THE SOUTH CHINA SEA DISPUTE: PHILIPPINES v. CHINA

Justice Antonio T. Carpio

The views expressed in this presentation are the personal opinion of the author and do not necessarily represent the position of the Philippine Government.
US$5.3 trillion in ship-borne goods traverse the South China Sea annually, accounting for almost one-half of the world’s shipborne trade in tonnage. Four leading exporting countries use the South China Sea for their maritime trade – China, Japan, South Korea and Taiwan. Sixty-five percent of South Korea’s petroleum imports, 60% of Japan and Taiwan’s petroleum imports, and 50% of China’s petroleum imports pass through the South China Sea.* Twelve percent of the annual global fish catch comes from the South China Sea, worth US$21.8 billion. Two billion people live in 10 countries bordering the South China Sea, and hundreds of millions of people depend on fish from the South China Sea for their protein. The maritime areas close to the coast of countries bordering the South China Sea are rich in oil and gas. The South China Sea is also rich in methane hydrates – which China considers its future source of energy.* https://www.businessinsider.com.au/why-the-south-china-sea-is-so-crucial-2015-2
A sandbar or rock, above water at high tide even by a few inches, is an island entitled to a 12 NM territorial sea around it (Article 121, UNCLOS). This amounts to 155,165 hectares of maritime space, more than twice the land area of Metro Manila of 63,600 hectares, and more than twice the land area of Singapore 70,000 hectares. All the fish, oil, gas and mineral resources within this huge area belong to the state that has sovereignty over the rock or sandbar.
Nine-dashed Line Map
Submitted by China to United Nations on 7 May 2009

China did not explain the legal basis for the dashes. The dashes had no fixed coordinates.

“China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof.” - China’s Note Verbale of 7 May 2009

The Vietnam, Malaysia and Indonesia promptly protested China’s claim under this dashed lines map. The Philippines belatedly protested on 11 April 2011.
In 2013, China released a new map of China, adding a 10\textsuperscript{th} dash on the eastern side of Taiwan. In its 2013 map, China claims the ten dashes are its “\textit{national boundaries},” without again explaining the legal basis or giving the fixed coordinates for the dashes. The 2013 China map was published by SinoMaps Press, under the jurisdiction of China’s State Bureau of Surveying and Mapping. This means the 2013 Map is an official Chinese government map.

In its \textit{Note Verbale} of June 7, 2013 to China, the Philippines stated it "\textit{strongly objects to the indication that the nine-dash lines are China's national boundaries in the West Philippine Sea/South China Sea.}"

\textbf{China’s 2013 Map with Ten Dashes
As China’s “National Boundaries”}
China Claims the Ten Dashes in the 2013 Map Are China’s “National Boundaries”
Before World War II, China’s southernmost defense perimeter was Hainan Island. Before the war, China did not have a single soldier or sailor stationed in any SCS island outside of Hainan Island. In 1946, right after the war, China took over the Amphitrite Group of the Paracels and Itu Aba in the Spratlys following the defeat of the Japanese, moving China’s defense perimeter southward. China (Kuomintang) vacated Itu Aba in 1950 until 1956, when Taiwan occupied Itu Aba. In 1974, China forcibly dislodged the South Vietnamese from the Crescent Group of the Paracels. In 1987, China installed a weather radar station in Fiery Cross Reef. In 1988, China forcibly evicted Vietnam from Johnson South Reef, and seized Subi Reef from the Philippines, moving further south China’s defense perimeter in the Spratlys.

