



South China Sea in Retrospect Post Tribunal Verdict

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Four hundred years ago, in the South China Sea, a Portuguese carrack 'Santa Catarina', laden with riches, was seized by the Dutch. Both nations were at war during that period. The seizure of this ship, led to a prolonged legal defence of this act by a jurist named Hugo Grotius. From this defence emanated a legal concept about oceans, termed '*mare liberum*'. The essence of the concept was that –'sea are open to use by all', antithetical to the Portuguese principle of '*mare clausum*' or closed seas. A similar debate was being replayed in the same sea, in more or less co located courtrooms, and in a curious rhyme of history, it was also about similar principles of law.

In July 2016, a tribunal in Hague delivered its award over several features and an ambiguous line over water in the South China Sea (SCS) - an issue that is brewing for several years between China and her maritime neighbours. The appellant to the arbitral tribunal- a redressal forum of the United Nations Conventions on the Laws of the Sea (UNCLOS) -was the Philippines. The award went against China in favour of Philippines. However, the heat and dust over SCS is unlikely to settle anytime soon, considering the hard *historical* line adapted by China. This article tries to place some relevant aspects of that case and gauges some of its impacts.

The South China Sea

The South China Sea is a marginal sea in the Pacific Ocean, littoral to the South East Asian Nations and China (refer fig1). It has several reefs and shoals,

which make it rich with fish and other resources. Nations that abut this sea, primarily China and the ASEAN nations, are also the engines of global growth. They are also deeply into trade, 90 percent of which happens via the oceans. This is especially true of China, which is the most trading nation in the world¹. The SCS is also an important maritime conduit that connects the Indian and Pacific Ocean Economic Systems, which has markets at one end and resources at the other. Any disturbance to this Indo-Pacific system can upset global economy.

Figure 1: The Map of SCS



Source <http://blogs.voanews.com/state-department-news/2012/07/31/challenging-beijing-in-the-south-china-sea/>

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The Disputes over SCS

The SCS has over two hundred land features in separate groups, many of which are presently contested. Of all the disputes, the Spratlys involve the most number of claimants, which include China, Malaysia, the Philippines, Taiwan and Vietnam. Over and above contests over these small features, there is a unique claim from China known as the 'nine dash line'. This is a Chinese cartographic expression which dates back to a 1947 map produced during the Nationalist rule. This makes matters complex with hardening of the positions taken by Communist China and Nationalist Taiwan². The modern version of this nine dash line³ surfaced in 2009. That year, China in its note *verbale* to the UN, in response to continental shelf claim by Vietnam and Philippines, placed the present version of the nine dash line. Over the years the dashes have varied both, in numbers and positions⁴. Two dashes in Tonkin Bay vanished, as China settled that portion of the claim, with Vietnam whereas an additional dash got added near Taiwan. China, since 2012, has also issued passports with a map showing this nine dash line. UNCLOS **does not** recognise such a line over water. Hence the SCS disputes have two main arguments-national ownership of land features, as well as legality and meaning of the infamous nine dash line.

