands" date only to the "early 20th century"
- 1933: inclusion of Paracels
- Century **before**: Viet Nam

[Map link](https://www.loc.gov/resource/g7821f.ct002303/)
And then things changed…

- 1935: Map including Spratly islands
- 1947: Eleven-dash line: Map showing the Location of the Various Islands in the SCS
- 1958: 12 nm territorial sea claim for mainland China, Hainan, Taiwan, Pratas, Paracels and Spratly islands
- 1992: Territorial Sea and Contiguous Zone Law
- 1998: EEZ and Continental Shelf Act (“not affect historic rights”)
- 2009: historic rights on water within nine-dash line
# 2. None of the South China Sea features are full-islands entitled to an EEZ and a continental shelf

- **A. Low-tide elevations (below sea level at high tide)**
  - Rule: within territorial sea, part of sovereignty; within continental shelf, part of sovereign rights
  - Charts from Philippines, China, Malaysia, Viet Nam, UK, US all agree these are low-tide elevations
  - Those part of the Philippine continental shelf
    - Mischief Reef
    - Second Thomas Shoal
  - Not located in China’s/Philippines’ continental shelf
    - Subi Reef
  - Within 12 nm from high-tide features of Viet Nam
    - Gaven Reef [from Namyit]
    - McKennan Reef (including Hughes Reef) [from Sin Cowe]
# 2. None of the South China Sea features are full-islands entitled to an EEZ and a continental shelf

- B. Rocks (above sea level at high tide)
  - Recall: 12 nm territorial sea only
  - Scarborough Shoal
  - Johnson Reef
  - Cuarteron Reef
  - Fiery Cross

- What has China done with these low-tide elevations and rocks?
  - From low-tide features and miniscule rocks to artificial islands
  - From standing capacity to airports
Massive construction: Mischief Reef
Massive construction: Subi Reef

Aug. 2012

July 2012

Nov. 2015

June 2015


amti.csis.org photos
Massive construction: Gaven Reef

Sept. 2007

Oct. 2014

Nov. 2014

Feb. 2016
Massive construction: Hughes Reef

Mar. 2008

Dec. 2014

Feb. 2016

amti.csis.org photos
Massive construction: Johnson Reef

Nov. 2004

Jan. 2012

Nov. 2014

Feb. 2016

amti.csis.org photos
Massive construction: Cuarteron Reef

Mar. 2013

Nov. 2014

Sept. 2014


amti.csis.org photos
Massive construction: Fiery Cross

Jan. 2006

Nov. 2014

Sept. 2014

Sept. 2015

amticsis.org photos.
# 3. China violates its environmental obligations

- Violates obligation to protect and preserve the marine environment.
  - Why is China constructing? Chinese MFA: Main purpose is to “better safeguard territorial sovereignty and maritime rights and interests.”
  - No information whether China conducts environmental impact assessments (EIA) before constructing.
  - Adverse effects of sand dredging and island-construction to marine ecosystem
  - Other activities: widespread blast fishing; extraction of coral, giant clams, turtles et al endangered species
# 4. China violates the Philippines’ Sovereign Rights

- Prevents oil exploration and exploitation
  - Sterling Energy PLC (UK) near Reed Bank (service contract), Nido Petroleum Limited (survey), offer of 2 blocks
- Prevents seismic surveys
  - MV Veritas Voyager near Reed Bank
- Imposes bans on fishing and requires consent from Hainan authorities
- Threatens navigation (collision)
- Threatens rotation and re-supply to Philippine contingency in Second Thomas Shoal
Other States are interested in case

- Viet Nam
  - Supports tribunal’s jurisdiction.
  - Resolutely protests and rejects PRC’s nine-dash line.
  - Reserves right to intervene.

- Other Observers
  - Indonesia
  - Malaysia
  - Japan
  - Thailand
  - Brunei
  - Australia
  - Singapore

Why relevant? Opens opportunity for greater cooperation and for a united stand on rule of law, from navigation to environmental protection to oil and gas investments
### What is next?

- **How will the tribunal decide?**

<table>
<thead>
<tr>
<th>Favorable</th>
<th>Unfavorable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nine-dash line invalid.</td>
<td>Tribunal no power to hear historical title.</td>
</tr>
<tr>
<td>Features are either low-tide elevations or rocks. Maximum entitlement is just 12 nm.</td>
<td>Finding some high-tide features as islands.</td>
</tr>
<tr>
<td>China violates its environmental obligation.</td>
<td>Nine-dash line valid.</td>
</tr>
<tr>
<td>China violates the Philippines’ sovereign rights.</td>
<td>China does not violate its environmental obligations.</td>
</tr>
</tbody>
</table>

- Regardless of the result, it will definitely clarify the extent of Philippine and Chinese sovereign rights.
What is next?

- Philippine security
  - Fishing
  - Oil and gas exploration
  - Other sovereign rights to its exclusive economic zone

- How to guarantee “compliance”?
  - Claimant States: multilateral platform for negotiation with China
  - Common ASEAN stand to recognize decision
  - Neighboring States and world community stand to ensure compliance with freedom of navigation and environmental protection
What can we take away from this case?

The Philippines v. China case is not about blaming or shaming or antagonizing a neighbor State. It is about the rule of law and its full realization through cooperation.