

PHILIPPINES V. CHINA: THE SOUTH CHINA SEA FINALLY MEETS INTERNATIONAL LAW

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The pending case of *Philippines v. China* before the International Court of Arbitration concerns the two countries' claims for territory and economic rights in the South China Sea, an area said to be the fiercest-contested in Asia. China, the Philippines, Vietnam, Brunei, Taiwan, and Malaysia all have overlapping claims in it.¹ The South China Sea is one of the world's busiest maritime routes with more than half of the world's annual merchant fleet tonnage and a third of all maritime traffic.² It is also rich in fish stocks as well as oil and gas deposits.³ The fight for control of the South China Sea is therefore the fight for power. For China, control of the waters could mean a Chinese regional hegemony,⁴ for others, e.g. Vietnam, it could mean resistance from such hegemony, which Vietnam sees as historically dangerous.⁵

In recent years, to cement its position and further its ambition, China has built seven artificial islets over uninhabited reefs and shoals as well as exerted significant military control over the area surrounding them.⁶ China also believes that it controls 80 or 90 percent of the 1.35 million square-mile sea that falls within the "nine-dashed line," a feature drawn on Chinese maps by its Nationalist government in 1947.⁷ China is projected to outspend the United States in military and especially in the naval forces, "outbuilding the U.S. in new submarines by four to one."⁸ If China prevails in this conflict, it would have even more influence on trade, and along the way, help advance its international prowess greatly into the 21st century.⁹ East Asia expert Robert Kaplan compares the

importance of the South China Sea to China to that of the Caribbean Sea to the U.S. where gaining complete naval dominance in the Caribbean Sea has given the U.S. hegemonic influence over the Caribbean states and a significant part of South America.¹⁰ Now, China wishes to do the same with East and Southeast Asia.

The U.S., China's chief economic rival and as the world's current sole super-power, also has interests in this case and the South China Sea at large. The reason for this is two-fold: first, the U.S. has an interest in protecting a "legal, rule-based order enshrining a freedom of navigation."¹¹ The second reason is strictly political: the U.S. does not trust China and is fearful of Chinese dominance in Asia,¹² a region which, according to President Barack Obama, "represents the future."¹³ It is the same reason the President has used to justify the creation of the Trans-Pacific Partnership.¹⁴ However, while the U.S. is critical of China for not abiding by international law, and in this case, the UN Convention on the Law of the Sea (UNCLOS), it has also been accused of hypocrisy and undue interference, among other things.¹⁵ In fact the U.S. has not yet ratified UNCLOS itself, despite Hillary Clinton and the Obama administration's push for the Senate to do so.¹⁶

Although the Philippines do not contest with China as much maritime territory as Vietnam and Taiwan, it also seeks to prevent a "Chinese westward push at its expenses."¹⁷ It is unsurprising that as the weaker state in this conflict, it seeks adjudication in an international court. It also perceives very strongly, however, that UNCLOS grants it territory and Exclusive Economic Zones (EEZ) vital to its economy, and the sea operates as national security, trade channels, fishing grounds, and especially the oil reserves within the perceived EEZ.¹⁸ The Philippines cannot get what it wants by competing arms with China, because it does not have the competitive resources to do so, not without help from the U.S.¹⁹ Therefore, diplomacy and international law have become the Philippines' primary strategic focus.²⁰

Hypothetically, the Philippines could have brought this case before the International Court of Justice (ICJ), the most powerful international tribunal. However, for the ICJ to gain jurisdiction, the parties have to agree.²¹ It is unlikely China would subject itself to the ICJ's jurisdiction, or any court's jurisdiction, because its legal arguments are meritless.

