

International Law and the South China Sea Dispute: China, Taiwan, and the Philippines¹

Abstract

Territorial disputes in the South China Sea have heightened regional and global tensions, igniting fears of disruptions to peace and prosperity in East Asia. The recent Scarborough Shoal standoff and fishing disputes among China, Taiwan, and the Philippines reflect the competition for island ownership and differing interpretations of the impact of international laws including the United Nations Convention on the Law of the Sea (UNCLOS).² This paper reviews the differing claims of these three key players, and considers the prospects for a resolution by means of international legal processes.

Key Words: South China Sea, UNCLOS, nine-dash line

Yet another storm seems to be brewing in the troubled waters of the South China Sea.³ Starting from April 2012, the Philippines and the People's Republic of China (PRC or China) engaged in a months-long standoff in the Scarborough Shoal area. A year later, in May 2013, the Philippine Coast Guard shot and killed a Taiwanese fisherman operating in the waters between Taiwan and Luzon. Both cases strained sensitive ties between Taipei and Beijing, challenged

¹The views and opinions expressed in this paper are those of the authors and do not represent the University where they are employed.

² "United Nations Convention on the Law of the Sea," December 10, 1982, UNTS 1833 (entered into force November 16, 1994). As of June 5, 2013, there are 165 parties (including the European Union), http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm.

³ Since 2011, Manila has referred to the South China Sea as the West Philippine Sea.

their respective relationships with both Manila and Washington, and rekindled global concerns that this area might be a flashpoint for larger conflict.

Strategically located on busy international trading routes joining the Indian and Pacific Oceans, the South China Sea (SCS) is also believed to sit atop vast oil and gas deposits.⁴ Yet sovereign ownership of two-thirds of its 3.5 million square kilometer surface area is disputed. China and Taiwan make the most expansive claims, encompassing approximately two million square kilometers within a now-familiar nine-dash line. The Philippines disputes the validity of the nine-dash line, and claims control of fishing zones in the Bashi Channel, as well as islands in the Spratly Archipelago, particularly in an area called the Kalayaan – a group of islands that the Philippines has officially claimed and administered since the 1970s, despite protests, as part of its Palawan Province. The Philippines also claims the Scarborough Reef, and disputes China's right to erect structures over submerged features that the Philippines regards as belonging to its continental shelf.

China, Taiwan, and the Philippines are not the only claimants to the Spratly Islands. Vietnam, Malaysia, and Brunei also claim the island group in whole or in part. Indonesia, though not a party to the ownership disputes, raises a jurisdictional issue over the north of its Natuna Island.⁵ At the core of these multi-national clashes are disputes over sovereign ownership of the rocks and islands, and the application of UNCLOS itself. This paper will focus on the tripartite disputes among Taiwan, the PRC, and the Philippines, as well as the role of international law in resolving those disputes.

⁴ "Nanhai gaikuang" [Overview of South Sea], excerpt from Wu Shicun (ed.), *Nanhai Zhishi Duben* [Knowledge of the South Sea], Nanhai Publishing Co., 2010.

⁵ For detailed maps over the disputes see "Territorial Claims in South China Sea," *New York Times*, May 31, 2012, accessed June 16, 2012, <http://www.nytimes.com/interactive/2012/05/31/world/asia/Territorial-Claims-in-South-China-Sea.html?ref=asia>.

Disputed Territories

The Philippine fishing spats with Taiwan and the PRC are derived from either overlapping maritime jurisdictions or competing territorial ownership claims. Four potential flashpoints are the Scarborough Shoal, the Kalayaans, the Reed Bank, and the environs of the Batanes Islands.

The Batanes Islands consist of ten islands located in the strait between Taiwan and Luzon. They currently comprise the Philippine northernmost province of Batanes. While Taiwan and the Philippines do not actively contest the ownership of the islands, some Taiwanese academics have continuously questioned the legality of the Philippine ownership of the Batanes, based on the fact that they were not part of the territory that was ceded by Spain to the United States in the *Treaty of Paris* of 1898.⁶ Taiwanese fishermen frequent the area, and the majority of boats accused of poaching and seized by the Philippines in the region are Taiwanese. A recent shooting incident that soured the bilateral relationship occurred here. At present, overlapping maritime jurisdictional areas remain the source of perennial conflict. It is important to note that Beijing, which viewed Taiwan as part of China, fully supported Taipei in this incident.

