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## Power Shifts and International Law: The Geopolitics of the South China Sea Dispute and Its Implications for the United Nations Convention on the Law of the Sea

Mico A Galang

### Introduction

Capturing worldwide attention, the ruling on the *Philippine v. China* case about the South China Sea (SCS) dispute was released on 12 July 2016. The decision went largely to Manila's favor. Against the backdrop of the Sino-American rivalry, the SCS dispute has placed at the forefront the viability of international law, specifically the United Nations Conventions on the Law of the Sea (UNCLOS), in promoting guidelines on maritime issues and the pacific settlement of disputes. As an exploratory study, this paper aims to discuss the implications of the SCS dispute, as the operational theater of the emerging power shifts in the APR, for the UNCLOS. Specifically, this article seeks to address the following questions: (1) How do power shifts affect the development and efficacy of international law? (2) What does control of the SCS mean for regional power shifts; (3) How does the Philippines use UNCLOS to resolve portions of the dispute to clarify maritime entitlements and sovereign rights, and how does China respond to the legal challenge posed by the Philippines?; and (4) What are the possible implications of the geopolitical dynamics of the SCS for UNCLOS as a legal framework for maritime issues including pacific settlement of maritime disputes?

### Power Shifts and International Law

Power shifts are a common phenomenon in international relations. In his seminal work *World Politics*, A.F.K Organski explains such shifts in foreign relations through a paradigm called Power Transition Theory (PTT).<sup>1</sup> The theory assumes that there is stability in the system when the dominant nation satisfies the other countries, especially the great powers, with the distribution of benefits. However, the rise of a challenger, which is a great power dissatisfied with the current order, signals instability—which is heightened when the status quo power fears that a challenger will contest “the leadership and rules of the international order”.<sup>2</sup> Against this backdrop, the “rules of the international order” strongly indicates that “international law is merely an epiphenomenon of underlying power.”<sup>3</sup> Nevertheless, international law is utilized by dominant powers to give a semblance of legitimacy to their hegemony.<sup>4</sup> Some countries may have initially agreed to the adoption of some international agreements. However, in the context of power

shifts, when these agreements no longer serve their interests, especially if they have gained enough power, their commitments to the same will inevitably waver. To preserve its hegemony, the status quo power will have to uphold the current international law against the challenge posed by the rising state.

Anchored on these theoretical underpinnings, this paper argues that China, with its new and growing economic and military prowess, seeks to dislodge the US from its pre-eminent position in APR, with the SCS as a step towards that goal. In carrying out its grand strategy, however, Beijing appears to contravene a key international law—UNCLOS, under which Manila, a treaty ally of Washington, legally challenges the expansive maritime claims of China. As the dominant power in the region, the US challenges the assertiveness of China in the SCS through actions that seem to uphold UNCLOS. These geopolitical dynamics have significant implications for UNCLOS as the legal framework for maritime issues and pacific settlement of disputes.

### South China Sea and Asia-Pacific Regional Power Shifts

The importance of the seas in international relations is not new. Geopolitical strategist A.T. Mahan argued that the effective control of the seas is a key in achieving the status of a world power. Mahan further argued that a naval power that dominates the Indian and Pacific oceans will have the capability to affect the decision-making of states—which is the very essence of power—in an area called by H.J. Mackinder as the Eurasian “Heartland.” But unlike Mackinder, who argued that the key to international pre-eminence is the control of the Heartland, N.J. Spykman stressed that control of the “Rimland,” which refers to the land and seas at the outer edge of the Heartland, is the decisive factor in achieving geopolitical dominance.