In 1995, China seized Mischief Reef from the Philippines, just 125 NM from Palawan and 594 NM from Hainan. In 2012, China seized Scarborough Shoal from the Philippines, just 124 NM from Luzon. In 2013, China seized Luconia Shoals from Malaysia, just 54 NM from Sarawak’s coast. In 2014, China started island-building on rocks and submerged areas in the Spratlys to construct air and naval bases.
“Chinese activities in the South China Sea date back to over 2,000 years ago. China was the first country to discover, name, explore and exploit the resources of the South China Sea Islands and the first to continuously exercise sovereign powers over them.” (China’s Position Paper of 7 December 2014 submitted to the Arbitral Tribunal)
Under the nine-dashed line, China claims the Reed Bank, James Shoal, waters within the EEZ of Vietnam, and prohibits foreign fishing vessels from fishing in the high seas of the South China Sea without permission from China. In short, China claims all the resources within the nine-dashed line, which encloses 85.7 percent of the South China Sea. Under the nine-dashed line, China wants to grab 80 percent of the EEZ of the Philippines in the South China Sea.
China’s grand design is to control the South China Sea for economic and military purposes. China wants all the islands, reefs, rocks, fishery, oil, gas and mineral resources within the nine-dashed line. China already takes 50% of the annual fish catch in the South China Sea as more than 80% of its coastal waters are already polluted. China has the largest fishing fleet in the world, with 220,000 sea-going vessels and 2,640 long-distance ocean-going vessels. China’s fish consumption is the highest in the world considering China’s 1.4 billion population.

China is the largest net importer of petroleum in the world. China wants the lion’s share of the oil and gas in the South China Sea. The Chinese estimate that the South China Sea holds 130 billion barrels of oil, and if this is correct, the South China Sea is as rich in oil as Kuwait or the United Arab Emirates. The South China Sea is also rich in methane hydrates or “flammable ice” - said to be one of the fuels of the future. China wants to secure all these methane hydrates for itself.

China also wants the South China Sea as a sanctuary for its nuclear-armed submarines - free from surveillance by U.S. submarine-hunting Poseidon airplanes or U.S. nuclear attack submarines. China wants a second-strike nuclear capability, joining the ranks of the U.S. and Russia.
China Seized Mischief (Panganiban) Reef in February 1995

The Philippine formally protested in 1995 China’s seizure of Mischief Reef. A protest is a peaceful, non-violent and non-confrontational assertion of Philippine sovereign rights to preserve and prevent waiver of such rights in view of the opposing claim or action of another state.
China Seized Scarborough (Panatag) Shoal in 2012

Just as in 1995 when China seized Mischief Reef, the Philippines had no military capability to defend or retake Scarborough Shoal in 2012 when China seized the shoal. The Philippines decided to bring the dispute to a forum where warships, warplanes and nuclear bombs do not count - to an UNCLOS arbitral Tribunal which would resolve the dispute solely based on the Law of the Sea. Robert Kaplan, in his book Asia’s Cauldron, called this resort to international law the “ultimate demonstration of weakness.”
Six Major Issues Raised in the Arbitration & Resolved by the Annex VII UNCLOS Tribunal

1. China’s claim to historic rights under the nine-dashed line is contrary to UNCLOS, without lawful effect and cannot be the basis to claim any maritime entitlement (territorial sea, exclusive economic zone and extended continental shelf).

2. No geologic feature in the Spratlys is capable of human habitation or economic life of its own so as to generate a 200-NM EEZ that overlaps with Palawan’s EEZ.

3. Mischief Reef, 125 NM from Palawan, is a low-tide elevation situated outside the territorial sea of any state and therefore forms part of the continental shelf and EEZ of the Philippines. Only the Philippines can exploit Mischief Reef and construct structures on it.

4. Reed Bank, 85 NM from Palawan, is completely submerged and within the Philippine EEZ. Only the Philippines can exploit the natural resources in Reed Bank.

5. China severely harmed the marine environment when it dredged reefs to reclaim or create artificial islands, and when it failed to prevent Chinese fishermen from harvesting endangered species.

6. Scarborough Shoal is a rock entitled only to 12-NM territorial sea. Filipino, Vietnamese and Chinese fishermen have traditional fishing rights in the territorial sea of Scarborough Shoal.
Ruling on China’s Claim to Historic Rights Under the Nine-Dashed Line

