

Concrete Solutions to the Maritime Disputes between the Philippines and China

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Introduction

Ladies and gentlemen, good morning.

Thank you for inviting me to this conference in Oxford on what remains the most complicated territorial and maritime disputes in the world, the South China Sea disputes. I hope that this discussion will enable us to see our way forward on some, if not all, the varied practical, legal, political, environmental, and regional relations issues that we have been hearing about since yesterday. I have been asked to discuss concrete solutions to the maritime disputes particularly between the Philippines and China. This is daunting task, but I will try to encapsulate years of observations about the reasons behind the two countries' disputes, and try to make realistic recommendations.

Interests at Stake

I begin with describing broadly the competing interests at stake for each party. First, the Philippines

The Philippines remains a developing country with a growing population of over 100 Million, scattered across 7,500 islands in a compact marine region rich with marine resources directly accessed by coastal communities. Its principal interests in the SCS, or more specifically its EEZ that is referred to as the West Philippine Sea, are best described, in order of priority more or less, as (1) energy security,, (2) food security, and (3) maritime security.

Energy security appears to be the primary driver of the Philippines decision to throw its hat into the SCS disputes in the late 1960s. The Western Palawan Sedimentary Basin, which encompasses the southern half of the West Philippine Sea and extends to the Spratly Islands region, is currently its one and only viable petroleum province. It is where the Camago-Malampaya Deepwater Gas-to-Power Project owned by Shell, Chevron, and PNOC is located and has produced 20-30% of the national power requirements. This single natural gas platform has enabled the Philippines to maintain its targeted energy mix that relies on indigenous petroleum energy sources, which is key to its economic resilience and growth. Take away this component, and the country will become absolutely dependent on imported fossil fuels and energy prices will be far more volatile and vulnerable to external factors.

Food security comes in second, as up to 20% of the country's total fish production has consistently come from the West Philippine Sea. Fish remain the principal source of protein the Filipino's diet, and provide subsistence directly to coastal fishing communities facing west. The maintenance of fish production and access to fishing grounds is key to social and economic stability and security for these communities. In recent decades, these communities have undertaken directly the task of establishing local marine protected areas, now numbering over 1,700 with varied success, to ensure direct local access to food sources independently of markets. Without access to these fishing grounds, already poor coastal communities will become poorer, stymie efforts to alleviate poverty and create conditions ripe for social disorder.

Maritime security is the third, on account of the vantage points provided that both Scarborough Shoal to the north and the Spratly Islands to the south for the corresponding western flanks of Luzon and Palawan. Scarborough Shoal is strategically located adjacent to Manila and Subic; from there, one can surveil and potentially control all maritime and air traffic into and out of these key nodes of Philippine commerce and governance. The Spratly Islands, on the other hand, lie between two major sea routes through the SCS including one that links Manila and other Philippine ports to the rest of Asia, the Middle East, and Africa. It also straddles routes from the Asian mainland into the historical southern “backdoor” region between Malaysia and the Philippines.

If we look at China, several orders of magnitude much larger and more powerful, a slightly different picture of interests emerges. Based on its more recent activities, China’s interests appear in a different order of priority, beginning with (1) maritime security, (2) food security, and (3) energy security.

Maritime security appears to be the primary interest of China given the extreme emphasis it has laid on ensuring that the SCS become a defensive zone to protect its southern coast. The SCS has been incorporated into its defensive perimeter to secure access and control of its coastal cities, industries, and ports. The rapid construction of massive artificial islands at huge expense between 2014-2016 demonstrates the absolute importance China places on this primary interest. This also complements the government’s need for political security, as the SCS is often portrayed as the arena of US containment of China, hence control of this maritime area represents an assurance of sovereignty. The historical narrative deployed by China is the basis for political support and unity among its population to support the government’s policies and initiatives in this regard, despite its negative impact on the regional neighborhood.

Food security ranks second, on account of the need of southern Chinese provinces, notably Hainan, for access to fishery resources in light of the decline in fish stocks and resources along the mainland coast. China has subsidized and promoted Chinese fishing further into the SCS most especially within the last decade.

Energy security is last, despite the much-touted and often-bannered petroleum riches in the SCS. While China, as an energy importer with growing needs for even more energy sources, would also be interested in petroleum resources, it is currently acquiring its energy from undisputed areas closer to the coast and is already able to tap its petroleum needs from the global market. While it has insisted on joint development of petroleum resources in the SCS, it has not demonstrated any particular urgency in offering modalities or negotiating detailed agreements with any of the littoral States. The rhetoric on joint development thus appears to be deployed for political effect rather than serious proposals.

Despite these competing interests, the Philippines and China actually do have common interests. Both require the economic security that is enabled by maritime trade, and therefore both have an interest in the freedom of navigation and overflight for purposes of trade and travel. Both have an interest in ensuring the freedom of communication enabled by submarine cables which support the conduct of international commerce. Both countries have an inherent interest in the environmental security, particularly in preserving the resilience and productivity of all living resources and habitats throughout the SCS. Conversely, they also have an interest in protecting the sea and its resources from oil and chemical spills, material discharges, and similar maritime disasters, as well as ensuring the safety of life at sea. Both countries also have an interest in ensuring regional stability through the prevention of crisis and incidents with the potential to escalate into armed conflict, no matter how limited.