Given China's utmost unwillingness for this matter to be adjudicated,²² the only way for the Philippines, and potentially other rival claimants, to bring a court case is by utilizing the dispute settlement mechanism in UNCLOS.²³ Because both the Philippines and China are parties to the Convention (the Philippines ratified it on May 8, 1984 and China on June 7, 1996), they are both bound by the dispute settlement procedures provided for in Part XV of the Convention in respect of any dispute between them concerning the interpretation or application of the Convention.²⁴

THE PCA JURISDICTION AWARD

The Philippines, whose head counsel – Mr. Paul Reichler – is something of a legend. Mr. Reichler won the landmark case *Nicaragua v. United States* before the ICJ, and on January 22, 2015, he filed suit against China at the Permanent Court of Arbitration (PCA).²⁵ After hearings conducted from July 7, 2015 to July 15, 2015, the PCA ruled on jurisdiction.²⁶ The Tribunal for the PCA held that the case “was properly constituted” and that “the Philippines’ act of initiating this arbitration did not constitute an abuse of process.”²⁷ The case was properly constituted because: first, any “dispute concerning the interpretation or application” of UNCLOS is to be resolved by a court which has jurisdiction,²⁸ and second, the PCA was a court explicitly listed in the Convention as having jurisdiction.²⁹

China has repeatedly asserted its position that it will not participate in the proceedings, because the Tribunal has no jurisdiction over China's “territorial sovereignty” in the South China Sea.³⁰ This position is unreasonable and is widely unpopular.³¹ For example, in its efforts to sabotage the Philippines’ legal arguments, China argued that the PCA’s jurisdiction was exempted from the Convention, because the Philippines was committing an “abuse of process.”³² China said that the Philippines abused the Arbitration mechanism under UNCLOS, because it unilaterally initiated the proceedings without first exhausting diplomatic channels.³³ Essentially, China wanted the Philippines to continue using negotiations exclusively for this dispute.

However, the Tribunal rejected China's arguments. The Tribunal acknowledged the Philippines had sought to negotiate with China, but said that international law does not require a State to continue negotiations “when it concludes that the possibility of a negotiated solution has been exhausted.”³⁴

Although Article 283 of UNCLOS mandates the two parties in a dispute to go through an “exchange of views” before going to the court,³⁵ the Tribunal found ample evidence that the Philippines and China have “exchanged views” but could not, and would likely not, come up with a mutually satisfactory results.³⁶

The Tribunal, after rigorously examining all other possible recourses under international law which China claims the Philippines had not “exhausted”—the Declaration on the Conduct of Parties in the South China Sea (DOC), the Treaty of Amity, the Convention for Biological Diversity, and other bilateral treaties between China and the Philippines—concluded none would preclude the Philippines’ right to compulsory dispute settlement under UNCLOS.³⁷ The Tribunal noted the dispute settlement provisions in UNCLOS was heavily negotiated and reflects a compromise, and parties cannot “pick and choose” after the fact which provisions apply.³⁸ This note implicitly accused China of violating *pacta sunt servanda*.³⁹

According to the Tribunal, however, the jurisdictional issue is not fully resolved on all of the Philippines’ requests. The PCA has requested the Philippines clarify a submission and will consider seven specific submissions “in conjunction with the merits.”⁴⁰

THE APPLICATION OF UNCLOS

Since the case began, the Philippines had presented its position on fifteen items relating to the hotly contested and resource-rich waters west of the Philippines. The Tribunal decided it was the proper body to decide on seven of the Philippines’ submissions, while seven others are reserved for further consideration because those issues “do not possess an exclusively preliminary character.”⁴¹ The Philippines was also directed to “clarify the content and narrow the scope” of its 15th submission which states that “China shall desist from further unlawful claims and activities.”⁴² The Tribunal made it clear that the other fourteen claims, however, will proceed to the merits phase, even if the PCA’s jurisdiction over seven of those claims is to be decided in conjunction with the merits.⁴³

Because the pending decision will likely address the merits of all those claims, it is proper to discuss all of them. There are substantive similarities between the claims, and the fifteen claims depend on four primary inquiries: (1) the status of Beijing’s “nine-dash line” sovereignty assertion; (2) the legality of

China's occupation of various features in the South China Sea; (3) the legality of China's exploiting natural resources in what the Philippines perceives as its EEZ; and (4) the legality of China's interference with the Philippines' navigation within its EEZ.