- The nine-dashed line has no legal effect and cannot serve as legal basis to claim any maritime entitlement under UNCLOS. In short, “there was no legal basis for China to claim historic rights to resources within the sea areas falling within the ‘nine-dash line’.”
- China’s maritime zones, just like those of other coastal states, cannot extend beyond the limits prescribed under UNCLOS. Maritime entitlements must be claimed only from land.
- All historic rights in the EEZ, ECS and high seas were extinguished upon effectivity of UNCLOS: “[A]ny historic rights that China may have had to the living and non-living resources within the ‘nine-dash line’ were superseded, as a matter of law and as between the Philippines and China, by the limits of the maritime zones provided for by the Convention.”
- “[T]here was no evidence that China had historically exercised exclusive control over the waters [of the South China Sea] or their resources.” The Tribunal upheld the Philippine position on this issue.
“[T]he Tribunal concludes that China’s claim to historic rights to the living and non-living resources within the ‘nine-dash line’ is incompatible with the Convention to the extent that it exceeds the limits of China’s maritime zones as provided for by the Convention.” (Para 261, Award of 12 July 2016)
“[T]he Tribunal concludes that China’s claim to historic rights to the living and non-living resources within the ‘nine-dash line’ is incompatible with the Convention to the extent that it exceeds the limits of China’s maritime zones as provided for by the Convention.” (Para 261, Award of 12 July 2016)
“The Philippines submits that Chinese historic maps dating back to 1136, including those purporting to depict the entirety of the Empire of China, consistently show China’s territory extending no further south than Hainan.” (Para 195, Award of 12 July 2016)
During the Chinese dynasties, Hainan Island was a part of Guangdong Province. Hainan became a separate province only in 1988. The Qing Dynasty saw one of the largest expansions of Chinese territory throughout the Chinese dynasties. The Qing dynasty ceded Formosa to Japan in 1895 following the Qing’s defeat in the First Sino-Japanese War (1894-1895).
China’s Southernmost Territory Through the Dynasties – Hainan (1894)
Vincenzo Coronelli made this famous terrestrial globe in 1688. This map is one of the 12 gores (sections) of the 1688 globe. Famous for his atlases and globes, Coronelli was the Father General of the Franciscan Order. The Franciscans arrived in the Philippines in 1578.
Expansion of Southernmost Territory of China Started in 1932

• In 1932, the French occupied the uninhabited Paracels. China sent a Note Verbale to the French Government on September 29, 1932 protesting the French occupation of the Paracels. In its Note Verbale, the Chinese Government officially declared:
“Note of 29 September 1932 from the Legation of the Chinese Republic in France to the Ministry of Foreign Affairs, Paris

On the instructions of its Government, the Legation of the Chinese Republic in France has the honor to transmit its Government’s reply to the Foreign Ministry’s Note of 4 January 1932 on the subject of the Paracel Islands.”

xxxxx
“xxx The eastern group is called the Amphitrites and the western group the Crescent. These groups lie 145 nautical miles from Hainan Island, and form the southernmost part of Chinese territory.” (Emphasis supplied)

The Paracels - “These groups lie 145 nautical miles from Hainan Island, and form the southernmost part of Chinese territory.” China’s Note Verbale to France of 29 September 1932
Status of Geologic Features in Spratlys

Paracel and Spratly Islands Occupation Status

- China
- Malaysia
- Taiwan
- Vietnam
- Philippines

Islands, reefs, and shoals that have portions above water at high tide are labeled in dark green.

Water Depth

Scale: 1:2,700,000

0 20 40 60 80 100

Kilometers

0 20 40 60 80 100

Tentative Miles

0 20 40 60 80 100

Nautical Miles

Spratly Islands

- Sin Cowe Island
- Union Atoll / Sin Cowe East Island
- London Reefs
- Quarterly Reef
- Pearl Reef
- Alison Reef
- Cornwallis South Reef
- East Reef
- Maralii Reef
- Pearson Reef
- Pigeon Reef
- Alicia Annie Reef
- First Thomas Shoal
- Second Thomas Shoal
- Half Moon Shoal
- Boxall Reef
- Plan Jiao
- Investigator North East Shoal

SOUTHAMPTON REEFS

- Discovery Great Reef
- Discovery Small Reef
- Kennan Reef
- Collins Reef
- Johnson Reef
- Landdowne Reef
- Fancy Wreck Shoal
- Grierson Reef
- Len Dao