Legal Frameworks Available for Adjusting Interests

International law, especially the United Nations Convention on the Law of the Sea, provides the fundamental framework for the adjustment of competing and convergent interests in the oceans. Provisional arrangements, which include the more specific mechanism of joint development of resources, were recognized as early as 1969 in the North Sea Continental Shelf Cases which recognized that overlapping continental shelf claims were a fact of life, and that pending resolution through boundary delimitation, States should agree on joint exploitation of resources in order to preserve “the unity of the deposit.” This is an economic rationale, that resources could be better and more efficiently harnessed through cooperation rather than lost and wasted through competition. In 1999, the Eritrea v Yemen Award advocated that parties should give every consideration to “shared or joint or unitized exploitation” of petroleum resources.

The obligation to make every effort to enter into provisional arrangements is expressed and codified in UNCLOS Articles 74(3) and 83(3), encouraging States to resort to non-prejudicial “provisional arrangements of a practical nature” pending delimitations. In the case of *Guyana v. Suriname*, this was interpreted to embody “twin obligations” in order to promote economic activities in a disputed maritime area so that resources are not left un-utilized or wasted, but at the same time prevent activities that jeopardize or hamper the negotiation of final agreements.

Beyond border delimitation areas, however, UNCLOS also anticipated the situation of the SCS and provided for enclosed and semi-enclosed seas in Article 123, advocating cooperation in the bordering States’ exercise of respective rights and performance of duties. It principally encourages States, directly between themselves or through an appropriate international organization, to coordinate their respective activities at sea, implementation of their rights and duties to protect and preserve the marine environment, and marine scientific research policies and programs. They are also encouraged to invite other interested States and international organizations to cooperate with their efforts.

In 2016, the arbitral tribunal in the case of *Philippines v. China* ruled on a number of submissions of the Philippines that led to the interpretation and application of UNCLOS to some threshold issues in the SCS disputes. As everyone knows, this resulted, among others, in a description of maritime entitlements establishing that (1) the Philippines is fully entitled to its 200nm EEZ and continental shelf zones extending from its mainland coasts, (2) confirmed the position that none of the maritime features in the Spratly Islands region and Scarborough Shoal, (3) declared as contrary to international law certain activities undertaken by China within the Philippine EEZ. But while the Award offers legal clarity for the Philippines, other Southeast Asian coastal States, and the international community legal clarity about jurisdictions within the SCS, and provides the legal basis for generating solutions for the intricate SCS disputes, China has refused to recognize, accept, and implement the Award. Since the Philippines cannot unilaterally enforce compliance and implementation, the disputes stand at a deadlock.

This deadlock, however, cannot be sustainable over the long run. If China forces access to Philippine waters and unilaterally imposes its claims to sovereignty and jurisdictions, it only invites resistance from the smaller Southeast Asian littoral States. Such resistance will only grow as these States realize and quantify their continuing losses to China’s appropriation. This will only maintain the seeds of future frictions and conflict, which in turn maintains the possibility of incidents and encounters with potential to escalate into armed conflict. China will find it increasingly “expensive” politically and militarily, not only economically, to maintain its ability to control the seas, placate littoral States, and exclude other

interested States from the SCS. Littoral States may even make China accountable and responsible for any downturn in the status of resources in the SCS, making it the target of blame for biodiversity loss, habitat destruction, and environmental degradation in the future. Littoral States will eventually ramp up the involvement of external powers, and the latter will never be lacking in reasons to be invited, in order to protect their respective interests through partnerships and alliances, thus making China's objective of maritime dominance even more elusive and difficult to achieve over the long term.

Compliance, or at least conduct consistent with the Award, would be more in China's long-term interest and favor long-term regional stability and security for all parties concerned. The sources of tensions will draw down, as incidents and issues can then be resolved in accordance with pre-determined and clear rules that States previously agreed upon as a fair division of rights and jurisdictions. The littoral States will be more open to negotiating and settling outstanding jurisdictional issues, and perhaps even open up to the negotiated settlement of sovereignty claims, in exchange for assured access to resources. China does not seem to appreciate that, by harmonizing their respective claims with UNCLOS and limiting the scope of sovereignty claims, the smaller Southeast Asian States opened the door for compromise and sharing of the maritime commons of the SCS. The reduction in tensions arising from resource competition will then lead to a draw-down in the need for maritime security forces and re-orient the missions of military and law enforcement units back to their more traditional missions of protecting their principal homelands. Conservation and protection of the marine environment will promote the continued productivity of living resources throughout the SCS, which will then obviate the need to make distant claims to distant fishing grounds. These will contribute to regional peace and stability, which will in turn pull down the need for constantly mobilizing maritime forces and reduce additional sources of worries and tensions.

The ball literally is in China's court at this point. And patently, how the SCS disputes will develop and evolve in the near future will be due largely on whether it can, and how, it faces up to the Philippines v. China Award and its implications.

