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The Scarborough Shoal dispute: Legal issues and implications

By Huy Duong

Synopsis

The dispute between China and the Philippines over the Scarborough Shoal area has until recently been a neglected sideshow in the South China Sea. However, if the Philippines goes to ITLOS or an Annex VII Arbitration Tribunal under UNCLOS to defend its "sovereign rights", there might be important implications for any attempt to interpret China's U-shaped line as a maritime claim.

Commentary

The tension between China and the Philippines over the Scarborough Shoal has turned the spotlight on a dispute that has until recently been a neglected side show. What is the dispute about and how can it be settled?

The dispute between China and the Philippines over Scarborough Shoal consists of two legal parts, each affecting a distinct geographical area.

The first part is the sovereignty dispute over the five rocks in the shoal that are above high tide and their 12 nautical-mile territorial sea. The second part of the dispute is over sovereign rights in the EEZ beyond 12 nm from the rocks. The area affected is potentially ten times that affected by the sovereignty dispute.

There is also an ambiguity about what China's U-shaped line in the South China Sea represents. Is it a claim only to the islands, to maritime space based on historic rights or on EEZ arguments? This article will look at the implication of the two disputes on the U-shaped line.

The sovereignty dispute

The Philippines claims that the historic evidence for its sovereignty includes the planting of a flag pole in 1965; the building and operation of a small lighthouse in 1965, which was rehabilitated by the Philippine Navy in 1992; and the use of Scarborough Shoal as an impact range by US and Philippine forces stationed at Subic Bay.

However, the lighthouse is not currently operational. How continuously did the Philippines operate it? Was the use of Scarborough Shoal as an impact range an actual display of sovereignty over territory and the territorial sea, or was it no more than a military activity that is permissible in international waters or in the EEZ?

China claims that in 1935, China's Map Verification Committee declared sovereignty over 132 islands, reef and

shoals in the South China Sea, when Scarborough Shoal was listed as a part of what China today calls Zhongsha Islands. Chinese authors argue that, since China considers Scarborough Shoal to be a part of Zhongsha, when China declared sovereignty over Zhongsha in 1951 this declaration implicitly included Scarborough Shoal.

Interestingly, in 1932 the Legation of the Chinese Republic in France had sent a Note to the French Ministry of Foreign Affairs asserting that according to China's Map Verification Committee the Paracels form the southernmost part of Chinese territory.

On Chinese maps, the label "Zhongsha" only appears over Macclesfield Bank, not Scarborough Shoal. Internationally Scarborough Shoal is regarded as being separate from Macclesfield Bank. It would seem that for China's declaration of sovereignty over Zhongsha to be taken as also including Scarborough Shoal, the onus was on China to specifically mention that its claim to Zhongsha also included Scarborough Shoal.

Although both sides' arguments for sovereignty seem to have weaknesses, neither is likely to abandon its sovereignty claim. Therefore, the only complete solution for the sovereignty dispute is third party adjudication or arbitration. Given that the Philippines and China are not willing to seek third party arbitration for the sovereign dispute, the best temporary solution is for the two countries to set aside the sovereignty dispute over the five rocks and share the resources of the 12 nautical mile territorial sea in some way. The five rocks themselves are economically worthless and their combined territorial sea only amounts to 2260 square nautical miles at maximum; therefore sharing the resources would not be significantly detrimental even to the side that in fact has sovereignty.

Since the Philippines is weaker on the ground, it may well accept equal sharing of the resources of the territorial sea, while China might wish for sharing of the EEZ beyond the territorial sea.

The dispute over sovereign rights

The second part of the dispute is over the sovereign rights in the EEZ beyond 12 nautical miles from the rocks. The area that it affects is potentially tens of times as large as that affected by the sovereignty dispute.

The Philippines contends that the rocks at Scarborough Shoal fall under Article 121(3) of UNCLOS and are not entitled to EEZ or continental shelf, therefore the EEZ beyond 12 nautical miles from them belongs to Luzon Island, regardless of the question of sovereignty over them. Above high tide level, these rocks are but a few dozen square meters in area, and it is hard to imagine that they can sustain human habitation or economic life of their own.

The Philippines' stated aim is to seek a ruling from either ITLOS or an Annex VII Arbitration Tribunal under UNCLOS confirming that the rocks at Scarborough Shoal fall under Article 121(3) and are therefore not entitled to an EEZ. It is unlikely that the Philippines is seeking from ITLOS a ruling on the question of sovereignty, contrary to what China's Ministry of Foreign Affairs assumes. The latter dismissed the Philippines' statements about going to ITLOS, on the ground that ITLOS is not the forum for resolving sovereignty disputes. China also prefers to use terms such as "sovereignty" and "historical rights" for the dispute as a whole.

It is likely that China will accept joint development in the EEZ beyond 12 nautical miles consistent with its long-standing principle of "setting aside dispute and pursuing joint development". In the past, the Philippines has stated that it is prepared to share resources in the disputed areas, but not in areas which it considers to belong to it outright. However, unless the Philippines manages to obtain a ruling that the rocks at Scarborough Shoal are not entitled to an EEZ, it might have little choice but to yield to China's pressure and accept joint development in parts of its EEZ, off Luzon Island.

Potential implication for China's U-shaped line

Of the three disputed groups of features in the South China Sea, namely, the Paracels, Scarborough Shoal and the Spratlys, Scarborough Shoal's features have the highest likelihood of being classified as rocks under Article 121(3). Although the Philippines cannot take the question of "Are the rocks at Scarborough Shoal under Article 121(3)?" to ITLOS without China's consent, it can unilaterally take this question to an Annex VII Arbitration Tribunal where it has a good chance of obtaining an affirmative answer.

With regard to the ambiguity as to whether China's U-shaped line is a claim only to the islands, or a claim to maritime space based on historic rights, or a claim to maritime space based on EEZ arguments, if the Philippines manages to obtain a ruling that the rocks at Scarborough Shoal are not entitled to EEZ then the third possibility will be ruled out for this area. That will be a significant step in narrowing down the possible meanings of the U-shaped line.

The author is a UK-based IT consultant and freelance writer, and has a Ph D in Physics from the University of Southampton. He contributed this article specially to RSIS Commentaries.