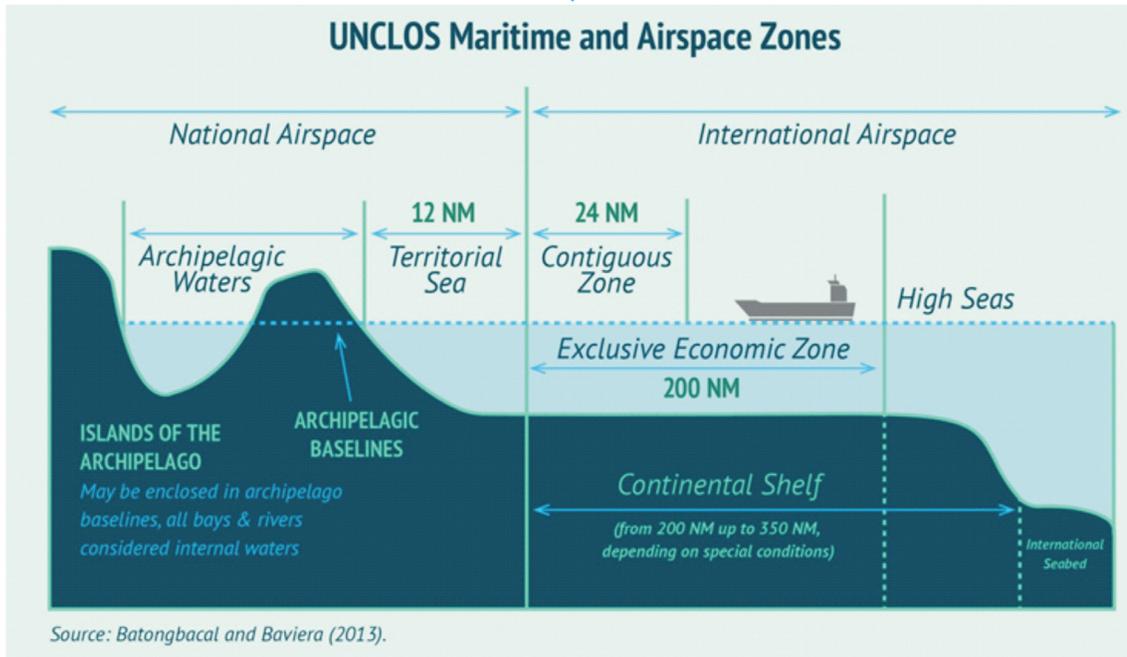
The Laws of the Sea

UNCLOS is the modern law of the ocean, first articulated as *mare liberum*, meaning open seas. The concept got refined over a period, resulting in the three mile **cannon shot** law. Growing marine activities demanded adapting the UNCLOS, a process that commenced in 1958, which finally came into force in 1994. China and all parties involved in SCS disputes are signatories of UNCLOS. The most notable non-party is the USA, which has reservations with its Seabed Convention. Some relevant UNCLOS tenets of the dispute are as follows (refer fig 2):-

- A country's entitlements over sea stem from its ownership of adjacent land. This is the doctrine of "*la terre domine la mer*" or *land dominates the sea*.
- The extent and rights of entitlement are from 12 nm territorial rights to 350nm economic rights for a continental shelf claim.

- Waters landward of 'baseline' are *internal waters*, where sovereign rights can be exercised.
- Land features, such as drying heights, rocks, and islands, may confer some entitlements such as:-
 - o Small features that are visible only during low water (Low Tide Elevations (LTE) do not provide entitlement over sea, nor can they be appropriated by occupation, but they become part of baseline points.
 - o Rocks accrue only a 12nm territorial sea (TS) around them.
 - o To qualify as Islands, features in their natural condition, must be able to sustain habitability and have capacity for non-extractive economic activity. Islands fetch territorial sea and 200nm Exclusive Economic Zone (EEZ).
- The UNCLOS accounted for *historic claims* during its formulation. Pre-existing rights to resources were considered, but not adopted by the convention. Such rights were extinguished with provisions of EEZ/Continental Shelf (CS) in UNCLOS.
- The UNCLOS defines an archipelago regime exclusively for states that exist as a group of islands which entitles an archipelagic baseline and internal waters inside them (refer fig 2).
- The degrees of freedom of passage vary, depending on nature of waters- i.e. straits, internal, territorial and high seas.

Figure 2: Maritime and Air Space Zones, Source Botanbacal and Baviera 2013



Along with UNCLOS came a dispute resolution mechanism. States could choose one or more designated organisations for settling disputes including the International Tribunal for the Law of the Sea (ITLOS), International Court of Justice or Arbitral tribunals.

A Brief History of Disputes

There are several reasons behind onset of SCS disputes. National maritime capacities and awareness expanded simultaneously with UNCLOS negotiations. One trigger point was discovery of oil in Spratlys in 1970s. The presence of reefs and shoals also made the area abundant in fish- a significant source of protein. The East Asian economies and China grew phenomenally, relying on trade as well as energy flows through the SCS. As significance of SCS grew, disputes too became bitter. China and Vietnam fought naval battles over the Paracel group in 1974 and a Spratlys reef in 1988. The coming in to force of UNCLOS, in 1994, accentuated the disputes. By 2002, diplomacy yielded a declaration of conduct between parties in SCS which provided some mitigating mechanisms.