Interim Measures

In the meantime, however, certain interim measures, similar to provisional arrangements of a practical nature, are in order. Such measures are necessary in order to at least stabilize the situation and prevent further complication, and at the same time possibly enable the parties to create room for future cooperation and eventual resolution.

Interim measures for the short term should have the parties work on their common interests that transcend maritime boundaries. These solutions could be seen as "borderless" measures that can be undertaken individually, within areas under their control or imposed on their own nationals, but which have beneficial effects for all littoral States. In concrete terms:

- (1) The parties should openly and expressly commit to complete freedom of navigation and overflight throughout the SCS, with the exception of occupied features up to a certain distance, as well as their mainlands' respective 12nm territorial sea zones.
- (2) The parties should not establish arbitrary and expansive military exclusion zones within the SCS around their occupied features, as these could create dangers for legitimate commercial navigation and overflight.

- (3) The parties should openly and expressly commit to the freedom to install and repair submarine cables and pipelines.
- (4) The parties should all take actions to stop activities that cause damage to marine living resources and habitats, and cooperate in
 - a. Protecting the integrity of fragile marine living resources and habitats
 - b. Combat illegal trade in endangered marine species
 - c. Commit to not cause any further damage to marine habitat
- (5) The parties should establish working mechanisms and carry out exercising for joint oil spill response, and search and rescue operations
- (6) The parties should create means of direct channels of communication between operational commanders of military, law enforcement units at sea that may be used during incidents and potential crisis events.

These interim measures directly address common interests in the SCS regardless of whether they are in the EEZ, high seas, or otherwise. Some of the foundations have been laid, such as the Memorandum of Agreement for Cooperation between the Philippine and Chinese Coast Guard, while others are urgent but remain to be discussed, such as combatting trade in endangered species and stopping the destruction of marine habitat. But simply addressing these issues will go some way toward at least conserving and protecting the resources throughout the SCS and slow down the ultimately self-destructive competition for dwindling fishery resources.

Medium-term Measures

Medium-term measures are more difficult, but could provide both parties with a workable solution to address the question of managing resource activities without prejudice to the SCS Arbitration Award.

One way would be to address fisheries and petroleum activities within the 12nm enclaves around each qualified feature, sovereignty over which is admittedly disputed between the parties. Such enclaves would exist even without the SCS Arbitration Award, and could provide the starting point for joint, or at least coordinated, management. These 12nm enclaves encompass huge areas of water, often also covering maritime features subject to fishing by all littoral States. Examples include the Union Banks, Tizard Banks, Thitu Reefs, and Scarborough Shoal which are large atolls commonly used by the parties.

Within these areas, the parties should not allow destructive fishing by their own nationals, and reciprocal access could be permitted, although conditioned upon the use of sustainable fishing methods. The parties should commit to conserve and protect the marine habitats in the areas under their control, and allow scientific monitoring and assessment of the health of such habitats to a central repository accessible to all parties. Areas commonly used by the parties should also be subject to reciprocal and cooperative monitoring based on a standard assessment template.

A system of documentation of destructive methods and reporting to the flag State should be established, allowing littoral States to report infractions to the flag State for the latter's action. Reports on actions taken against infraction should be made available to all.

Joint exploration and development for petroleum resources may be undertaken through a treaty framework that either (a) considers the entire SCS, not only the areas claimed by the littoral States, but excluding territorial seas and archipelagic waters, as a maritime commons, or (b) reciprocally provides

access to both parties' undisputed continental shelf areas. This means a reciprocal stake in the exploration and development of petroleum resources by ALL littoral States and ANYWHERE in the SCS, not just the continental shelf of the Philippines. Even if specific projects will operate in a specified location, the arrangement should theoretically enable joint development even on the Chinese side of the SCS as a measure of reciprocity and mutuality in interests. Reciprocity is a basic condition of fairness necessary for any joint development proposal to be acceptable.

In addition, any treaty framework must ensure transparency through clear terms and conditions, and must include an express "without prejudice" clause covering all activities of the parties.

In the alternative, it may be possible to consider a special negotiated concession agreement, which is currently allowed under the Philippines' offshore petroleum development law. Such an agreement would need to depart from the existing standard service contract, incorporating special features such as (most importantly) the "without prejudice" clause, the sharing formula, distribution of taxes, applicable laws for employment, benefits, dispute-resolution, and contract. And again, such a special agreement must be transparent and contain clear terms and conditions. This, however, will require a special law.

In any case, any joint exploration and development scheme must be expressly described as an agreement of a "practical" nature, having no implications on the respective legal positions of the parties. Despite China's refusal to acknowledge the award, its rulings are legally binding on both China and the Philippines. Any joint exploration and development on the Philippine continental shelf, given the Duterte administration's insistence that it is not giving up the Award, can only be justifiable as a purely political accommodation at best, not an act pregnant with legal meaning. If both parties are as sincere as they both claim to be in pursuing joint exploration and development to improve relations without backing down from their respective claims, then they should acknowledge that this effort is due to expediency rather than legality.

I hope that this is enough to give us food for thought. Thank you very much!