The Scarborough Shoal is a triangle-shaped chain of reefs and rocks located about 220 kilometers west of Philippines' Zambales province. The Chinese call it Huangyan Island, and the Philippines refers to it as Bajo de Masinloc (meaning "below Masinloc," a town in Zambales) or Panatag Shoal. It too falls outside the limits set by the *Treaty of Paris* for Philippine territory and

⁶ Hurng-yu Chen, "Bashi Strait: a lesson in geography," *Taipei Times*, September 23, 2004, 8; Hurng-yu Chen, "Manila's weak claim to the Batanes," *Taipei Times*, Dec 23, 2007, 8.

subsequent treaties, but the Philippines claimS ownership.⁷ Unlike in the Batanes region, offending fishermen caught in the vicinity of Scarborough shoal are mostly from mainland China. Manila charges them likewise with “illegal entering” and “poaching”.

The Kalayaan Island Group (KIG) consists of a group of Filipino-occupied islands or islets forming part of the Spratly group. The KIG constitutes the largest territorial prize in the competition between the Philippines, Taiwan, and the PRC (as well as Vietnam). China, Taiwan, and Vietnam claim the entire Spratly group. Philippines, Malaysia, and Brunei claim parts of the group.⁸ Since the 1970s the Philippines has continuously occupied Thitu Island, the second largest in the Spratlys, and have built an airstrip, a military base and a small town hall, along with accommodations for some 60 civilians. Although Thitu is the only island in Spratlys populated by Philippine civilians, through its military, Manila occupies the largest total area in the Spratlys. The Philippines’ claim to the KIG is based on a private Filipino citizen’s “discovery” and assertion in the 1950s of ownership of 35 islands, reefs and fishing grounds. Claiming the islands as “*terra nullius*,” Thomas Cloma named them Kalayaan (Freedomland), and requested government backing against competing claims from Taiwan and the PRC. In 1978, Philippine President Ferdinand Marcos annexed eight islands to create the Kalayaan Municipality under the Province of Palawan. Upon losing control of Mischief Reef to China in 1995, the Philippines in 1999 moved to occupy the neighboring Second Thomas Reef (26 kilometers away). Strategically important, the latter sits halfway on a vital supply route from Palawan to Thitu and the oil-rich Reed Bank. Unlike other KIG islands, Manila has not built any

⁷ The Philippine Republic Act No. 9522 (2009) established Bajo de Masinloc as a “Regime of Islands” that is entitled to its own territorial sea, contiguous zone, exclusive economic zone and the continental shelf. Section 2 (b) of Republic Act No. 9522, http://www.lawphil.net/statutes/repacts/ra2009/ra_9522_2009.html.

⁸ Andrew Taffer, “China’s Claims to Sovereignty Over the Spratly Archipelago,” *Harvard Asia Quarterly* 15.2 (2013): 34.

structures on the reef, but a dozen soldiers guard it aboard a deliberately grounded former US cargo ship which, though rusting and sinking, serves as a military base. Beijing recently sent fishing vessels and warships to the area to challenge the Philippines. The Philippines inaugurated a kindergarten for half a dozen students on Thitu in mid 2012. Taiwan, China, Vietnam each lodged protests, and recently the PRC called on the Philippines to remove all residents and facilities from the Kalayaans.

Reed Bank is located about 149 kilometers west of the Palawan province, and is believed to lie over massive hydrocarbon deposits, estimated to be 5.4 billion barrels of oil and 55.1 trillion cubic feet of gas.⁹ Separate from the disputed Kalayaans at the northeast end of the Spratlys, the bank's deposits promise riches to any player that could successfully develop the site. Manila has offered some 15 contracts to foreign oil companies in the area. One of them is the British company Forum Energy, which planned to drill for gas upon completion of a seismic survey. In March 2011, two Chinese patrol boats harassed the survey vessel, causing a delay in schedule. The Chinese eventually forced the Philippines to drop joint oil and gas exploration plans with other claimant countries in the Reed Bank.¹⁰

The Philippines also disputes Taiwan's occupation of Taiping Island, the largest in the Spratlys, and vigorously challenges China's constructions over a number of islets and submerged rocks, but these disputes appear less likely to flare into major conflicts at this time.