Nations had also commenced building and reclamation on the features in their possession. Some of it were with a military perspective to

improve habitability and status as per UNCLOS. This altered natural state of the features reclaiming approximately 3300 acres, majority being Chinese efforts.

As an aside to territorial disputes, Freedom of Navigation (FoN) became another flashpoint in SCS. Both issues are related and rely on UNCLOS. The Sino- US EP3 Aircraft incident in 2001 and USNS Impeccable incident in 2009 added a FoN dimension to SCS. Differing interpretations of UNCLOS, between US and China is the reason behind FoN episodes.

The Arbitration

The territorial disputes kept simmering till early 2013 when Philippines chose the arbitration route, through the Permanent Court of Arbitration at The Hague, as per UNCLOS provisions. Instead of raising sovereignty, Philippines pivoted the case on interpretation of UNCLOS⁵. This was an astute strategy, primarily, since the tribunal has no mandate to award on sovereignty or delineation but can interpret legalities based on UNCLOS. Two core questions, from Philippines, comprised the legality as per UNCLOS of 'Historic Rights and the

'Nine-Dash Line' and 'Status of Features' in Spratlys. From these two core questions emerged *legality of Chinese actions*. It also raised *aggravation of dispute and harm to environment* in its submission.

China abstained from the arbitration, but pronounced its views and non-acceptance of arbitration through position papers. Yet, the hearing proceeded since *'absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings'* according to UNCLOS. The tribunal initially decided on admissibility and jurisdiction and later, awarded the final verdict in July 2016 against China.

The Award

The award of the Tribunal on the core issues is as follows⁶:-

- ***The 'Nine-Dash Line' and Historic Rights.***

- ***'Nine-Dash Line'***. Award stated that scope of entitlement is defined by UNCLOS. Claims in excess by China are invalid regarding nine dash line.

Comments. An entitlement over sea originates from ownership of land. The waters in contest are more than 350 miles away from Chinese Mainland, beyond maximum zone of entitlement (i.e. extended Continental Shelf). Therefore, Chinese entitlement around Spratlys, if any, would emerge from the ownership of features within it and not the dashed line over water. It is here, that historical aspect of the claim becomes relevant.

- ***Historic Rights.*** It stated that UNCLOS during the formulation had considered historic rights but were not adopted and deemed subsumed and extinguished in EEZ rules. The award stated that though Chinese mariners historically made use of the islands, there was no evidence that it historically exercised exclusive control over water or their resources. Tribunal, therefore, concluded that there is no legal basis for China to claim historic rights to resources within sea areas of the nine dash line.

Comments. UNCLOS considers historic claims in two instances. They are articulated as historic bays and historic *titles*. Both pertain to sovereignty over a sea area close to land, with certain quantifiable as well as subjective criteria, treating them as 'internal waters'. In these cases claimant has to prove notoriety, continuous effective control, besides acquiescence of foreign states in exercise of that authority⁷. In distinguishing between historic water, title and rights, there is an interpretation that historic 'water' or historic 'title' are about sovereignty whereas historic 'rights' are lesser set of rights⁸.

- ***Status of Features.*** The tribunal considered the features. As described earlier, an island, rock or an LTE accrued different entitlements over water. Tribunal concluded, from present and historic evidence, that none of the Spratlys feature was an island.

- ***Implications and Comments.*** This meant none of it generated an EEZ or a CS irrespective of ownership by any nation freeing up a very large area for global commons. To illustrate, merely a spot on island would generate 125600sq nm of EEZ, whereas 'rocks' reduced entitlement to 452sqnm of territorial sea⁹. The verdict implied that certain seas were part of Philippines EEZ since they were not in any 'possible' entitlement of China. Additionally, EEZ entitlement also has a navigational implication considering China's views on freedom of navigation in EEZ.

- ***Other Awards.*** The other awards which were relevant are:-

- China violated the Philippines' sovereign rights in its EEZ and created a serious risk of collision with Philippine vessels.
- China caused severe harm to environment and violated its obligation to preserve ecosystems.
- China had aggravated dispute, by land reclamations and construction during dispute resolution.

