

Maritime Suspicion and Distrust: Global and Regional Implications of the *South China Sea Arbitration*

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A region of disputed maritime claims



'Big Power' Maritime Dominance





China as a 'two-ocean' power

The 'string of pearls': Deep water ports in (including) Burma, Bangladesh, Pakistan, Sri Lanka, Kenya. And Greece (the port of Piraeus)

Robert Kaplan: The South China Sea is to the Chinese in the 21st Century what the Caribbean was to the US at the start of the 20th Century

However:

Ash Carter (US Defence Secretary, 2015): "Turning an underwater rock into an airfield does not afford the rights of sovereignty or permit restrictions on international air or maritime transit"



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Significance / Value

\$5.3 trillion worth of goods shipped annually

Covers (approx.) 3.5 million square miles, with abundant resources:

Crude oil: 11 billion barrels (could replace China's oil imports for 5 years)

Gas: 190 trillion cubic feet (could replace China's gas imports for 102 years)

Fishing: 10% of global production:

- Crucial importance to local fishermen, primarily Vietnamese and Filipino. And an expanding Chinese fishing fleet

Geo-political significance:

China will not leave the sea lanes in its neighbourhood to be policed by the US

US: regards this area as crucial to their role as an 'Asian' superpower and as part of their treaty obligations to certain ASEAN nations - especially the Philippines (the strategic importance of the US Naval base and joint action with regard to terrorism in the South)

In terms of **global shipping:** A remarkable lack of concern – provided freedom of navigation is preserved

UN Convention on the Law of the Sea 1982 (UNCLOS 1982)

168 States are parties

Philippines: ratified on 8 May 1984

China: ratified on 7 June 1996.

UNCLOS as a “constitution for the oceans,”: in order to “settle all issues relating to the law of the sea,”

The Convention addresses a wide range of issues and includes a system for the peaceful settlement of disputes.

This is set out in **Part XV** of the Convention, which provides for a variety of dispute settlement procedures, including **compulsory arbitration** in accordance with a procedure contained in **Annex VII** to the Convention.

It was under Annex VII that the Philippines commenced this arbitration against China on 22 January 2013.

UNCLOS 1982 Article 279 Obligation to settle disputes by peaceful means

States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations.

Article 280 Settlement of disputes by **any peaceful means** chosen by the parties

Article 287 Choice of procedure

States may choose (by a written declaration) the means for the settlement of disputes:

- (a) the International Tribunal for the Law of the Sea (ITLOS – Hamburg);
- (b) the International Court of Justice (ICJ – The Hague);
- (c) an arbitral tribunal constituted in accordance with Annex VII;
- (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein

China: Choice of tribunal

China has not made a declaration regarding choice of tribunal under Article 287

Neither has the Philippines

UK: declaration choice of the ICJ

The default position is compulsory arbitration under Annex VII

BUT

Article 298: A State may make a declaration that that it does not accept compulsory arbitration with respect to specific disputes.

China has taken advantage of the 'opt out' (2006 Declaration) for the following disputes –

- (a) Sea boundary delimitation
- (b) Disputes concerning military activities
- (c) Disputes where the Security Council is exercising functions under the UN Charter

UK has opted out of disputes concerning (b) and (c)

Philippines: no record of any 'opt out'

The South China Sea Arbitration

Republic of the Philippines v People's Republic of China

Permanent Court of Arbitration: 12 July 2016



Permanent Court of Arbitration (PCA)

Peace Palace, The Hague

Established by the 1899 Hague Convention on the Pacific Settlement of International Disputes
Over 121 Member States

Facilitates:

Arbitration, conciliation, fact-finding and other dispute resolution proceedings

Currently:

8 on-going inter-State disputes, 73 investor-State arbitrations, 34 cases arising under contracts involving States, other public entities and inter-governmental organisations.

12 cases initiated under Annex VII, UNCLOS 1982, including:

- *Malaysia v Singapore* - Final award: 1 September 2005)
- The MOX Plant Case (*Ireland v UK*) – Terminated: 6 June 2008
- The ‘Enrica Lexie’ Case (*Italy v India*) - Pending

The value of arbitration?