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⁹ "Reed Bank 'holds huge oil, gas reserves'," *RAPPLER.COM*, February 10, 2013, accessed May 19, 2013, <http://www.rappler.com/business/21460-reed-bank-holds-untapped-riches-us-agency>.

¹⁰ Ian Storey, "China and the Philippines: Implications of the Reed Bank Incident," *China Brief*, 11 (8), May 6, 2011, accessed July 15, 2013, http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=37902&cHash=cf62177b359628f1326f2b516655196c.

Observers are rightly skeptical that a resolution of the competing claims in the South China Sea will be achieved through international legal means alone. As has been wryly observed, international law is to law as professional wrestling is to wrestling: no one mistakes it for the real thing. However, international legal rules, such as they are, provide at least a backdrop, if not a framework, for the potential resolution of the SCS conflicts. In addition, because the Philippines recently invoked the dispute resolution powers of an UNCLOS tribunal, it is important to understand the international legal framework and how the tribunal's decision may influence the parties.

Legal decisions are based on rules, and the sources of the rules to be followed in deciding international legal disputes are set out in Article 38(1) of the Statute of the International Court of Justice. The primary sources are international conventions (treaties) "establishing rules expressly recognized by the contracting states," and international custom which has been accepted as law.¹¹ Article 38(2) of the Statute specifically notes that parties are free to call upon the Court to decide a case *ex aequo et bono* (according to the right and good), if they agree thereto, but no state has ever opted to do so. Ultimately, as discussed further herein, the sources of international law set forth in Article 38(1) do not point to a definitive global resolution to the SCS conflict, and the parties are highly unlikely to turn the matter over to an international tribunal to decide "what is just and good" unbounded by legal rules.

Several treaties are invoked in the disputes. The Treaty of Paris (1898)¹² ended the Spanish-American War and ceded various territories, including the Philippines, to the United

¹¹ Article 38(1) also lists general principles of law, judicial decisions (subject to the proviso that precedent is non-binding) and scholarly works as sources of rules, but these are less significant here.

¹² "Treaty of Peace Between the United States and Spain," signed at Paris, December 10, 1898, TS No. 343, accessed July 15, 2013, http://avalon.law.yale.edu/19th_century/sp1898.asp.

States. The Cession Treaty of 1900¹³ and the 1930 Treaty of Washington¹⁴ later clarified specifics of the cession. The Philippines earlier claimed that the boundary lines set forth in these treaties, represented by a large rectangle around the main archipelago of the Philippines, established the territorial borders of the Philippines, and that all waters within the rectangle were territorial sea of the Philippines. This position was later modified to bring the Philippine baselines and territorial sea into harmony with UNCLOS.¹⁵

The Treaty of San Francisco,¹⁶ which came into force on April 28, 1952, divested Japan of various territories, including the Spratly islands in the South China Sea. Neither Taiwan nor the PRC was a party to the San Francisco Treaty. Taiwan later signed the Treaty of Taipei (1952) with Japan,¹⁷ in which Japan “renounced all right, title and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly Islands and the Paracel Islands.” However, neither of these treaties, nor the earlier Cairo Declaration,¹⁸ which provided for the restoration of “Manchuria, Formosa, and The Pescadores” to the Republic of China, expressly indicated what state would obtain sovereignty over the Spratly Islands following the Japanese withdrawal.

China and the Philippines are members of the United Nations and are bound by the provisions of its Charter, which is also an international convention that gives rise to rules of law.

¹³ “Treaty between Spain and the United States for the Cession of Outlying Islands for the Philippines,” signed at Washington, November 7, 1900, TS No. 345, accessed July 15, 2013, http://photos.state.gov/libraries/164311/tratados_bilaterales/Insular%20Possessions%20Bevans%20623.pdf.

¹⁴ “Convention between the United States and Great Britain Delimiting the Philippine Archipelago and the State of Borneo,” signed at Washington, January 2, 1930, TS No. 856, accessed July 15, 2013, <http://www.gov.ph/1932/12/15/convention-between-the-united-states-of-america-and-great-britain-delimiting-the-boundary-between-the-philippine-archipelago-and-the-state-of-north-borneo-1930/>.

¹⁵ See Mary Ann Palma, “The Philippines as an Archipelagic and Maritime Nation: Interests, Challenges and Perspectives,” *RSIS Working Paper* No. 182 (July 21, 2009): 2-5, accessed July 15, 2013, <http://www.rsis.edu.sg/publications/workingpapers/wp182.pdf>.