First is the status of Beijing's nine-dash line claim in the South China Sea. The Philippines argues the nine-dash line is an excessive maritime claim and not in line with the entitlements for coastal states under UNCLOS.⁴⁴ China has kept the scope of its nine-dash line "rights formed in history" but giving no elaboration on the legal nature and effect of such rights.⁴⁵ In China's view, if it indeed possesses such rights to certain land features in the South China Sea, its territorial seas, EEZs, and rights to various maritime features would be expanded.⁴⁶



Based on the record so far, however, it is likely China's "historic" nine-dash line will be held invalid. The sole "historic" evidence that China has presented so far is not entirely convincing: it is a map drawn by what was known as the Republic of China (ROC), before it gained independence and became Taiwan today.⁴⁸ There are two problems with this evidence: first, the legitimacy of the drawn map and "historic rights" associated with it are deeply in question,⁴⁹

and second, even if the map is legitimate, who would be the rightful holder of such “historic rights” to the sea – China or Taiwan?

The second, third, and fourth primary inquiries in this case will be heavily dependent upon resolution of the first, whether the nine-dash line is an excessive claim. If it is, the Philippines argues, China’s occupation of various features in the Spratly, exploitation of natural resources in the Philippines’ EEZ, and interference with travel in the Philippines’ EEZ are all illegal because such activities are well beyond China’s territorial seas or EEZs.

If “historic rights” do not apply, then UNCLOS favors the Philippines’ positions in these three issues because first, under UNCLOS, any rights to water generally attach to territorial ownership of certain land features,⁵⁰ and second, the features China is currently occupying and exercising control over will not qualify as such rights-giving land features. To illustrate, the Convention lists three different types of features, each giving surrounding waters certain, distinctive legal effects:

(1) Islands

The first is “island” defined as “a naturally formed area of land, surrounded by water and above water at high tide.”⁵¹ An island, such as the entirety of Cuba or of Singapore, entitles the country that owns it to a 12 nautical mile (approx. 14 miles) territorial sea from the coastline with which it has full sovereignty.⁵² A country can exclude foreign entities from its territorial sea.⁵³

The island is also entitled to a 200 nm (approximately 370 km) EEZ which gives the country the sole right to exploit the resources within it such as fish, minerals, and oil reserves, if any.⁵⁴ Articles 60(8) and 80 of UNCLOS further prescribe that an artificial island constructed in the EEZ or on the continental shelf “does not possess the status of [an] island.”⁵⁵ As compared to the islands specified in Articles 10(2) and 121(2), which could be used as a base point to measure sea zones, artificial islands within the context of Article 60(8) “have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.”

(2) Rocks or Reefs

The second features are “rocks or reefs” that are mostly below water but have rocky protrusions above water during high tide.⁵⁶ The important point under

UNCLOS states that a maritime feature is a rock if “it cannot sustain human habitation or economic life on its own.”⁵⁷ These mostly submerged features are entitled to only a 12 nm territorial sea and no EEZ.⁵⁸

(3) Low-tide Elevations

The third type of maritime features called “low-tide elevations” are submerged rocks and reefs that are not visible above water.⁵⁹ This type of maritime feature is not entitled to any territorial sea or EEZ.⁶⁰

If the features China control at best only amount to “rocks or reefs” then the territorial issue concerning the “nine-dash line” does not need to be considered. Unfortunately for China, this seems to be the case. There are eight maritime features of concern that are currently under the control of China.⁶¹ The first four are low-tide elevations that are completely submerged: Mischief Reef, Kennan Reef, Gaven Reef, and Subi Reef.⁶² “These are all below water at high tide. They’re not entitled to anything. No territorial sea, no EEZ. But all of these four are physically occupied by China.”⁶³ China has constructed concrete structures on the reefs including helicopter landing pads over the years since 1995 but that does not give them entitlements to the seas around it because they would still not be considered “islands” in UNCLOS terms.⁶⁴