UNION REEFS

- Sin Cowe Reefs
- Grierson Reef
- Landdowne Reef
- Fancy Wreck Shoal

TIZARD BANK

- Thitu Island
- Loaita Island
- Thitu Reefs
- Sandy Cay
- Tiedzhi Jiao

LOAITA BANK

- South East Reefs
- North Reefs
- Southwest Cay
- South Reef

NORTH DANGER REEF

- Trident Shoal
- Lys Shoal
- Menzies Reef
- Irving Reef

WEST YORK ISLAND

- West York Island
- Flat Island
- Nanshan Island

JACKSON ATOLL

- Third Thomas Shoal
- Hopkins Reef
- Baker Reef
- Hoare Reef
- Deane Reef
- Neumann Reef
- Pitch Reef

SABINA SHOAL

- Lix Jiao
- Boxall Reef
- Plan Jiao
- Investigator North East Shoal
None of the geologic features (rocks and islands) in the Spratlys is capable of “human habitation or economic life of [its] own” so as to be entitled to a 200-NM EEZ.

Since there is no other EEZ that overlaps with Palawan’s EEZ, the Tribunal has jurisdiction to rule on the maritime issues in the Spratlys.

To be entitled to a 200-NM EEZ, the geologic feature must have the “objective capacity, in its natural condition, to sustain either a stable community of people or economic activity that is not dependent on outside resources or purely extractive in nature.”

Itu Aba, 45 hectares in area and the largest geologic feature in the Spratlys, is a borderline case. However, historically, there has been no community of people that ever inhabited Itu Aba because the natural conditions there could most probably not sustain human habitation. Thus, Itu Aba is entitled only to a 12-NM territorial sea.

The Tribunal upheld the Philippine position on this issue.
Seven Geologic Features Occupied by China in Spratlys
• Of the seven (7) reefs China occupies in the Spratlys, five (5) are high-tide elevations (above water at high tide), namely: Fiery Cross Reef, Johnson South Reef, Gaven Reef, Cuarteron Reef and McKennan Reef; these reefs are entitled to 12-NM territorial sea.

• Mischief Reef is a low-tide elevation situated outside the territorial sea of any state. Mischief Reef forms part of the Philippine EEZ. Only the Philippines can erect structures on Mischief Reef. China’s structures on Mischief are illegal. Ayungin Shoal is also a low-tide elevation outside the territorial sea of any state, and therefore part of Philippine EEZ.

• Reed Bank is entirely submerged and forms part of Philippine EEZ as it is within 200-NM from Philippine baselines.

• The Tribunal upheld the Philippine position on this issue except for Gaven Reef and McKennan Reef, which the Philippines argued are only low-tide elevations but the Tribunal ruled they are high-tide elevations entitled to 12-NM territorial sea.
China violated its obligation under UNCLOS to “protect and preserve the marine environment” when China:

1. Dredged and built islands on seven (7) reefs;
2. Failed to prevent its fishermen from harvesting endangered species like sea turtles, corals and giant clams in the Spratlys and Scarborough Shoal.

The Tribunal ruled that China “caused permanent and irreparable harm to the coral reef ecosystem.”

The Tribunal upheld the Philippine position on this issue. This is the first time that an international tribunal applied the UNCLOS provision on protection and preservation of the marine environment.
Dr. John McManus, the world-renowned marine scientist who studied the Spratlys in the 1990s, went back to the Spratlys last February 2016. He surveyed several reefs, including those exploited by clam dredgers from Tanmen, Hainan. Dr. McManus said:

“The damage was much worse than even I expected it to be. I swam over one whole kilometer of reef before I saw a single living invertebrate. It was really massive, massive destruction.”*

The South China Sea is home to 34 percent of the world’s total coral reefs while occupying only 2.5 percent of the world’s total ocean surface.