¹⁶ “The Treaty of Peace with Japan,” signed at San Francisco, September 8, 1951, accessed July 9, 2013, <http://taiwandocuments.org/sanfrancisco01.htm>.

¹⁷ “Treaty of Peace between the Republic of China and Japan,” signed at Taipei, April 28, 1952, accessed July 9, 2013, <http://taiwandocuments.org/taipei01.htm>.

¹⁸ “The Cairo Communiqué,” December 1, 1943, accessed July 9, 2013, http://www.ndl.go.jp/constitution/e/shiryo/01/002_46/002_46tx.html.

(Taiwan was previously a founding member of the United Nations representing the China seat until 1971, but is presently not regarded by that body as a sovereign state, and may therefore not be a member of that body, nor become a party to the UNCLOS or bring an action in the International Court of Justice.) Article 2, paragraph 3 of the Charter requires all member states to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” However, the parties to such disputes are free to choose the specific method of resolution, and one state may not compel another to adopt a procedure against their consent. Article 33 states that they may utilize “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”

China and the Philippines are also parties to UNCLOS, which also requires peaceful resolution of disputes, by “any peaceful means of [the parties’] own choice” (Articles 279 and 280).

However, notwithstanding these general requirements that settlement be made by peaceful means, the parties have no legal basis to compel a binding adjudication that would completely resolve their disputes in the South China Sea. The International Court of Justice (ICJ) does not exercise a general compulsory jurisdiction over states. The matter could be brought to the ICJ only if the states involved agreed to the Court’s jurisdiction. Philippines has declared its acceptance of the Court’s jurisdiction under the optional clause (Article 36, paragraphs 2 and 3), but has expressly limited that acceptance to exclude any dispute concerning “the territory of the Republic of the Philippines, including its territorial seas and inland waters.”¹⁹ China has not made an Article 36 declaration. In any case, the principle of reciprocity set forth in paragraph 2

¹⁹ Philippines Declaration Recognizing the Jurisdiction of the Court as Compulsory, January 18, 1972, accessed July 15, 2013, <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=PH>.

of the Article limits the acceptance of jurisdiction made under the optional clause to instances where the other disputing state has “accept[ed] the same obligation” of submitting to jurisdiction. As long as one disputing state has refused to submit to jurisdiction concerning sovereignty over territory, the ICJ will be unable to adjudicate the matter.

Nor does UNCLOS provide a basis to compel adjudication of a dispute regarding which State has sovereign rights to rocks and islands. Section 2 of Part XV of UNCLOS sets forth “Compulsory Procedures Entailing Binding Decisions,” but both China and the Philippines have deposited declarations pursuant to UNCLOS Article 298 that carve out disputes over the extent of sovereign territory from any grant of jurisdiction under Section 2 of Part XV. Further, in its accession statement to UNCLOS, China declared, “The People’s Republic of China reaffirms its sovereignty over all its archipelagos and islands as listed in Article 2 of the Law of the [PRC] on the territorial sea and the contiguous zone.”²⁰ Article 2 of that law provides, “The land territory of the [PRC] includes . . . the [Spratly] Islands.”²¹

Thus, neither China nor the Philippines may compel binding adjudication of the sovereign territorial dispute, by arbitration or litigation, and absent the willingness of both countries to do so, recourse must be had to the non-binding methods set forth in Article 33 of the UN Charter. This does not mean that binding dispute resolution may not play any role in the matter, as discussed further below.

UNCLOS has no provisions on how to determine sovereignty over disputed land areas. However, under UNCLOS, States with sovereignty over land territory are permitted to claim maritime zones from such land territory. These maritime zones are measured from baselines. The

²⁰ Declaration of China Upon Ratification, June 7, 1996, accessed July 15, 2013, http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China Upon ratification.

²¹ “Law of the People’s Republic of China Concerning the Territorial Sea and the Contiguous Zone,” February 25, 1992, accessed July 15, 2012, <http://www.asianlii.org/cn/legis/cen/laws/lotprocottsatz739/>.

“normal baseline” for measuring maritime zones is the low-water line along the coast (Article 5). Straight baselines may be employed if the coastline is deeply indented or has a fringe of islands, provided that the baseline does not depart to an appreciable extent from the general direction of the coast (Article 7). The waters inside the baselines are known as internal waters (Article 8).