The other four are rocks or reefs that are, at most, entitled to only 12 nm. These are Scarborough shoal, Johnson reef, Cuarteron reef, and Fiery Cross reef. These are rocks or reefs at best, because they fail the critical inquiry: they cannot sustain economic life on their own.⁶⁵ Despite Chinese efforts building artificially islets to add to the land mass in these shoal and reefs,⁶⁶ there is no economic life on those rocks and the only life there is military.⁶⁷

Because of such circumstances, UNCLOS dictates that “China’s EEZ extending southward from its coastline gets it comparatively little beyond deep blue water, with exceptions including Pratas Island, Macclesfield Bank, and Scarborough Shoal” while “everyone else’s EEZs get them possession of shallow archipelagic areas near coasts thought to contain energy deposits.”⁶⁸ The claimants’ UNCLOS rights could thus be mapped as below:



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CONCLUSION

“Maritime features,” which include islands, rocks and reefs, and low-tide elevations possess complex physical geographic characteristics and a multiplicity of legal statuses, according to which they generate different maritime rights. Maritime delimitation therefore creates different legal effects. Although South China Sea expert Wu Shicun opines that such complexities are incapable of being regulated only by the Convention, and international judicial practice has yet to evolve a standard capable of rendering objective judicial determination of the legal rights and wrongs in such disputed waters,⁷⁰ what we know for certain is that any determination on the legal status of maritime features immediately alters a country’s territorial sovereignty.⁷¹ The world is waiting for the PCA decision, and China will have to respond.

According to the Philippines College of Law Professor Jay L. Batongbacal, the jurisdictional decision already stands to benefit China's rival Asian states, regardless of the case's final outcome.⁷² China's "nine-dash line" claim may now be legally discussed, explained, and evaluated by the Tribunal based on the cumulative statements and explanations of Chinese officials and academics even if this is done without their direct participation.⁷³ Internationally, Professor Batongbacal says, this could seriously undermine China's influence over South China Sea stakeholders and domestically it could challenge the credibility of Chinese leadership.⁷⁴

In the political angle, it will be difficult to reach resolution to this dispute purely through negotiation channels such as the DOC, as China insists. Therefore, adjudication is necessary. Negotiations have been and likely will remain difficult because China has always had unfair realpolitik advantage and all parties to this dispute are "guilty of playing domestic politics with their claims."⁷⁵ In Vietnam, for example, nationalistic sentiment is strong.⁷⁶ Aristotle has taught that "law is intellect without appetite,"⁷⁷ and since the mass population has "appetite," peace may be easier to achieve if they are left out of the equation, at least in some degree. In the meantime, it is necessary for the U.S. to maintain its naval check on China in the region.⁷⁸

¹ Shen Dingli, Elizabeth Economy C.V. Starr, Richard Haass, Joshua Kurlantzick, Sheila A. Smith, & Simon Tay, *China's Maritime Disputes: A CFR InfoGuide Presentation*, Council on Foreign Relations (2016), available at: <http://www.cfr.org/asia-and-pacific/chinas-maritime-disputes/p31345#!/>

² Robert D. Kaplan, *Asia's Cauldron: The South China Sea and The End of a Stable Pacific*, p.9 (1st ed. 2014), hereinafter Kaplan, *Asia's Cauldron*.

³ *Id.*

⁴ Associated Press in Washington, *China seeks to control east Asia, US commander tells senators*, The Guardian (23 Feb. 2016) available at: <http://www.theguardian.com/world/2016/feb/23/south-china-sea-east-asia-control-us-military>

⁵ Kaplan, *Asia's Cauldron* at p. 56, 80.

⁶ Derek Watkins, *What China has been building in the South China Sea*, the New York Times (27 Oct. 2015), available at: <http://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea.html>

⁷ Gregory Poling, *Beijing's South China Sea strategies: consolidation and provocation* (East Asia Forum, (28 Mar. 2015), available at: <http://www.eastasiaforum.org/2014/03/28/beijings-south-china-sea-strategies-consolidation-and-provocation/>

⁸ James C. Bussert and Bruce A. Elleman, *People's Liberation Army Navy: Combat Systems Technology, 1949-2010*, Naval Institute Press, Annapolis, Maryland, 2011, p. 183.

