

**MAINTAINING FISH STOCKS UNDER EUROPEAN UNION COMMON FISHERY  
POLICY: GARRET HARDIN'S TRAGEDY OF THE COMMONS PERSPECTIVE**

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**Introduction**

The South China Sea dispute between China, Philippines, Vietnam and other disputing countries has been one of the biggest international issues in the modern era, this issue firstly risen when China registering their “Nine-Dash Line” to the United Nation back at 7 May of 2009<sup>1</sup> i.e., the ancient maps of China that illustrate 9 Line over South China Sea, furthermore this Issue exploded when China commencing action on the South China Sea which “by any means” breaching other Countries sovereignty over the South China Sea and those breached countries stating that China`s action was a violation to the United Nation Convention on the Law of the Sea (“UNCLOS”). Afterwards, the Phillipines Government taking this into account and perform an action which submitting their objection to the Permanent Court of Arbitration (“**Tribunal**”) using UNCLOS as their legal grounds to settle the dispute.

In general, Phillipnes has rise 15 (fifteen) objections to the Tribunal, but the objections can be simplified into 3 (three) main issues including (i) the violation toward UNCLOS on China`s action based on Nine-Dash Line in the South China Sea i.e., Historical Rights, (ii) sovereign rights of the Phillipines and China over South China Sea<sup>2</sup> and (iii) the legal status of several feature over Nine-Dash Line.

**A. The Validity of Historical Rights**

China claims that they have exclusive historical rights due to the Nine-Dash Line over South China Sea, and therefore China prohibiting Phillipines` fishermen to fish on the territorial sea of Scarborough Shoal. Therefore, The Tribunal decided that China does not have historic rights upon South China Sea and Nine-Dash Line Concept is unlawful towards

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<sup>1</sup> Efie Baadilla, ‘Klaim Republik Rakyat China atas Zona Ekonomi Eksklusif Indonesia’ (2020) 26 SASI 3, 392 - 402

<sup>2</sup> Rakshit Mohan and Aditya Laxman Jakki, ‘Sovereignty issues in the South China Sea: The Republic of the Philippines vs The People`s Republic of China’ (2019) 15 (2) Maritime Affairs: Journal of the National Maritime Foundation of India, 15 - 30



UNCLOS, there are several theory and case law that made the Tribunal judgement's reasonable.

Theoretically, historical rights can be divided into exclusive and non-exclusive historical rights, the Libya/Tunisia Case<sup>3</sup> describing exclusive historical rights as long-established activities and interests “of its population” in exploiting the fisheries under particular water area, furthermore as stated in the Qatar/Bahrain Case<sup>4</sup> the court found that the claim over exclusive historical rights is invalid since the court examined the evidence that “the fishermen from all neighbour countries were performed in pearling activities on the disputed area and **thus there was no exclusivity**, from the aforementioned case law, it can be concluded that exclusive historical rights needs an “exclusivity situation and activity”, or, to be clear: the area is should be exploited only by one country with no neighbouring countries ever perform similar actions on the area. In contrast, non-exclusive historical rights should be performed in a non-exclusive manners, did not possess zonal impact and therefore be recognized in the maritime zone of another state<sup>5</sup>, the non-exclusive rights are also known as passage and fishing rights<sup>6</sup>.

Furthermore, arising from Judge Oda's dissenting opinion on Tunisia/Libya Case<sup>7</sup>, it was found that in order to claim historical rights there must be strong “**juridical**” and “**historic**” evidence. Firstly, Juridicially speaking, China is signatories' country of UNCLOS and already ratify UNCLOS in 1996 and therefore made China's Nine-Dash Line (historic rights) legally extinguished by the UNCLOS because China already agrees with UNCLOS' provision regarding sea territory (for instance, 200 Miles Exclusive Economic Zone under Article 57 UNCLOS<sup>8</sup>). Secondly, from historical perspective, China's Nine-Dash Line

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<sup>3</sup> *Continental Shelf* (Judgment) [1982] ICJ Rep 18

<sup>4</sup> *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Jurisdiction and Admissibility)* (Judgment) [1994] ICJ Rep 112

<sup>5</sup> Robert Kolb, 'Case Law on Equitable Maritime Delimitation: Digest and Commentaries' (2003) 38 Publications on Ocean Development, 185

<sup>6</sup> Yehuda Z. Blum, 'Historic Titles in International Law' (1965) 360 The Hague: Martinus Nijhoff

<sup>7</sup> *Continental Shelf* (n 3).