Against this geopolitical context, it is therefore not surprising why China seeks to dominate the SCS as a precursor to its grand design of dominating the APR—a region in which the US has enjoyed pre-eminence. As the PTT suggests, the challenger will ultimately aim for a change in leadership in the international order. Shaped by the dynamics of this power shift, the SCS dispute, although not new, has been transformed into one of the major

geopolitical hotspots around the world. It is interesting to note that, at the operational level, China has a plan to achieve such strategic—if not ambitious—objective of displacing the US from its pre-eminent position in the region. In 1982, the PLA Navy (PLAN) developed a strategy which called for China to control of the First Island Chain and the Second Island Chain.<sup>5</sup> This Island Chain Strategy (ICS) is largely similar to the 19<sup>th</sup> century Monroe Doctrine of the US. As a corollary to the ICS, Beijing appears to employ what has been called as “Anti-Access/Area Denial” (A2/AD) concept.<sup>6</sup>

The PTT postulates that the status quo power, to maintain its pre-eminence, will counter the challenges posed by an aspiring hegemon. Hence, President Barack Obama declared in 2011: “...the United States is turning our attention to the vast potential of the [APR]...**The United States is a Pacific power, and we are here to stay.**”<sup>7</sup> This pronouncement, subsequently referred to as either the “Pivot” or the “Rebalance” strategy, has been the cornerstone of US policy in the region. Although the Rebalance strategy has other economic and diplomatic components, the military aspect has figured more prominently in the region. The security dimension of the Pivot has three main planks: (1) the repositioning of US naval assets to the APR from the Atlantic with a projected 60/40 ratio in favor of the former; (2) enhancement of the alliances; and (3) development of the “Air-Sea Battle” concept to counter A2/AD.<sup>8</sup> Overall, Washington stressed that its mission is “sustaining US global leadership.”<sup>9</sup>

In a nutshell, access and stability are the US interests in the SCS.<sup>10</sup> However, the emerging power transition have added dimension to this SCS dispute, which may explain why the Rebalance strategy is sometimes perceived to be aimed at enhancing US position in the SCS against China. Indeed, Washington’s 2015 *Asia Pacific Maritime Security Strategy* (APMSS) seeks to address “excessive maritime claims [that if] left unchallenged, they could restrict the ability of the US and other countries to conduct routine military operations or exercises in more than one-third of the world’s oceans”<sup>11</sup>—an apparent reference to the supposed A2/AD strategy of China.

### Manila’s Legal Challenge and Beijing’s Response

Based on the foregoing discussion, China is perceived to be a determined power aiming for expansion in the region.<sup>12</sup> However, expansion through hard power alone may be difficult to achieve without any justification of sort. As noted earlier, rising powers, like China, need to cloak the use of hard power with a veil of legitimacy. Hence, to justify its maritime and territorial expansion in the SCS, China has extensively relied on and propagated its “9-dash line” claim. However, China has yet to clarify the extent of its claim, as well as the historical and also legal bases for the same. As far as international law is concerned, the *Philippines v. China* case rules that “China’s claims to historic rights, or other sovereign rights or jurisdiction, with respect to the

maritime areas of the [SCS] encompassed by the relevant part of the ‘nine-dash lines’ are contrary to [UNCLOS] and without lawful effect to the extent that they exceed the geographic and substantive limits of China’s maritime entitlements under [UNCLOS].”<sup>13</sup> The ruling further added that UNCLOS “superseded any historic rights, or other sovereign rights or jurisdiction, in excess of the limits imposed therein.”<sup>14</sup>

For its part, aside from diplomatic counter-arguments like its 2014 Position Paper on the arbitration issue, Beijing initiated a far more assertive action which appeared to be a response to the arbitration case: land reclamations. The creation of artificial islands began in September 2013, the same year the Philippines launched the arbitration case. There are strong indications that these new islands will be transformed into military facilities. Evidently, the PLA can conduct its A2/AD operations in the SCS from these new islands. Arguably, given the extensiveness of the project, China could have planned the reclamation many years back. However, because of the timing and the pace of the initiative, the Philippine-initiated case may have hastened decision to pursue the reclamation.<sup>15</sup> More importantly, the reclamation activities are perceived to be the mode by which China will continue with its maritime expansion that will compromise the maritime entitlements, sovereign rights of other coastal states, as well as the freedom of navigation and overflight in the area. The activities conducted by China, in this regard, are tantamount to undermining UNCLOS without necessarily withdrawing from the treaty. As Philippine Foreign Secretary Albert F del Rosario said in November 2015: “**No State should be permitted to write and re-write the rules in order to justify its expansionist agenda.** If that is allowed, [UNCLOS] itself would be deemed useless.”<sup>16</sup>