Before and After Reclamations

Fiery Cross Reef

https://amti.csis.org/constructive-year-chinese-building/
Before and After Reclamations

Fiery Cross Reef
Infrastructure completed in 2017

https://amti.csis.org/constructive-year-chinese-building/
Before and After Reclamations

Subi Reef

https://amti.csis.org/constructive-year-chinese-building/
Before and After Reclamations

Subi Reef
Infrastructure completed in 2017

https://amti.csis.org/constructive-year-chinese-building/
Before and After Reclamations

Mischief Reef

https://amti.csis.org/constructive-year-chinese-building/
Before and After Reclamations

Mischief Reef
Infrastructure completed in 2017

https://amti.csis.org/constructive-year-chinese-building/
Scarborough (Panatag) Shoal - High-Tide Elevation Incapable of Human Habitation
Ruling on Status of Scarborough Shoal; Right to Traditional Fishing

• Scarborough Shoal is a high-tide elevation entitled to 12-NM territorial sea but not to a 200-NM EEZ since obviously it is not capable of human habitation.

• The territorial sea of Scarborough Shoal is a traditional fishing ground of Filipino and Chinese fishermen, as well as fishermen from other countries; China cannot prevent Filipino fishermen from fishing in Scarborough Shoal.

• The Tribunal upheld the Philippine position on this issue.
The Philippine EEZ in the SCS has an area of about 381,000 square kilometers. Deducting the 4,650 square kilometers total territorial seas of Johnson South Reef, McKennan Reef and Scarborough Shoal, the Philippines has an EEZ of about 376,350 square kilometers in the SCS free from any Chinese claim.

This maritime area is larger than the total land area of the Philippines of approximately 300,000 square kilometers. All the living and non-living resources in this huge maritime area – the fish, oil, gas and other minerals – belong exclusively to the Philippines.
Disputed EEZ Area before the Ruling of Tribunal

Map showing disputed EEZ areas in the South China Sea with labels and territorial claims.

Key:
- China's Claimed National Boundaries
- UNCLOS 200 NM Exclusive Economic Zone
- Disputed Islands
- Oil Pipeline
- Gas Pipeline
- Disputed Territory

Countries and areas included:
- China
- Vietnam
- Philippines
- Malaysia
- Thailand
- Cambodia
- Brunei
- James Shoal
- Scarborough Shoal
- Mischief Reef
- Itu Aba
- Wood Island
- Paracel Islands
- Spratly Islands
- Bashi Channel
- Malacca Strait
- Myanmar

Legend:
- Red: Disputed Islands
- Green: Gas Pipeline
- Black: Oil Pipeline
- Dotted Blue: UNCLOS 200 NM
- Solid Blue: China's Claimed National Boundaries
- Star: Disputed Territory

Map highlights territorial disputes and claimed EEZ areas in the South China Sea.
The Tribunal ruled that McKennan Reef is above water at high tide. McKennan Reef and Johnson South Reef are the only Chinese-occupied high-tide features within the Philippine EEZ in the Spratlys. Scarborough Shoal, McKennan Reef and Johnson South Reef are thus the only disputed land features occupied by China within the entire Philippine EEZ. The Tribunal ruled that these three land features generate only a 12-NM territorial sea, with no EEZ.
Chinese Foreign Minister Wang Yi stated: "The three treaties that stipulate the Philippines' territory, the first in 1898, the second in 1900 and the third in 1930, all regulated the Philippines' western boundary line at 118 degrees east longitude. Areas in the west of the 118 degrees east longitude do not belong to the Philippines. But the Nansha islands claimed now by the Philippines, the Huangyan Islands, are all in the west of the 118 degrees east longitude." Speech on 25 February 2016 at the CSIS, Washington, D.C.
What is the Legal Basis of the Philippines’ Claim to Scarborough Shoal

• The 1898 Treaty of Paris between Spain and the United States drew a rectangular line wherein Spain ceded to the United States all of Spain’s territories found within the treaty lines. Scarborough Shoal lies outside of the treaty lines.
In the 1900 Treaty of Washington, Spain clarified that it had also relinquished to the United States “all title and claim of title, which (Spain) may have had at the time of the conclusion of the Treaty of Peace of Paris, to any and all islands belonging to the Philippine Archipelago, lying outside the lines” of the Treaty of Paris. Thus, under the 1900 Treaty of Washington, Spain ceded to the United States all territories, to which Spain had title or claim of title, lying outside the lines of the Treaty of Paris. These territories outside the lines, west of the 118 degrees east longitude, included Scarborough Shoal and the Spratlys.