<sup>8</sup> Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 1833 UNTS 397 (UNCLOS).



seems lack in juridical and historic claims since, in fact, the neighbouring countries is also performing activities on Scarborough Shoal and therefore China`s claim does not meet the requirements of exclusive historical rights i.e., **continuous, long-established and undisturbed situation in particular regime.**

Ultimately, the Tribunal on its Awards stated that China`s does not possess any exclusive historical right on Scarborough Shoal and concluded that the Shoal is non-exclusive historical area which means any neighbouring countries is able to exploit the area (including Phillipines). On the other hand, although Scarborough Shoal is not under Phillipines territorial but the Tribunal basis on this argument is using **Eriteria/Yemen Case** that stated “*the traditional fishing rights i.e., non-exclusive historical rights are exist although within the another states`s territory*”<sup>9</sup> and another supporting argument found on **Gulf of Maine Case** that also addressed aforementioned issue by stating “*the maritime areas that had been open to and fished by several states are part of the freedom of the high seas*”<sup>10</sup>, hence the Tribunal sees that China`s action to prevent Phillipines` fishermen to fish on Scarborough Soal is breaching international law due to their disrespect towards traditional fishing rights and freedom of high seas i.e., *non-exclusive historical rights that possessed by Phillipines` fishermen in Scarborough Shoal.*

## **B. Sovereign Rights of Philippines and China**

China strongly expressed that they possess absolute sovereignty over South China Sea, there are 2 (two) strong statement from China to the United Nations Secretary-General based on Note Verbale CML/17/2009 mentioned that “*China has indisputable sovereignty over the islands in the SCS and the adjacent waters, and enjoys sovereign rights and jurisdiction over relevant waters as well as the seabed and subsoil thereof*”. Afterwards, China released CML/17/2009 and added “*China`s sovereignty and related rights and jurisdiction in the SCS are supported by abundant historical and legal evidence.*” it is clear that China claiming their absolute sovereignty rights over South China Sea based on

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<sup>9</sup> *Territorial Sovereignty and Scope of Dispute (The Government of the State of Eritrea v The Government of the Republic of Yemen)* (1998) 22 Reports of International Arbitral Awards 209.

<sup>10</sup> *Case Concerning Delimitation of the Maritime Boundary in The Gulf of Maine Area (Judgment)* [1984] ICJ Rep 246.



historical rights i.e., Nine-Dash Line, and therefore Phillipines took an action by submitting their objection through the Tribunal.

Thus, the perspective to assess sovereign rights issue upon South China Sea dispute must be from Philippines` perspective since the Phillipines is the party that must be proven that they have sovereign rights over the disputed area. On the other hand, China`s position has been clear which China claim their sovereignty rights over South China Sea based on historical rights (Nine-Dash Line). There are several definitions of sovereignty rights such as “*supreme authority within a territory*”<sup>11</sup> and “*the rights of the states to perform their affairs under the states` own defined territorial boundaries with full autonomy.*”<sup>12</sup>.

Legally speaking, Montevideo Convention<sup>13</sup> also defined that there are 4 (four) qualifications for sovereign state such as:

1. having **defined territory**;
2. possess **permanent populations**
3. the existence of **effective government** for ruling the state; and
4. **capacity to enter into international relations** i.e., other sovereign states.

In the development of sovereign rights, such rights can also be divided into 2 (two) aspect which **External Sovereignty** and **Internal Sovereignty**, the prior sovereignty having their own criterias such as (i) legally equal states, (ii) each state enjoys its rights inherent in full sovereignty, (iii) each state oblige to respecting legal entity of other state, (iv) political independence and territorial integirty of such state are inviolable, (v) every state has right to deliberately choose and enchance their political, economic, cultural system as well as social system and (vi) such state obliged to carry out international obligations with

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<sup>11</sup> Daniel Philpott, ‘Sovereignty’ (*Stanford Encyclopedia of Philosophy*, 22 January 2020) <<https://plato.stanford.edu/entries/sovereignty/>> accessed 3 January 2022.

<sup>12</sup> Rakshit Mohan and Aditya Laxman Jakki, ‘Sovereignty issues in the South China Sea: The Republic of the Phillipines vs The People`s Republic of China’ (2019) 15(2) *Maritime Affairs: Journal of the National Maritime Foundation of India*, 15-30.

<sup>13</sup> Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19.



consistent and full, also willing to live in peace with other states<sup>14</sup>, and for the latter sovereignty the criterias are having supreme authority and power within its own state as well as having supreme body that able to make a decisions that binding to all groups, institutions and citizens within the states territorial border<sup>15</sup>, it is necessary to asses aforementioned sovereignty elements in order to understand the sovereignty issue upon South China Sea dispute.

Firstly, it is needed to asses whether Phillipines can be considered as “sovereign state”? From the Phillipines stance, it is clear that Phillipines is qualified to be defined as “sovereign state” based on Montevideo Convention due to several reasons such as Phillipines are fullfilded the criteria which having its own territory, permanent population, government and capacity to enter to other state relation, in particular, Phillipines also part of UNCLOS` signatory state which is makes more sense and strenghten Phillipines` legal standing to file an objection to China.