Responses

International responses were along expected lines, mostly measured and diplomatic. Even domestic responses within affected nations were muted and controlled like:-

- The Chinese response to the Tribunal award was by stating it is '*a political farce under the pretext of law*', and declaring the award *null and void* with no *binding force*. It reiterated *China has neither accepted nor recognized it*. It had crafted a response, alluding to existence of internal waters in SCS taking the archipelagic/historic route for legitimising what is within the nine dashes¹⁰. A white paper was also released with copious historic details reinforcing its historic claim. The response fails to challenge the logic of the verdict apart from hardening the historical route to the claim. In an attempt to gain support, China has also incorrectly interpreted the joint Russia India China statement as a measure of Indian and Russian support¹¹. Pakistan and Taiwan were notable supporters of China.

- **Indian statement mentioned the following¹²:-**

- o Expressed support to freedom of navigation, over flight and unimpeded commerce.
- o Ushered respect to International law and UNCLOS.
- o Sought resolution of disputes using peaceful means without use of force and threats.
- o Sought self-restraint in not complicating disputes.
- The dynamics in Philippines have also undergone a change. New President Duterte is busy with extra-legal crackdowns and has even risked fallout with its ally, the USA. It is mending equations with China with ex-President Fidel Ramos as chief interlocutor. The, official reactions have also been with restraint¹³. Hanoi, too has clamped down anti-China protests¹⁴.

- President Trump's China policy will be important to South China Sea. Unlike previous Presidents who used economy as a balancer in relations, Trump has been overtly critical of Chinese monetary policies, which he says hurts US business. He has shown lesser interest in geopolitics, putting US allies in the region in some doubt about continued support from US. However, his phone call to Taiwan President broke several conventions much to the chagrin of China. In a tweet supporting his phone call, in early December 16, he equated this call to China's currency policy, tariffs on US goods and Chinese military build-up in South China Sea. His response to the recent capture of the US drone by China has been initial accusations on China of 'stealing' to add tweet which said after indifferent 'let them keep it!' Philippine President Duterte, who had given less importance to tribunal verdict thus far, has also warmed up to the new US leadership. Amidst these mixed signals and events, one may have to wait for President elect Trump to take office before a new policy to become discernible.

A Geopolitical Perspective

China's late maritime resurgence, geography and its historical actions in the continent partly answer why it is undertaking contrarian positions after signing UNCLOS in 1996. It appears, just as it had created a continental buffer around a coastal Han core by annexing Xinjiang, Tibet and Inner Mongolia in initial days of PRC, it is in the process of creating a maritime buffer zone in the SCS. It is called a *core*¹⁵, albeit in unofficial parlance, due to following reasons:-

- SCS is vital to its maritime commerce and energy needs, especially with the '*new normal*' of slow economic growth. Even a minor disturbance to trade flows can cause severe imbalance, with a political price to pay. This is closely linked to Malacca Dilemma, reinforced by an emphasis by President Hu Jintao in 2003¹⁶.
- SCS holds reasonable reserves of oil and gas.
- As the largest consumers of fish in the world with the depleting fish stock in Chinese EEZ, SCS is a source of food and livelihood for China.

- SCS is the vital area, leading to Malacca Straits, critical to a two ocean strategy. Kaplan argues that SCS is key to China's two ocean strategy just as Caribbean Sea was key to US's two Ocean presence with the making of Panama Canal¹⁷.
- The US Pivot to East Asia accentuates that insecurity.

Steps to Control that Buffer

China's aim appears converting SCS into zones where it has higher control. According to UNCLOS the legal nature of waters- whether internal, territorial, EEZ¹⁸ or high seas decides degree of freedom of navigation through those waters. Since land dominates the sea, a line over water has no locus standi and only a feature in the sea can give a nation control over water. That must explain the scramble for features and island building. Among maritime zones of control within the ambit of UNCLOS, 'internal waters' offer highest navigational control¹⁹. They are usually landwards of 'baseline' or within boundaries of an archipelago²⁰. The geography of contested waters in SCS legally cannot become internal waters to China since:-

- o It is not landwards of any Chinese baseline.
- o Creation of archipelagic base line is an exclusive privilege of an *archipelagic* state²¹ which China isn't with a continental mainland.
- o The tribunal has also ruled that Spratlys do not fulfil the archipelago criterion as per UNCLOS on its own, even if features were deemed as a single entity.