### Implications of the Power Dynamics for UNCLOS

Notwithstanding its limitations, UNCLOS has been hailed as the international “Constitution for the Oceans,” for it has laid down specific regulations on the use of maritime environment, as well as pacific settlement of disputes which may arise there from. However, the SCS dispute, as a manifestation of the emerging power shifts in the region, may have serious implications for UNCLOS.

*First, China’s goals and actions in SCS appear to have seriously undermined the provisions of UNCLOS on maritime entitlements, sovereign rights, and freedom of navigation and over flight.* First of all, China anchors its claim on “historical” facts. However, as noted earlier, such historic claims were debunked by UNCLOS, as reinforced by the 2016 ruling on *Philippines v. China* case. But beyond these arguments, however, it is the actions of Beijing that strongly indicate that the maritime entitlements and sovereign rights of other countries are being violated. Table 1 summarizes these major incidents in the SCS.

**Table 1. Some of the Major Incidents in the SCS<sup>17</sup>**

Year	Incident
1995	China seized Mischief Reef from the Philippines
2010	Beijing strongly protested the service contract awarded by Manila to Sterling Energy in the Reed Bank, which is part of the Philippine EEZ.
2011	Chinese Coast Guard (CCG) prevented the Philippine MV Veritas Voyager from conducting oil exploration in the Reed Bank
2012	Beijing announced that it was inviting companies to conduct energy explorations in the EEZ of Vietnam
2012	China seized Scarborough Shoal from the Philippines.
2013	China seized Luconia Shoal from Malaysia
2013	China released an official map indicating that the “10-dash” lines in the SCS as part of its “national boundaries”
2013	China began land reclamation in the SCS.
2014	A state-owned Chinese oil rig was installed in Vietnamese EEZ
2014	Hainan province of China issued Fishery Regulations, Article 35 thereof mandates that “to engage in fishery operations or fishery resource surveys shall secure approval from relevant departments of the State Council.” Hainan also claimed jurisdiction over the waters within the 9-dash line.

Evidently, these tactical moves of China strongly suggest that they are part of the overall objective of controlling the SCS as a prelude to eventually ejecting the US out of the region. In the process, however, Beijing has violated the maritime entitlements and sovereign rights of other coastal states, which are guaranteed in UNCLOS.

As argued above, there are strong indications that the reclaimed islands in the SCS are being developed as military facilities, designed to facilitate the A2/AD of Beijing. More importantly, however, there are also indications that China is creating a “Strategic Triangle” in the SCS, which entails the establishment of major military facilities on Woody Island, Fiery Cross Reef, and Scarborough Shoal—three areas that would connect the Regime of Islands in the SCS.<sup>18</sup> With the Fiery Cross Reef as the main military base, the other artificial islands could serve as outer guard posts which could then enhance the maritime domain awareness capabilities of China, as well as the control of SLOCs. The transformation of Scarborough Shoal into a military garrison will be a far more dangerous development, especially for the Philippines. Only 120 NM away from the coast of Zambales province, Scarborough Shoal is near to pivotal military and economic centers of the Philippines. Such structures would provide China the capability to possibly monitor and gather information vital to Philippine national security. On a regional scale, however, China can deploy, in the now artificial-island Mischief Reef, J-11 fighter aircraft which has a 1,000 radius that can cover the entire Philippines, Borneo Island (occupied by Brunei, Malaysia, and Indonesia), and Vietnam.<sup>19</sup>