Phillipines further adressed that China`s claim over sovereignty rights over South China Sea means that they **claim full rights over maritime resources over South China Sea i.e., Nine Dash Line** which further means prohibiting Phillipines` airplane and vessels to passage and performing other activities over Nine Dash Line without prior permission from China, however, in fact without any strong legal basis aside from Nine Dash Line map China already perform their rights e.g., blocking Phillipines` oil explorations, constructing military base and prohibiting Phillipine`s fishermen to fish over disputed area which is violating Phillipines sovereignty rights in the **External Sovereignty** perspective, moreover, Phillipines argue that even though China is eligible to do that based on historical rights is is already rendered (*null and void*) at the moment China sign accession to UNCLOS and became the signatory party since UNCLOS is having non-retroactive nature.<sup>16</sup>

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<sup>14</sup> Martin Griffiths, Terry O' Callaghan and Steven C Roach, *International Relations: The Key Concepts* (2<sup>nd</sup> edn, Routledge 2008).

<sup>15</sup> Andrew Heywood, *Global Politics* (2<sup>nd</sup> edn, Basingstoke: Palgrave Macmillan 2011).

<sup>16</sup> Vinai Kumar Singh, 'Analysis of Advantages and Disadvantages of Forums Prescribed Under the UNCLOS and State Practice: The Way Ahead for India' (2016) 13(3) *Revista de Direito Internacional* 318.



### **C. The Legal Status of Several Feature Over Nine-Dash Line: Interpretation of Article 13 and Article 121 UNCLOS**

Several submissions of Phillipines are asking the Tribunal to decide the legal status of several feature, as follows (i) Scarborough Shoal generates no entitlement to continental shelf or economic zone, (ii) Mischief Reef and Sdcond Thomas Shoal are the part of continental shelf and exclusive economic zone of Phillipines and (iii) Johnson Reef, Fiery Cross Reef and Cuartenon Reef generates no entitlement to continental sheld or exclusive economic zone<sup>17</sup>.

And therefore, the Tribunal on its Award ruled that Scarborough Shoal, Fiery Cross Reef, McKennan Reef, Cuartenon Reef, Gaven Reef (North) and Johnson Reef are **High Tide Feature** and Second Thomas Shoal, Gaven Reef (South), Mischief Reef and Subi Reef as **Low Tide Elevation**, and the further legal issue arises from these ruling which “whether the High-Tide Feature as mentioned in the Awards are legally capable to be granted with entitlements?”.

#### **Low Tide Elevation**

In order to asses it, it is requiring to firstly understand the regulation of Low Tide Elevation and High Tide Feature, Article 13 of UNCLOS is regulating Low Tide Elevation as “*naturally formed area of land which surrounded by and above water at low tide but submerged at high tide*”<sup>18</sup>, Further provision of Low Tide Elevation is regulated under Article 13 paragraph 2 UNCLOS which stipulate that if the low-tide elevation is wholly situated at a distance is exceeds the breadth of territorial sea from an island or the mainland therefore it has no territorial sea of its own.

And ultimately, the Tribunal found that Second Thomas Shoal, Gaven Reef (South), Mischied Reef and Subi Reef are qualified to the Article 13 paragraph 2 UNCLOS, then the Tribunal ruled that aforementioned low-tide elevations will not generate any entitlements to EEZ, continental shelf or territorial sea.

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<sup>17</sup> Yoshifumi Tanaka, ‘Reflections on the Interpretation and Application of Article 121 (3) in the South China Sea Arbitration (Merits)’ (2017) 48 Ocean Development and International Law 365.

<sup>18</sup> UNCLOS art 13.



### **High Tide Feature**

Subsequently, the ruling of high tide feature is legally debatable since the possible outcome of High Tide Feature is “**Rocks**” which cannot generate any entitlements or “**Island**” that is capable of acquire an entitlement i.e., continental shelf or Exclusive Economic Zon based on Article 121 of UNCLOS as the legal basis of High Tide Feature i.e., Rocks and Island.

Article 121 paragraph 1 of UNCLOS regulated that “***Island is a naturally formed area of land, surrounded by water, which is above water at high tide***”, based on the article there are 3 (three) elements that constitute as legal definition of island which (i) naturally formed an area of land, (ii) must be surrounded by water and (iii) the area must be above the water on high tide situatuon. However, although the elements that constitute an island is quite clear, Article 121 paragraph 3 of UNCLOS regulates the “extra-requirements” of an island that should be capable to be granted with an entitlement which the island **must have sustain human habitation or economic life**, or, otherwise the Island must be called Rocks and cannot have continental shelf or exclusive economic zone pursuant to Article 121 paragraph 2 of UNCLOS, in other words the Rocks are a category of an island<sup>19</sup>, which makes not every Island based on Article 121 paragraph 1 UNCLOS is capable to be granted with entitlement. Further to note, According to International Court of Justice on Nicaragua/Colombia Case ruled that the size of the feature is not prescribed under international law which makes any feature that qualified to be called as Island (without taking into account the size of feature) will capable to have an entitlement<sup>20</sup>.