Many advantages, including:

- Avoids the adversarial nature of court proceedings (the tribunal determines its own procedures)

- Flexibility in choice of arbitrators

- Flexibility in choice of Law

- The possibility of a negotiated settlement

This has been (very) successful in other situations

Annex VII UNCLOS 1982

Article 2 List of arbitrators

I. A list of arbitrators shall be drawn up and maintained by the Secretary-General of the United Nations. Every State Party shall be entitled to nominate four arbitrators, each of whom shall be a person experienced in maritime affairs and enjoying the highest reputation for fairness, competence and integrity. The names of the persons so nominated shall constitute the list.

Article 11 Finality of award

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

China's 2006 Declaration

Although UNCLOS 1982 provides for compulsory dispute settlement, it also allows States to opt out in certain cases.

China's 2006 Declaration specifically excludes maritime boundary delimitation

This was recognised by the Tribunal:

“Accordingly, the Tribunal has not been asked to, and does not purport to, delimit any maritime boundary between the Parties or involving any other State bordering on the South China Sea. To the extent that certain of the Philippines’ claims relate to events at particular locations in the South China Sea, the Tribunal will address them only insofar as the two Parties’ respective rights and obligations are not dependent on any maritime boundary or where no delimitation of a boundary would be necessary because the application of the Convention would not lead to any overlap of the two Parties’ respective entitlements.” (para 6)

Is this possible? The reality is that the Tribunal did what it said it would not do!

And it should have been aware that this would be how its decision would be interpreted.

China's Position Paper of December 2014, and in other official statements: China neither accepts nor participates in the arbitration unilaterally initiated by the Philippines.

Reasons:

(a) The real issues relate to territorial sovereignty and maritime delimitation – the Tribunal was precluded by China's 2006 Declaration (entirely lawful under International Law)

(b) The existence of bilateral agreements between China and the Philippines (including the Declaration on the Conduct of Parties in the South China Sea), to settle their relevant disputes through negotiation

(c) Bilateral negotiations with ASEAN

Speculation as to the Filipino reasons for initiating the case:

- The US 'pivot to Asia', as declared by US Secretary of State Hilary Clinton
- The US-centred previous Filipino administration
- An expectation of support from ASEAN

Article 9 Default of appearance

In case of non-appearance or failure to defend the other party may request the tribunal to continue the proceedings but the Tribunal must satisfy itself that it has jurisdiction over the dispute and also that the claim is well founded in fact and law.

The Tribunal decided that (a) China's non-participation did not prevent the arbitration from continuing, (b) that China was still a Party to the arbitration and, (c) was bound by the decision

PCA: "... throughout these proceedings, the Tribunal has taken steps to test the accuracy of the Philippines' claims, including by requesting further written submissions from the Philippines, by questioning the Philippines both prior to and during two hearings, by appointing independent experts to report to the Tribunal on technical matters, and by obtaining historical evidence concerning features in the South China Sea and providing it to the Parties for comment."

Criticism

Tiantian He, “Commentary on Award on Jurisdiction and Admissibility of the Philippines-instituted Arbitration under Annex VII to the UNCLOS: A Discussion on Fact-Finding and Evidence”

(2016) 2 *The Chinese Journal of Global Governance*, 96–128

“... the reasoning process of the Tribunal was by no means based on facts, common sense or justice, and its positions were neither fair nor impartial. The Tribunal deliberately framed the Philippines’ evidence in a favourable way, ignored the jurisprudence of other international courts, and thus disregarded the basic facts.”

Involvement of 'indispensable' third parties

Did the absence of other States act as a bar to PCA jurisdiction?



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Arbitrators:

- (a) should consider the interests of third parties,
 - (b) should not proceed if the rights of third parties were the 'very subject-matter' of the claim
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Test: Were the rights of other States the 'the very subject-matter of the jurisdiction'? The Tribunal ruled that this test was not satisfied.