Evidently, the Strategic Triangle could pave the way for the implementation of the ICS through the A2/AD, and thus can hamper freedom of navigation and over flight in the region. There are already indications that such plans are underway. Aside from the reclamation of the Fiery Cross Reef and the initial construction of military facilities therein, China, in early 2016, deployed YJ-62 anti-ship cruise missiles (ASCMs) on Woody Island. This type of ASCMs has a range of about 400 kilometers (KM) and could therefore be used for power projection by the PLAN and, ultimately, A2/AD.<sup>20</sup>

As noted earlier, China has exercised de facto control of the Scarborough Shoal since 2012. There have been reports that China is already planning to convert the shoal into a military base where the PLA can construct a runway and a harbor that could host PLAN and CCG vessels. These military developments may eventually lead to China to declare an Air Defense Identification Zone (ADIZ) in the SCS, which could further complicate the situation. To note, China earlier declared an ADIZ in East China Sea, an area disputed by Beijing, Taipei, and Tokyo.

*Second, China’s non-participation in the arbitration proceedings may weaken the viability of the dispute settlement mechanism under UNCLOS.* Unambiguously, Beijing declared that it will not participate in the arbitration proceedings and thus, after the ruling was rendered, announced that it will not recognize the decision. To some extent, this may be seen as a weakening of the UNCLOS dispute settlement mechanism—compulsory arbitration, in particular—because of one party’s refusal to abide by the ruling of the court. Indeed, international law can either be strengthened or weakened by states themselves—which created the law in the first place—because there is no international government that will enforce the law.

An argument to the contrary suggests that China will succumb to international pressure and eventually abide by the ruling in the similar manner that Washington did in the case of Nicaragua vs. United States. Proponents of this argument suggest that the Nicaragua, which is a small power like the Philippines, effectively used the international legal system to settle a dispute with the US, which is a great power like China. In this way, the implication given is that UNCLOS will be strengthened in the process.

However, a closer examination of the circumstances of the two disputes suggests that they are much more nuanced than what appears on the surface. First, whereas the Nicaragua issue is largely about reparations, the SCS dispute is about the territory and maritime entitlements. Although Managua alleged Washington violated its sovereignty by interfering with its internal affairs, it was not about the seizing of territory and the deprivation of maritime entitlements. On the other hand, the SCS dispute has a short-, medium-, and long-term effects on the parties directly and indirectly involved because of the importance of the SCS for economic and military purposes. In other words, the SCS issue has larger interests at stake. Second, whereas the Nicaragua issue is purely a bilateral concern, the SCS dispute is a multilateral issue. The latter is much more volatile because other great powers, such as US, Japan, and even India, are indirect parties to the dispute. As noted earlier, this situation has an added complexity because of the military activities of China in the region. Third, which is closely related to the second reason, is that the SCS dispute occurs against the backdrop of an emerging power shift in the APR, while the Nicaragua issue had no such dimension. Indeed, these are the crucial differences between the two landmark cases. It must also be noted that while the US did

not subsequently participate in the arbitration process, also did not, technically, abide by the ruling because Nicaragua withdrew the case. In other words, the parties eventually came into a compromise.<sup>21</sup>

*Third, the US appears to challenge the assertiveness of China by upholding the norms and principles of UNCLOS.* The US, as the PTT would postulate, will try to maintain the existing rules of the international order as the pre-eminent power in the region. However, Washington has yet to ratify UNCLOS. In an attempt to remedy this problem, Washington argued that it “will continue to support and observe principles of established customary international law reflected in the [UNCLOS].”<sup>22</sup> Clearly, the US will balance against China, and UNCLOS will be used to legitimize this balancing action. Indeed, the US already displayed a similar action when it challenged the expansive Libyan maritime claim in the Gulf of Sidra during the 1980s, despite Washington’s UNCLOS non-ratification.