Furthermore, after understanding the High Tide Feature provision under Article 121 UNCLOS and case law, this essay will further elaborate “Whether Scarborough Shoal, Fiery Cross Reef, McKennan Reef, Cuartenon Reef, Gaven Reef (North) and Johnson Reef are qualified to be considered as a high tide feature that able to sustain human habitation or economic life?”.

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<sup>19</sup> Marius Gjetnes, ‘The Spartlys: Are They Rocks or Islands?’ (2001) 32 Ocean Development and International Law 193.

<sup>20</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Judgment) [2012] ICJ Rep 624.



Ultimately, the Tribunal found that Scarborough Shoal, Fiery Cross Reef, McKennan Reef, Cuartenon Reef, Gaven Reef (North) and Johnson Reef are Rocks instead of Island which making them unable to acquire an entitlement, the ruling is based on several reasons as follows<sup>21</sup>:

1. The features are lacks of primary needs of survival of human being e.g., vegetation, fresh water even living space and therefore the features cannot be considered as qualified to sustain human life; and
2. The features do not have “**feature-oriented**” economic activity, which means the economic activity on the features cannot be solely, or, majorly depends on its surrounding waters but the feature itself must be able to provide economic activity.

Hereafter, it is also important to examine the conformity of Tribunal`s ruling towards High Tide Features (i.e., granting a legal status of Rocks towards such features) towards practice and international law. In practice, there are several instances that relates to Tribunal`s ruling such as the establishment of exclusive economic zone towards Kerguelen Islands based on the Decree No. 78-144 dated 3 February 1978 which creating EEZ under the coasts of French Shouthern & Antarctic Territories and subsequently an observation found by Judges Vulkas under **Monte Confurco Case**<sup>22</sup> that stated The Kerguelen Islands are uninhabited and uninhabitable. **The Qatar/Bahrain Case**<sup>23</sup> also disputing “whether Qit`at Jaradah (*maritime feature located northeast of Fasht al Azm*) a low tide elevation or an island?” and ultimately the Court decided that the Qit`at Jaradah is an island that remain uninhabited and do not have any vegetation. **The Black Sea Case**<sup>24</sup> also disputing regarding “whether the Serpents` Island is a rock pursuant to Article 121 (3) UNCLOS?” in this case The Ukraine is asserted the island as an island that supporting human life and economic life, in contrast Romania stated that the island is incapable to sustain human and economic life, and ultimately the International Court of Justice was not choosing the stance of both disputing

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<sup>21</sup> Tanaka (n 17) 372.

<sup>22</sup> *The “Monte Confurco” Case (Seychelles v. France)* (2000) 6 ITLOS Reports 86.

<sup>23</sup> *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (n 4).

<sup>24</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* [2009] ICJ Rep 61.

parties instead attributed 12 nautical mile to the island pursuant to the agreement of both parties and the ruling generate similar effect as expressly stated that the Serpent Island is a Rock (even though the ICJ did not mention it).

In conclusion, based on aforementioned case law it is common for the Tribunal to assess whether the disputing features is able to sustain human habitat and economic life in order to fullfil the requirements of an island based on Article 121 UNCLOS, however, the contrast ruling made by the Tribunal in its awards is strongly expressed that the Scarborough Shoal, Fiery Cross Reef, McKennan Reef, Cuartenon Reef, Gaven Reef (North) and Johnson Reef **are rocks** while the other case law only assess the elements of Article 121 UNCLOS without implicitly stated that the disputing feature is Rocks, and therefore made the Tribunal`s awards is important to the interpretation of Article 121 (3) UNCLOS itself.

### Conclusion

In conclusion, it is noted that the main legal issues that arise from South China Sea Dispute between Phillipines and China is the claim of Historical Rights i.e., the Nine Dash Line, the violation of Phillipines` sovereignty rights by China activities and the legal status of several features over South China Sea. It is noted that the Awards from the Tribunal towards the Case is important to clarify the obscurity of legal issue and status of South China Sea (i.e., Nine Dash Line) in particular due to the audacity of Tribunal to make an obvious award such as **(i)** China`s Historical Rights based on Nine Dash Line over South China Sea is unlawful towards UNCLOS and therefore its invalid, **(ii)** China cannot using the determined invalid Nine Dash Line to established their sovereignty rights and perform any activities or actions towards Phillipines over Nine Dash Line since such action is violating Phillipines` sovereignty rights and **(iii)** Clearly determined which disputed features that legally categorized as “low tide elevations” and “high tide features” in order to clarify the entitlements status of disputed features.



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