December 2014 – Viet Nam submitted a statement that it 'had no doubt' that the Tribunal had jurisdiction

Also: Malaysia and Indonesia had attended the hearing as observers and not made any objections

23 June 2016: Malaysia had submitted a statement regarding its claims but the Tribunal ruled that Malaysia's interests did not prevent the Tribunal from dealing with the Philippine submissions.

China's Position Paper in December 2014 and in other official statements:

The Tribunal lacks jurisdiction in this matter

Article 288: Jurisdiction

4. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal

The Tribunal convened a hearing on jurisdiction and admissibility in July 2015:

Award on Jurisdiction and Admissibility on 29 October 2015, deciding some issues of jurisdiction and deferring others for further consideration.

The Tribunal then convened a hearing on the Merits from 24 to 30 November 2015:

Final Award on 12 July 2016

The Award is final and binding: Article 296 of UNCLOS and Article 11 of Annex VII



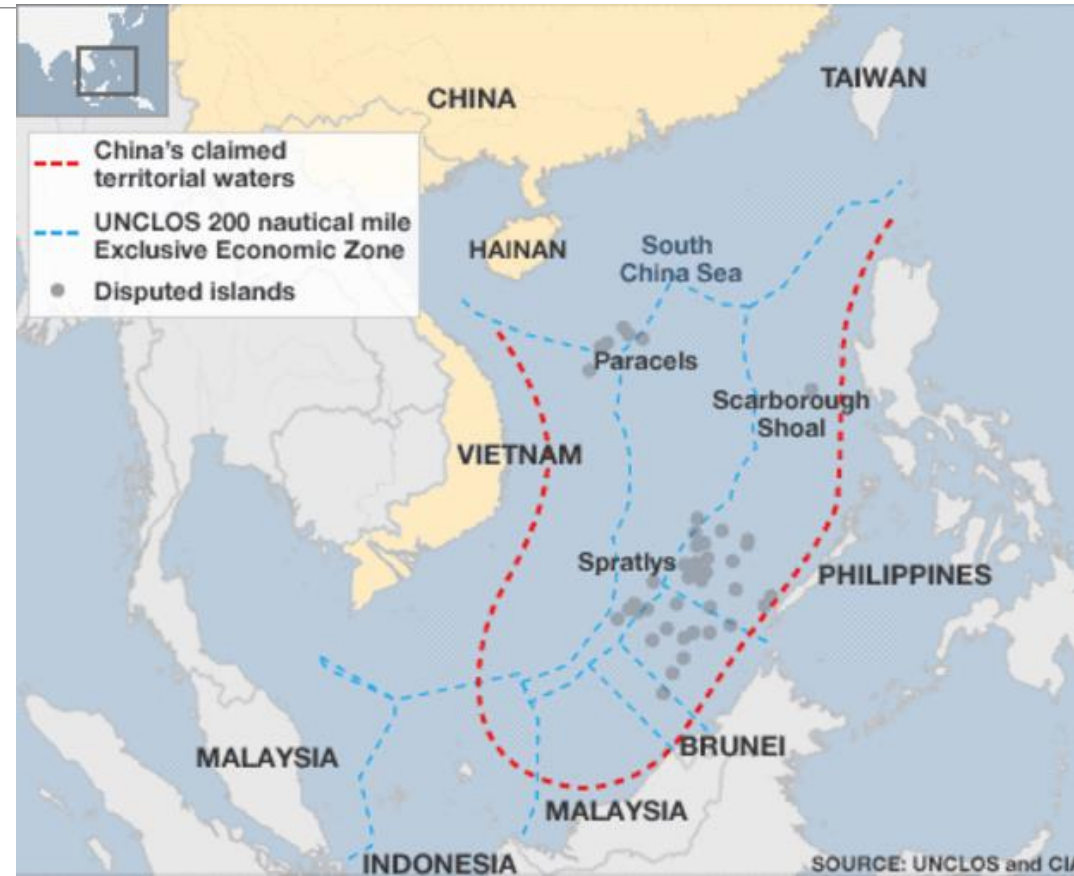
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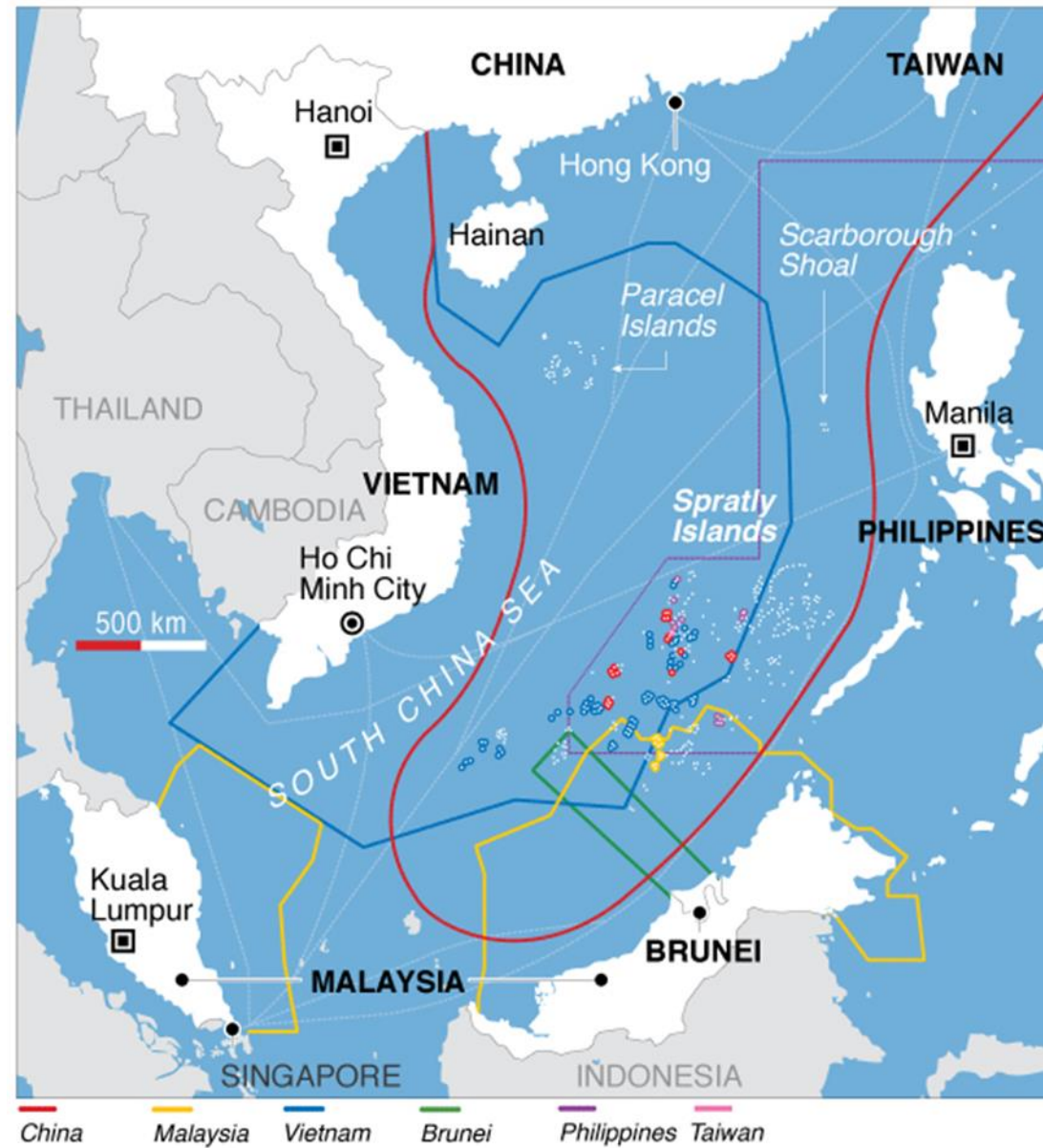
The Spratlys, color-coded by occupying country