The regional power shifts seem to have led Washington to up the ante in its rhetoric and, in an apparent response to the A2/AD of China, Defense Secretary Ash Carter reiterated in October 2015: “Make no mistake, the [US] will fly, sail and operate wherever international law allows, as we do around the world, and the [SCS] will not be an exception.”<sup>23</sup> In July 2015, the Washington attempted to send a strong message to Beijing when the Commander of the US Pacific Fleet participated in a seven hour maritime surveillance mission above the SCS. In September 2015, a similar surveillance mission by the US Navy (USN) P8-A Poseidon was conducted.

These missions are part of what the US calls as “Freedom of Navigation Operation” (FONOP) in the SCS, in accordance with APMSS. On 27 October 2015, the USN conducted a FONOP with the USS Lassen, sailing within the 12 NM radius of Subi Reef, which China transformed into an artificial island. Sailing within the said radius is critical because 12 NM is the allowable territorial sea of an island under UNCLOS. Hence, by conducting the FONOP, Washington appears to uphold this principle of the Convention. On 19 January 2016, another FONOP was conducted when the USS Curtis sailed within the 12 NM radius of Triton Island, which is part of the Paracels. This time, the US was more explicit in explaining the rationale of the operation: “The excessive claims regarding Triton Island are inconsistent with international law as reflected in the [UNCLOS].” It is evident, therefore, that the US, as the pre-eminent power in the region, will contest the Chinese attempt to alter the status quo. As noted earlier, international law is but a mere reflection of power, and UNCLOS is right at the middle of this geopolitical power play.

*Fourth, the dispute settlement mechanism used by the Philippines may serve a strategic purpose in the emerging power balance.* The arbitral tribunal released the ruling on the merits of the case in July 2016. While the decision has no formal enforcement mechanism, the ruling

can now be used by other powers, especially the US and Japan, in providing a firmer legal basis for conducting FONOPs, or similar operations of that nature.<sup>24</sup> This is not to suggest that the other powers in the region may take such course of action for moral purposes. Rather, such an initiative would give added legitimacy to their balancing efforts against an increasingly assertive Beijing. Nevertheless, these efforts will somehow uphold at least the fundamental norms and principles embodied in UNCLOS, anchored on a balance of power in the region.

## Conclusion

In conclusion, this article discussed how the power shifts in the APR, with the SCS as the operational theater, affects UNCLOS. The control of maritime space is a crucial factor for a great power to exercise dominance in their sphere of influence. It is therefore not surprising why China seeks to dominate the SCS as a precursor to its larger geostrategic ambition—to dominate the APR by forcing the US out of the region through its ICS, as carried out by its A2/AD concept. However, in doing so, the goals and actions of China appear to contravene UNCLOS—the leading international legal framework that governs the seas and oceans. The US, as the status quo power, appears to challenge China’s assertiveness by implicitly upholding the norms and principles of UNCLOS.

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*Mico A Galang is a defense researcher in the Research and Special Studies Division (RSSD) of the National Defense College of the Philippines. The views expressed in this policy brief are those of the author alone and do not necessarily reflect the views of NDCP. The readers are free to reproduce copies or quote any part provided proper citations are made. For comments and suggestions, please email galangmico@gmail.com*

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## Notes

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- <sup>12</sup> Dr. Renato De Castro, interview by author, De La Salle University, Manila, May 6, 2016.
- <sup>13</sup> Republic of the Philippines v. People’s Republic of China (Philippines v. China), *The South China Sea Arbitration, Award on Merit of July 12, 2016*, p. 473, emphasis added.
- <sup>14</sup> *Ibid.*, emphasis added.
- <sup>15</sup> Lara Tan, “Expert: China speeding up reef reclamation due to arbitration case,” *CNN Philippines*, July 10, 2015, <http://cnnphilippines.com/news/2015/07/10/China-Mischief-Reef-reclamation.html> (accessed May 10, 2016).
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