A State’s sovereignty within its internal waters is complete. UNCLOS also provides that coastal States have sovereignty over the 12 nautical mile belt of sea adjacent to their coasts called the territorial sea (Articles 2 and 3). However, their sovereignty in territorial seas is subject to the passage regimes of UNCLOS and to other rules of international law. “Archipelagic States” such as the Philippines are permitted to draw straight baselines connecting the outermost points of the outermost islands of their archipelago. The waters inside the archipelagic baselines are called archipelagic waters, and such states have sovereignty within those waters, subject to passage regimes (UNCLOS Part IV). In 2009, the Philippines adopted legislation designed to bring its baselines into conformity with UNCLOS, and a constitutional challenge to that legislation was dismissed by the Supreme Court of the Philippines on July 26, 2011.²² However, although the Spratly Islands are an archipelago under UNCLOS Article 56, China is not an “archipelagic State,” and is not entitled by UNCLOS to simply draw a line around a zone of islands and waters that it asserts claims over.

UNCLOS further provides that coastal States have rights within an exclusive economic zone (EEZ) which is adjacent to the territorial sea and which extends to 200 nautical miles from the baselines from which the territorial sea is measured (Article 57). In their EEZ, coastal States have sovereign rights and jurisdiction for the purpose of exploring and exploiting the living and

²² *Magallona v. Ermita*, Supreme Court of the Philippines, August 16, 2011, accessed July 15, 2013, http://www.lawphil.net/judjuris/juri2011/aug2011/gr_187167_2011.html.

non-living natural resources of the waters and of the seabed and its subsoil (Article 56). Such resources include fishing resources and hydrocarbon resources.

Another major resource zone identified by UNCLOS is the continental shelf. The coastal State exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources (Articles 76(1) and 77). This includes the seabed and subsoil to the limit of the outer edge of the continental margin, as established by the UNCLOS Commission on the Limits of the Continental Shelf (Articles 76(4) and 76(8)).

UNCLOS Part VIII is entitled “Regime of Islands,” and discusses the rights appurtenant to island possessions. Article 121(1) defines an “island” as “a naturally formed area of land, surrounded by water, which is above water at high tide.” Article 121(3) provides that “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” And Article 121(2) specifies that “Except as provided for in paragraph 3” islands give rise to territorial sea, contiguous zone, and exclusive economic zones in accordance with the same UNCLOS provisions as are applicable to land territory.

On its face, Article 121 seems to indicate that any rock protruding from the water at high tide supports an entitlement by the sovereign to the rights appurtenant to the sovereign territory, including territorial sea. Following this approach, it would appear that a classic determination of “ownership” of each rock and island would be necessary to determine the maritime rights within the disputed areas of the SCS.

As Anthony Aust points out, “[u]nlike land disputes in domestic law, there is no detailed set of rules to decide” what sovereign state controls a disputed territory.²³ Any such dispute will be highly fact-specific, and the disputing parties would stress whatever legal principles favored their factual presentation. Among the relevant principles are discovery, the passage of title

²³ Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2005), 36.

through treaty, the exercise of effective control, acquiescence and recognition by other states, and conduct giving rise to estoppel.

In the seminal 1928 *Palmas Islands Arbitration*, the Permanent Court of Arbitration held that discovery of an island does not suffice to establish sovereignty, and discovery must be followed by the “continuous and peaceful display of territorial sovereignty.”²⁴ But the arbitrator in that case, Max Huber, was also highly critical of claims based on the principle of contiguity – that an island relatively close to the shores of a state could belong to that state by virtue of its geographical situation. Huber wrote, “it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size).”²⁵

Over the past several decades, China and Philippines have each taken actions that seek to demonstrate authority over disputed territories. However, sparring in this manner cannot be regarded as satisfying the requirements of the *Palmas Islands* decision, as such gamesmanship is bellicose in nature and therefore cannot give rise to a “peaceful display of . . . sovereignty” as required by that case. Further, it is dangerous and contrary to the fundamental UN mandate that disputes shall be resolved peacefully.