- China
- Malaysia
- Philippines
- Taiwan
- Vietnam
- Unoccupied or unclear



Contested claims





<https://www.youtube.com/watch?v=LrCmurO70vA>





Spratleys: February 2016







The Philippine Claim

1. The source of maritime rights and entitlements:

- That China's claims must be based on UNCLOS 1982 and not on any claim to 'historic' rights
 - That the claims within the 'nine-dash line' marked on Chinese maps are without legal basis
 - That these exceed what is permitted under UNCLOS 1982
-

2. Entitlements to those maritime zones that are generated by the maritime features (including Scarborough Shoal and the Spratly Islands) claimed by both States:

- Submerged banks and low-tide elevations are incapable of generating any claim to maritime zones
- Rocks which do sustain human habitation or economic life cannot generate an EEZ of 200 nm or a continental shelf

3. Specific Chinese activities:

- Interfering with the Philippines' right with respect to fishing, oil exploration and navigation
- Failing to protect the marine environment and using harmful fishing methods that damage the fragile coral eco-system
- Degrading the marine environment by the construction of artificial islands

4. Declaration that China had aggravated and extended the dispute

Elements of the ruling (1)

Prior to UNCLOS, the waters of the South China Sea which were beyond the territorial sea were 'high seas'. UNCLOS 1982 was intended to comprehensively allocate the rights of States to maritime resources.

Legal background: The 'new' maritime zones:

- Territorial Sea (12 nm) + Contiguous Zone (further 12 nm)
- Exclusive Economic Zone (EEZ – 200 nm)
- Continental Shelf

It was not possible to preserve '**historic**' fishing rights. China's 'historic rights' were extinguished by UNCLOS and were inconsistent with the system of maritime zones contained in UNCLOS.

Status of coral reefs: Under UNCLOS, only features that are above water at high tide can generate a 12-mile territorial sea. This applied to a number of reefs (including Scarborough Shoal, Fiery Cross Reef). Others did not qualify: Subi Reef, Mischief Reef

Rocky outcrops: Could these above-high tide' features generate an EEZ? Tribunal: this was only possible if that feature could sustain human habitation or economic life of their own. Conclusion: All of the high-tide features of the Spratly Islands are legally 'rocks' that cannot generate an EEZ or continental shelf

Elements of the ruling (2)

Effects of China's actions on the **marine environment**: the large scale land reclamation and construction of coral reefs had caused severe harm to the coral reef environment and that China had violated its obligations under UNCLOS to preserve and protect the marine environment.

Fishing: Illegal interference with the rights of Filipino fishermen; unreasonable force had been used.

Also: as far as **navigation safety** was concerned, China had breached the provisions of UNCLOS on maritime safety as well as the 1972 Convention on the International Regulations for Preventing Collisions at Sea (SOLAS)

Note: the use of maps and charts and the Chinese, UK, US '**Directions for Sailing**'

The criteria for legitimate / lawful arbitration

- The tribunal should have jurisdiction over the subject matter
- The arbitrators should be impartial and authoritative
- The procedure should be reasonable
- The ruling should work towards a resolution of the disputes

Q? Were these criteria satisfied?

China's 'soft-power' approach

A diplomatic strategy to pull the ASEAN nations away from the US, using both carrot and stick

The carrot:

Investment

Declaration of the Conduct of Parties in the South China Sea (between ASEAN and China, 17 October 2012)

Actively seeking the support of the current Filipino President

The stick: ???

Reactions of the 'Big Powers': US, Japan, Korea, UK, France, Russia

- Joint China – Russia naval exercises September 2016
- The 2006 Kitty Hawk incident

Reactions of the major shipping nations?

Reactions of the ASEAN countries:

- Viet Nam, Philippines, Singapore, Malaysia, Thailand, Indonesia, Brunei, Burma

A flash point for Conflict?

<https://www.youtube.com/watch?v=yVH68yslv0>