*Treaty between Spain and the United States for Cession of Outlying Islands of the Philippines, signed on 7 November 1900.*
Chinese Foreign Minister Wang Yi stated in February 2016 in Washington DC, that China and the Philippines are very close neighbors separated by just a “narrow body of water” – referring to the sliver of territorial sea and EEZ between the Philippine coastline and the nine-dashed lines.

China considers the nine-dashed lines as the common border between China and the Philippines, running 1,700 kilometers very close to the territorial sea of the Philippines, just 64 kilometers off the coast of Balabac Island in Palawan, the southernmost island in Palawan, 70 kilometers off the coast of Bolinao in Pangasinan, and 44 kilometers off the coast of Y’ami Island in Batanes, the northernmost island in Batanes.
China and Philippines “Separated by Narrow Body of Water”
The Philippines will lose 80 percent of its EEZ in the West Philippine Sea, a maritime space as large as the total land area of the Philippines. **This is the gravest external threat to the Philippines since World War II.** The Philippines will lose to China all the oil, gas, fishery, methane hydrates or combustible ice, and other mineral resources within this huge maritime space, including the gas-rich Reed Bank. The Reed Bank is supposed to replace the Malampaya gas field when it runs out of gas in less than 10 years. Malampaya supplies 40 percent of the energy requirement of Luzon.

Without a replacement for Malampaya, Luzon will have 10 to 12 hours of brownouts every day less than 10 years from now. Factories will close and workers will be out of jobs. This will devastate the Philippine economy. Unless there is assurance of a replacement for Malampaya, no serious investor will put up a new factory in Luzon during the Duterte administration.
Next Steps – Enforcement of Ruling

Article 11, Annex VII, UNCLOS. “The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute.”

Article 300, UNCLOS. “State parties shall fulfill in good faith the obligations assumed under this Convention xxx.”

Thus, China and the Philippines, which have both ratified UNCLOS, have the obligation to comply in good faith with the award.
An island above water at high tide is entitled to a 12 NM territorial sea (Article 3 & 121(1), UNCLOS). If such island is capable of human habitation or economic life of its own, it is entitled to a 200 NM EEZ (Article 121(2), UNCLOS). If there is an outer continental shelf beyond 200 NM, the island is entitled to an ECS of 150 NM from the outer limits of its EEZ. The maximum maritime zone a coastal state can claim is 150 NM from the outer limits of its 200 NM EEZ (or 100 NM from the 2500 meter isobath (Article 76(5), UNCLOS), a limitation which does not apply to coastal states in the South China Sea based on the geology and geomorphology of the South China Sea). China is claiming maritime zones more than 150 NM from the outer limits of its EEZ, or more than 350 NM from its coastlines in Hainan Island or its mainland.
Two Aspects in Enforcement of Ruling

1. Enforcement of the ruling by the world’s naval powers with respect to freedom of navigation and overflight for military vessels and aircraft in the high seas and EEZs of the South China Sea.

2. Enforcement of the ruling by the Philippines with respect to its exclusive right to exploit the resources of its EEZ in the South China Sea.
1. The United States says its military forces will continue to operate in the disputed South China Sea in accordance with international law. The US Chief of Naval Operations John Richardson said, "The US Navy will continue to conduct routine and lawful operations around the world, including in the South China Sea, in order to protect the rights, freedoms and lawful uses of sea and airspace guaranteed to all. This will not change."* Just recently, U.S. President Donald Trump approved a Pentagon plan that requires regular challenges to China’s excessive maritime claims in the South China Sea.**

2. France is urging the 27-nation EU to coordinate naval patrols in the South China Sea to ensure a "regular and visible" presence in the disputed waters illegally claimed by China xxx. The French government said the protection of freedom of the seas is vital from an economic standpoint. It's also concerned a loss of this right in the South China Sea might lead to similar problems in the Arctic Ocean or Mediterranean Sea, said Defense Minister Jean-Yves Le Drian.***