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- ⁹ <http://www.prospectmagazine.co.uk/world/chinas-false-memory-syndrome>
- ¹⁰ Kaplan, *Asia's Cauldron* at p. 49.
- ¹¹ Kaplan, *Asia's Cauldron* at p. 173.
- ¹² See Kaplan, *Asia's Cauldron* at p. 24-25.
- ¹³ Jeffrey Goldberg, *The Obama Doctrine*, the Atlantic Monthly (April 2016), available at: <http://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/>.
- ¹⁴ The White House, *Statement by the President on the Trans-Pacific Partnership*, the White House Office of Press Secretary (5 Oct. 2015), available at: <https://www.whitehouse.gov/the-press-office/2015/10/05/statement-president-trans-pacific-partnership>.
- ¹⁵ Hu Bo, *The Hypocrisy of U.S. Freedom of Navigation Operations in the South China Sea*, the Diplomat (17 Nov. 2015), available at: <http://thediplomat.com/2015/11/the-hypocrisy-of-us-freedom-of-navigation-operations-in-the-south-china-sea/>.
- ¹⁶ Stewart M. Patrick, *(Almost) Everyone Agrees: the U.S. Should Ratify the Law of the Sea Treaty*, the Atlantic (10 Jun. 2012), available at: <http://www.theatlantic.com/international/archive/2012/06/-almost-everyone-agrees-the-us-should-ratify-the-law-of-the-sea-treaty/258301/>.
- ¹⁷ Lucio Blanco Pitlo III & Amruta Karambelkarhe, *Philippines and Vietnam in the South China Sea*, the Diplomat (21 Oct. 2013), available at: <http://thediplomat.com/2013/10/philippines-and-vietnam-in-the-south-china-sea-2/>.
- ¹⁸ Bill Hayton, *The South China Sea: the Struggle for Power in Asia*, p. 131-132 (1st ed. 2014), hereinafter Hayton, *Struggle for Power*.
- ¹⁹ Bex Wright, *U.S.-Philippines enhance military alliance, China isn't happy*, CNN (15 Apr. 2016), available at: <http://www.cnn.com/2016/04/14/politics/ash-carter-philippines-south-china-sea/index.html>.
- ²⁰ Lucio Blanco Pitlo III & Amruta Karambelkarhe, *Philippines and Vietnam in the South China Sea*, the Diplomat (21 Oct. 2013), available at: <http://thediplomat.com/2013/10/philippines-and-vietnam-in-the-south-china-sea-2/>.
- ²¹ Statute of the International Court of Justice, art. 34-36.
- ²² China's Position Paper, para. 3.
- ²³ UNCLOS, art. 281, 286, 287.
- ²⁴ *Philippines v. China*, PCA Case N° 2013-19, para. 106 (2015) (Award on Jurisdiction), hereinafter Jurisdiction Decision.
- ²⁵ Jurisdiction Decision at para. 2.
- ²⁶ *Id.* at para. 15.
- ²⁷ *Id.* at para. 413(c).
- ²⁸ UNCLOS, art. 286.
- ²⁹ UNCLOS, art. 287 & Annex VII (Other than the PCA, the International Court of Justice and the International Tribunal for the Law of the Sea also have jurisdiction).
- ³⁰ China's Position Paper, para. 4.
- ³¹ *China v the rest*, the Economist (26 Mar. 2016), available at: <http://www.economist.com/news/asia/21695565-sea-becomes-more-militarised-risks-conflict-grow-china-v-rest>
- ³² Jurisdiction Decision at para. 128.
- ³³ China's Position Paper, para. 86.
- ³⁴ Jurisdiction Decision at para. 343.
- ³⁵ UNCLOS, art. 283 & 286.
- ³⁶ Jurisdiction Decision at para. 343.
- ³⁷ *Id.* at para. 193-321.
- ³⁸ *Id.* at para. 107.
- ³⁹ *Id.*
- ⁴⁰ Jurisdiction Decision at para. 413.
- ⁴¹ *Id.*
- ⁴² *Id.* at para. 412.