Even if the efforts did give rise to a claim of peaceful domination, the claim may be undermined by changing views of the extent of the legal claim that a particular feature, such as an uninhabited shoal, is capable of supporting. UNCLOS does not contain definitions of the terms “rocks”, “human habitation”, or “economic life of their own.” And, as Schofield points out, Article 121(3) remains ambiguous and open to conflicting interpretations, and the drafting

²⁴ *Palmas Island Arbitration* (US v. Neth.), 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928), accessed July 15, 2013, http://untreaty.un.org/cod/riaa/cases/vol_ii/829-871.pdf.

²⁵ *Ibid.*, 854.

history of Article 121 gives little clarification regarding the proper treatment of a shoal that consists of bare rocks emerging from the sea or the submerged reefs in the Spratly areas.²⁶ Consistent state practice on the issue is lacking, and there has been no authoritative ruling from an international court or tribunal. Further, a trend may be emerging “whereby small, isolated, sparsely inhabited or uninhabited islands are awarded only a reduced effect in the generation of maritime claims and in the context of the delimitation of maritime boundaries.”²⁷

If this trend were followed in the case of Scarborough Shoal, for example, the Philippine position, that the mainland and main island territories generate stronger entitlements to the territory, would be strengthened.

A dispute over the sovereignty of an island or rock within the South China Sea is not subject to binding resolution without the consent of the disputing claimant states. However, disputes over the *interpretation or application of a provision in UNCLOS* that cannot be resolved by consultation and negotiation, may be referred to an international court or arbitral tribunal for binding resolution.²⁸

The Nine-Dash Line and the Philippines Arbitration Demand

It is well known that both China and Taiwan have staked out their expansive claims with a broad U-shaped, nine-dash line that encompasses most of the South China Sea.²⁹ The nine-dash line is a modification of an earlier eleven-dash line first drawn by the Ministry of Internal Affairs of the Republic of China on its “Location Map of the South China Sea Islands” in 1948,

²⁶ Clive Schofield, “Maritime Cooperation in Contested Waters: Addressing Legal Challenges in East and Southeast Asian Waters,” in *Maritime Energy Resources in Asia: Local Regimes and Cooperation*, ed. Clive Schofield (Seattle: NBR Special Report #37, National Bureau of Asian Research, February 2012), 4.

²⁷ *Ibid.*, 5.

²⁸ UNCLOS art. 286, 296(1).

²⁹ Taffer writes that China in effect abandoned the nine-dash line as the basis of its claim when it acceded to UNCLOS, and now relies on its UNCLOS ratifying statement as the legal basis of its claim. Taffer, “China’s Claims,” 41.

before the ROC retreated to Taiwan.³⁰ Both Taiwan and China consistently hearken back to this line in asserting their claims. In 2009, China officially relied on the nine-dash line when it submitted a map containing the line to the UN Commission on the Limits of the Continental Shelf, an UNCLOS body, asserting “indisputable sovereignty over the islands in the South China Sea and adjacent waters” and “sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof.”³¹ Despite this expansive language, China has never clarified the precise significance of the nine-dash line or the precise legal nature of its claims in the South China Sea. At one extreme, China could be asserting sovereignty over all islands and the entire sea and seabed enclosed by the nine-dash line. Or it could be making a more limited set of claims, such as sovereignty over the islands, with appurtenant maritime rights under international law, and perhaps additional historical rights, such as fishing or navigation rights.

Taiwan, however, has asserted that the waters enclosed by the traditional claim line are its “historic waters” and it is entitled to “all the rights therein.”³² Notwithstanding that assertion, “[b]oth Beijing and Taipei have decrees or legislation relating to the territorial sea that specifies its measurement from straight baselines around islands in the South China Sea.”³³ Measuring from baselines would be consistent with claims emanating from land features, as contemplated by UNCLOS, rather than a broader type of claim based on historical rights or use not contemplated by UNCLOS.

³⁰ Daniel J. Dzurek, “The Spratly Islands Dispute: Who’s On First?” *Maritime Briefing* 2(1) (1996): 11.

³¹ “China Statement to the Secretary General of the United Nations,” May 7, 2009, accessed July 15, 2013, http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf. The submission was in response to submissions by Malaysia and Vietnam made on May 6, 2009, “Joint Submission by Malaysia and the Socialist Republic of Viet Nam,” accessed July 15, 2013, http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm.

³² Dzurek, “Who’s on First,” 13.