3. British Ambassador to the U.S. Kim Darroch stated that British Typhoon fighter jets that visited Japan in October 2016 flew over the South China Sea in their return flight to assert freedom of overflight. He added: “Certainly, as we bring our two new aircraft carriers on-stream in 2020, and as we renew and update our defense forces, they will be seen in the Pacific. And we absolutely share the objective of this U.S. administration, and the next one, to protect freedom of navigation and to keep sea routes and air routes open.”*

4. Australian Defense Minister Marise Payne stated on 4 February 2017 at the Shangri-la Dialogue in Singapore that Australia military ships and aircraft will continue to “operate in the South China Sea, as they have for decades, consistent with the rights of freedom of navigation and freedom of overflight.”** On 19 September 2017, Prime Minister Malcolm Thurnball announced that six Australian navy ships had left Australia on 4 September 2017 to conduct military exercises in the South China Sea. This is the biggest deployment of an Australian naval task force in 30 years.***

* http://www.reuters.com/article/us-britain-southchinasea-fighters-idUSKBN13R00D
Talk or War with China – False Option

The option for the Philippines is not to either “talk with China or go to war with China.” This is a false option, and shows a dismal lack of understanding of international law and international relations.

First, the Philippine Constitution prohibits war as instrument of national policy. Second, the UN Charter has outlawed war as a means of settling disputes between states. In resolving the SCS dispute, war is not an option, and has never been an option. That is precisely why the Philippines filed the arbitration case against China, because war was never an option.
The real and practical option for the Philippines is to talk with China while taking measures to fortify the arbitral ruling. We should talk with China on the Code of Conduct, on the application of the Code for Unplanned Encounters at Sea (CUES) not only for naval but also for coast guard vessels, on conservation of fish stocks, on preservation of the marine environment, on how our fishermen can fish in Scarborough Shoal, and on safety at sea. There are many other things to talk with China on the South China Sea even if China refuses to discuss the arbitral ruling.
As we talk with China, we can enforce and fortify the arbitral ruling in many ways:

1. The Philippines can enter into a sea boundary agreement with Vietnam on our overlapping ECSs in the Spratlys, based on the ruling of the tribunal that no geologic feature in the Spratlys generates an EEZ. Such an agreement implements part of the arbitral ruling by state practice.
2. The Philippines can enter into a sea boundary agreement with Malaysia on our overlapping EEZ and ECS in the Spratlys, again based on the ruling of the tribunal that no geologic feature in the Spratlys generates an EEZ. Such an agreement also implements part of the arbitral ruling by state practice.
Sea Boundary Agreements with Vietnam and Malaysia
3. The Philippines can file an extended continental shelf (ECS) claim beyond our 200 NM EEZ in the West Philippine Sea off the coast of Luzon. If China does not oppose our ECS claim, the United Nations Commission on the Limits of the Continental Shelf (UNCLCS) will award the ECS to the Philippines, similar to our ECS claim in Benham Rise where there was no opposition. If China opposes our ECS claim, China will have a dilemma on what ground to invoke. If China invokes the nine-dashed lines again, the UNCLCS will reject the opposition because the UNCLCS is bound by the ruling of the arbitral tribunal which, just like the UNCLC, was created under UNCLOS. If China claims an overlapping ECS, then China will be admitting that the Philippines has a 200 NM EEZ from Luzon that negates the nine-dashed lines.
China can raise two grounds to oppose the Philippines’ ECS claim before the UNCLCS. First, China can again raise its nine-dashed line claim but the UNCLCS is bound by the award of the UNCLOS tribunal. Second, China can claim that the Philippines’ ECS overlaps with China’s ECS but this means China accepts that the Philippines has an EEZ from Luzon.
4. The Philippines can claim damages before an UNCLOS tribunal for the “severe, permanent harm” to the marine environment, as ruled by the arbitral tribunal, that China caused within Philippine EEZ in the Spratlys because of China’s dredging activities and its failure to stop Chinese fishermen from harvesting endangered species.
5. If China will prevent the Philippines from exploring and exploiting the gas in the Reed Bank, which the Arbitral Tribunal has ruled is within Philippine EEZ, then the Philippines can file an arbitration case against China to recover actual damages that the Philippines may suffer from the failure to exploit the Reed Bank due to China’s unlawful acts.
Article 246 of UNCLOS states, "Coastal States shall, in normal circumstances, grant their consent for marine scientific research projects by other States" in the exclusive economic zone or continental shelf. The refusal of China to comply with the arbitral award of the UNCLOS tribunal is not a "normal circumstance," and thus the Philippines should refuse China's request for MSR in Benham Rise.