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- ⁴³ *Id.* at para. 397-412.
- ⁴⁴ *Id.* at para. 101(2).
- ⁴⁵ *Id.* at para. 160.
- ⁴⁶ See China's Position Paper, para. 13.
- ⁴⁷ Source: <http://panaynewsphilippines.com/wp-content/uploads/2015/07/prince-sea-row-fishing.jpg>
- ⁴⁸ Martin Riegl, Jakub Landovský, Irina Valko, eds., *Strategic Regions in 21st Century Power Politics*, pp. 66–68 (26 Nov. 2014).
- ⁴⁹ Yi-Hsuan Chen, *South China Sea Tension on Fire: China's Recent Moves on Building Artificial Islands in Troubled Waters and Their Implications on Maritime Law*, *MarSafeLaw Journal*, at 11-12 (1 Jan. 2015), available at: http://www.marsafelawjournal.org/wp-content/uploads/2015/08/Issue1_Chen_Article.pdf.
- ⁵⁰ UNCLOS, Section 1 and 2.
- ⁵¹ UNCLOS, art. 121(1).
- ⁵² UNCLOS, art. 121(1) and art. 3.
- ⁵³ UNCLOS, art. 19.
- ⁵⁴ UNCLOS, art. 57.
- ⁵⁵ UNCLOS, art. 60(8) and 80.
- ⁵⁶ UNCLOS, art. 6 and art. 121(3)
- ⁵⁷ UNCLOS, art. 121(3)
- ⁵⁸ *Id.*
- ⁵⁹ UNCLOS, art. 13
- ⁶⁰ *Id.*
- ⁶¹ Solicitor General Francis Jardeleza, *The Philippines, China and the Rule of Law In the West Philippine Sea*, transcript available at: <http://www.cnas.org/sites/default/files/SolGen%20Speech%20CNAS.pdf>.
- ⁶² *Id.*
- ⁶³ *Id.*
- ⁶⁴ *Id.*
- ⁶⁵ UNCLOS, art. 121(3).
- ⁶⁶ Derek Watkins, *What China has been building in the South China Sea*, the *New York Times* (27 Oct. 2015), available at: <http://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea.html>.
- ⁶⁷ Dana Dillon, *Countering Beijing in the South China Sea*, *Stanford University Hoover Institution Policy Review* (2011), available at: <http://www.hoover.org/research/countering-beijing-south-china-sea>
- ⁶⁸ Kaplan, *Asia's Cauldron* at p. 172-73.
- ⁶⁹ Source: <http://www.aspistrategist.org.au/indonesia-and-chinas-energy-security-ambitions-in-the-south-china-sea/>
- ⁷⁰ Wu Shicun, *The South China Sea Arbitration Case Could Exacerbate Disputes in the South China Sea*, the *Diplomat* (27 Jan. 2016), available at: <http://thediplomat.com/2016/01/the-south-china-sea-arbitration-case-could-exacerbate-disputes-in-the-south-china-sea/>.
- ⁷¹ *Id.*
- ⁷² Jay Batongbacal, *Implications of the Philippines v. China Award On Jurisdiction*, *Asia Maritime Transparency Initiative* (5 Nov. 2015), available at: <http://amti.csis.org/implications-of-the-philippines-v-china-award-on-jurisdiction/>.
- ⁷³ *Id.*
- ⁷⁴ *Id.*
- ⁷⁵ Kaplan, *Asia's Cauldron* at p. 174.
- ⁷⁶ Trung Nguyen, *Vietnam Departs Chinese Workers Amid Rising Nationalist Sentiment*, *Voice of America News* (10 Dec. 2015), available at:

<http://www.voanews.com/content/vietnam-deports-chinese-workers-amid-rising-nationalist-sentiment/3097719.html>.

⁷⁷ Kaplan, *Asia's Cauldron* at p. 176 (citing Aristotle, *The Politics*).

⁷⁸ *Id.*