³³ *Ibid.*

Acknowledging the limits of its maritime power, the Philippines has stated that it expects “international law including UNCLOS will be the great equalizer” in its disputes with China.³⁴ In other words, after passing a new baselines law that brought its claims into conformity with UNCLOS in 2009, Philippines appears to believe that UNCLOS is on its side. In accordance with that strategy, on January 22, 2013, the Philippines formally requested that a UNCLOS Arbitral Tribunal consider China’s claims in the South China Sea. The object of the proceeding may be characterized in differing ways. The US Congressional Research Service notes that the Philippines seeks a ruling on “whether China’s claims and its actions within the nine dash line comply with UNCLOS.”³⁵ Paul Reichler, a prominent American international lawyer representing the Philippines in the matter, describes the object of the arbitration more ambitiously as “to determine the maritime entitlements of the Philippines and China in the South China Sea.”³⁶ One objective of the Philippines may be to oblige China to clarify the legal significance that it attaches to the nine-dash line.

The characterization of the precise relief sought in the arbitration will be critical to its outcome and impact, because it will affect the tribunal’s determination as to whether it has jurisdiction over the proceeding. According to the Philippine government, the relief sought includes the following:

- A declaration that China’s “rights in regard to maritime areas in the South China Sea” are only those that are established by UNCLOS, and “consist of its rights to a Territorial Sea and Contiguous Zone [and] an Exclusive Economic Zone”;

³⁴ “Statement of Philippine Secretary of Foreign Affairs Albert del Rosario,” January 22, 2013, accessed July 14, 2013, <http://www.gov.ph/2013/01/22/statement-the-secretary-of-foreign-affairs-on-the-unclos-arbitral-proceedings-against-china-january-22-2013/>.

³⁵ “Maritime Territorial Disputes in East Asia: Issues for Congress, Congressional Research Service, January 30, 2013, at 11.

³⁶ Paul Reichler biography, accessed June 5, 2013, <http://www.foleyhoag.com/people/reichler-paul>.

- A declaration that China’s maritime claims in the South China Sea based on its so-called nine-dash line are contrary to UNCLOS and invalid;
- An order requiring China to bring its domestic legislation into conformity with its obligations under UNCLOS; and
- An order requiring that China desist from activities that violate the rights of the Philippines in its maritime domain in the West Philippine Sea.³⁷

In its declaration of August 25, 2006, under Article 298 of UNCLOS, China excluded compulsory jurisdiction for any dispute “concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles.”³⁸ At that time, China also declared that it would “effect, through consultations, the delimitation of boundary of the maritime jurisdiction with the states with coasts opposite or adjacent to China respectively on the basis of international law and in accordance with the equitable principle.”³⁹ In accord with that declaration, China has consistently eschewed resort to binding dispute resolution methods in this matter.

Cognizant of the jurisdictional issue, the Philippines has avoided asking the tribunal to actually resolve any of the historic sovereignty disputes, and instead seeks to limit China’s claims to, at most, the maritime rights that would extend under UNCLOS from any geological features that China may ultimately establish sovereign rights over. In particular, Philippines would like a ruling from the tribunal that man-made constructions over low-tide elevations or submerged features within the Philippines continental shelf are contrary to UNCLOS. Under this view, China could have no claim to Mischief Reef, McKennan Reef, Gaven Reef, and Subi Reef, which are all submerged features. However, the tribunal will need to decide whether to adopt the

³⁷ Albert del Rosario, “January 22, 2013 Statement”.

³⁸ UNCLOS, Article 298.

³⁹ Declaration of China Upon Ratification.

characterization of the Philippines' legal advisors, or to view the demand in a different way. In other words, the panel could rule that China's occupation of those features is illegal because they are part of the continental shelf of the Philippines. Alternatively, the panel might determine that it cannot decide whose continental shelf such features are part of without engaging in maritime boundary delimitation, which is outside its jurisdiction. Or it may acknowledge that there are species of legal rights that survive a state's accession to UNCLOS, even though those rights are not explicitly identified in UNCLOS.

The arbitration claims of the Philippines require that the tribunal determine whether particular features are (or are not) islands or rocks that generate limited maritime entitlements. However, as the matter is couched before the tribunal by the Philippines, the tribunal may not then go on to say which States possess those entitlements.