UNCLOS is a "package deal," which means that a state that ratifies UNCLOS must accept its rights and obligations as one entire package. A ratifying state cannot cherry pick - accepting only certain provisions and rejecting others.

By refusing to accept the award of the UNCLOS arbitral tribunal pursuant to the dispute settlement provisions of UNCLOS, China is not accepting its obligation under UNCLOS. China should not be allowed to enjoy its rights under UNCLOS, like conducting MSR in Benham Rise, while it refuses to accept its obligation under the arbitral award. Otherwise, China is cherry picking and not taking UNCLOS as one package deal.
Declare the Spratlys an International Marine Peace Park

As a win-win solution to the territorial dispute in the Spratlys, (the Tribunal’s ruling does not resolve the territorial dispute), all claimant states should suspend for 100 years their territorial claims and declare all the low-tide and high-tide features in the Spratlys, and an area of 3-NM around each feature, an international marine peace park* for the benefit of all coastal states in the South China Sea.

This insures that the Spratlys will remain the South China Sea’s nursery where fish spawn. The eggs and larvae of fish that spawn in the Spratlys are carried by currents to the coasts of China, Vietnam, Luzon, Palawan, Malaysia, Brunei, Natuna Islands, as well as the Sulu sea.

The claimant states will hold on to whatever islands/structures they now possess. Only coast guard personnel and vessels can be stationed in the Spratlys. The islands/structures can only be used for marine scientific research and eco-tourism.

There is a precedent to this. The 1994 peace agreement between Israel and Jordan created the Red Sea Marine Peace Park in the Gulf of Aqaba in the Red Sea.

Marine Ecologists from PROC, Taiwan, the Philippines and Vietnam Support a Spratlys Marine Protected Area

1. “Kwang-Tsao Shao, a marine-biodiversity expert at Taiwan’s Academia Sinica in Taipei, says that at meetings that include his mainland peers, there is consensus from ecologists on both sides of the strait that the region should be set aside as a marine protected area.”*

2. Prof. Edgardo Gomez, Philippine national scientist for marine biology, and other marine biologists at the U.P. Marine Science Institute, support a marine protected area in the Spratlys.**

3. Professors Nguyen Chu Hoi and Vu Hai Dang, Vietnamese marine ecologists, support a marine protected area in the Spratlys.***

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**  [http://www.fpi.sais-jhu.edu/#!Marine-Peace-Park-Plan-Offers-Promise-for-South-China-Sea/c1qvb/563ba7370cf28330832ed0fb](http://www.fpi.sais-jhu.edu/#!Marine-Peace-Park-Plan-Offers-Promise-for-South-China-Sea/c1qvb/563ba7370cf28330832ed0fb)

Of the total world annual fish catch, 12% comes from the SCS, valued at US$21.8 billion. The SCS has 3,365 species in 263 families of fish. Bordered by 10 countries with two billion people, the SCS is one of the top five most productive fishing zones in the world in terms of total annual fish catch. (Boom or Bust, the Future of Fish in the South China Sea, U. Rashid Sumaila & William W.L. Cheung, 2015) Fish consumption per person in Southeast Asia has increased from 13.1 to 33.6 kg. in the last two decades.
Major Fisheries Collapse Could Lead to Mass Starvation

“If we don’t do this (establish a Marine Protected Area), we are headed toward a major, major fisheries collapse in a part of the world where [that] will lead to mass starvation,” Prof. John McManus warned on 12 July 2016 in a Washington, D.C. forum organized by the Center for Strategic and International Studies.*

End

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