Yet, the three post tribunal Chinese responses on sovereignty and arbitration, by foreign minister Wang Yi, the Government and the White paper mention internal waters in the SCS!²²²³²⁴.

Whilst, creation or claim over features provides measurable methods of control, there is another route- of history which in very rare, well defined cases provides internal waters and rights. In a peculiar position of the Marxist Leninist state over history, Chinese statements hinge on the *historic* claim²⁵ in an effort to give a fillip to its 'rights' over these waters. In fact, the Chinese post tribunal

response invokes history over twenty times, whereas UNCLOS mentions history just twice, that too, in a text ten times as voluminous. This desire to turn the clock back into a historic era with incipient law will do China and the world more harm. The SCS issue is back to where it started, with such a stand, albeit with greater public clarity over UNCLOS.

Implications of the Award

The most significant implication of the award is that it clarified several UNCLOS aspects, hitherto not available from a legal perspective to a wider audience, as follows:-

- o This offers a legal respite to affected parties.
- o By awarding that the subject features are not islands but rocks and low tide elevations, it has freed large water space for use of global commons.
- o It has awarded that historic rights were considered and deemed extinguished when EEZ's were decided.

This award serves as a precedence and reference to further resolutions of disputes in the region. However, it did not judge on sovereignty, leaving that question open for resolution. Here, China's insistence of a bilateral approach to resolution is a measure considering the power differential between China and individual nations.

The verdict has affected China's claim to adherence to rule of law and peaceful development. Even though it abstained and rejected the verdict as a "farce", it reacted throughout the proceedings through position papers, public hearings across nations and newspaper advertisements.

As a cue for the road ahead, it is good to recall that power in global politics will remain diffused in the future²⁶. This is also one reason why adherence to law becomes all the more important with less powers with the hegemon. Concepts like buffer zones have proven to be part of the problem than solutions, and could become redundant when rules based, equitable cooperative constructs emerge in a new order. It would be ideal and augur well for China, as a responsible global power, to scale down the actions and take lead in a cooperative oceanic regime based on rule of law with all stake holders. That should assuage some of its own insecurities.

The award will positively affect rule of law for oceans. So far, members of the Security Council, including the USA, have shown little respect to previous arbitrations²⁷. Whereas, middle powers have amicably settled issues by arbitration irrespective of sizes of countries involved like India-Bangladesh Settlement²⁸. China has portrayed Philippine action as a proxy initiative by the USA. Whereas USA, a non-party to the convention was not allowed to be a part of the Tribunal hearings. USA becoming a party to UNCLOS will strengthen the regime in a world which is becoming increasingly multipolar. Bill Hayton highlights the irony that China has ratified UNCLOS but doesn't adhere to it, whereas US has not ratified but adheres to most of its provisions.

Chinese internal situation is presently marked by a powerful President, an anti-corruption campaign which has shaken its polity, economic slowdown and a transition of its economic model. Such a transition makes any nationalist spark a sensitive issue. Despite etching the nine dash line on public consciousness, China has so far clamped down on public response²⁹. It can ill afford any popular uprisings as previous experiences indicate that such events quickly spin out of control and attain a different tone and tenor.

The SCS has so far not been elevated to a core³⁰ status, unlike Taiwan, Tibet and Xinjiang. Yet its response evoking internal waters and historical rights are signs that the issue is far from over. The 'verdict' is one window, to tone down the rhetoric as a first step to an eventual settlement. It remains to be seen how far China would push the envelope in the matter, as nine dash line has been tattooed. However, it can alter interpretations to suit the verdict for non-exclusive rights such as those over Scarborough Shoals or the joint development route that it seeks as per UNCLOS.

The Dutch seizure of Portuguese Carrack Santa Catarina in South China Sea, four hundred years ago, provided the world a liberal law of the sea. However, in this unfortunate rhyme of history, China wants to box back that hard learned lessons of law into a dashed line about which China itself has very little clarity. Whatever be its choice, it appears that the issue is far from over considering the stakes involved. India and the world must encourage parties to resolve disputes through peaceful means without use of force and exercise self-restraint based on the principles of UNCLOS. Law must remain above politics.

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