Further, the question arises as to whether the tribunal has jurisdiction to declare that China may not claim a unique new type of rights in the SCS. UNCLOS sets forth specific maritime rights appurtenant to sovereignty over land features. Does it also cut off and preclude any other unique form of rights? Scholar Keyuan Zou of the National University of Singapore notes that although traditionally historic rights are either exclusive with complete sovereignty (such as historic waters and historic bays) or nonexclusive without complete sovereignty (such as fishing rights in high seas), the rights of China in the SCS may be "unique and different".⁴⁰ Zou observes that while Taipei has officially claimed that the nine-dash line encloses "historic waters" over which Taiwan asserts full sovereignty, Beijing has kept silent and offered no express statement on the precise legal significance of the line.⁴¹ Thus, "the mainland's practice

⁴⁰ Li Jinming and Li Dexia, "The Dotted Line on the Chinese Map of the South China Sea: A Note," *Ocean Development & International Law*, 34:287, 293, 2003.

⁴¹ Zou Keyuan, *Law of the Sea in East Asia: Issues and Prospects* (Routledge, 2005), 51-52.

may be viewed as ambiguous and confusing.”⁴² On one hand, it seems that the PRC does not claim everything within the line, but claims only the islands and their adjacent waters. On the other hand, other conduct and statements indicate that China is not prepared to abandon its claim to all waters within the line.⁴³

Zou offers that China may assert rights falling somewhere between the complete sovereignty associated with historic waters and the more limited rights associated with, for example, fishing rights in the high seas. He calls this new species of rights “historic rights with tempered sovereignty,” and believes that while it is not clear that China’s practice has established a new rule in international law, “it may already be influencing the development of the concept of historic rights.”⁴⁴ The panel must determine whether China has conceded jurisdiction for it to rule on whether UNCLOS cuts off any possible Chinese claim to such rights.

Support for such a notion of hybrid rights comes also from scholars who question whether the South China Sea dispute is amenable to a legal solution. For example, Daniel J. Dzurek notes that the “application of Western-developed international legal criteria to this Asian dispute is of questionable validity and limited utility.”⁴⁵

In some respects, the Philippines’ application is reminiscent of the 1984 Nicaragua claim made to the International Court of Justice, wherein Nicaragua charged the United States with violations of the UN Charter and other international obligations in providing aid to the Nicaraguan Contras in their rebellion against the Sandinista government. However, unlike China in this dispute, the US vigorously disputed the issue of jurisdiction, and only withdrew from the

⁴² Ibid., 57.

⁴³ Ibid., 57-17. Zou notes that granting the Wan’an Tan Bei block concession to the Crestone company has been viewed as an indication that China claims all rights within the “historical line”. However, Zou states that China’s statements regarding the concession make it “clear that the right of concession is based on the conception that the Spratly Islands [belong to China] and have an EEZ and/or continental shelf.” Ibid.

⁴⁴ Li and Li, supra note 31, at 293, quoting Zou Keyuan, “Historic Rights in International Law and in China’s Practice” *Ocean Development and International Law*, Vol. 32 (2001): 160.

⁴⁵ Dzurek, “Who’s On First?” 51.

proceedings when the court determined that it had jurisdiction and moved to determine the merits of the case. After the court found against the US in all respects, the US did not comply with the court's judgment, and blocked enforcement of the judgment in the Security Council. After the election of Violeta Chamorro to the presidency of Nicaragua in 1990, Nicaragua eventually withdrew its complaint from the court.

In both cases, a lesser military and economic power attempted to draw a major state into a legal forum against its will, and sought an adjudication of a matter that the major state preferred to deal with through other means.

Adjudication of the dispute is further clouded by the unique status of Taiwan. Taiwan is not a party to UNCLOS, and it may therefore be argued that Taiwan has not released or waived its traditional claims by acceding to the UNCLOS regime. Thus, even if the UNCLOS tribunal were to rule against China, that ruling would not foreclose Taiwan's assertion of its traditional claims within the nine-dash line since it is not a party and not theoretically bound by the decision.

Conclusion

Despite the fact that both the Philippines and the PRC have ratified the 1982 UN Convention on the Law of the Sea, a settlement based on international law remains elusive due to uncertainties regarding the scope and effect of the treaty. To complicate the matter, Taiwan is not a party to the UNCLOS and may not willingly accept any adjudication by the tribunal. For the present, the dangerous game in the South China Sea will continue to be played out militarily and politically.