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Spratlys Idiosyncrasies :
Does the Philippines Have What It Takes to Prevail Over China ?

This write-up will not dwell on the political and military capability of the Philippines over a rising power such as China, but will provide a sketch of the relative legal merits of the Philippine claims over the Spratlys Island or Kalayaan Island Group, in the recently-named West Philippine Sea.

The late Prof. Haydee Yorac of the University of the Philippines College of Law, wrote as early as 1983 in a Philippine Law Journal article that

Persuasive arguments in favor of the Philippine claim are the related notions of abandonment, *territorium nullius* and effective occupation.

Prof. Yorac explained that the case for abandonment is anchored on the premise that it is Japan, not China, that can be considered to trace their legal title to the islands before World War II, making the earliest categorical claim of sovereign occupation over the islands and actually occupying the islands for a long period of time. The existence of a legal title can also be inferred from the way Japan was made to renounce title to the islands in both the Treaty of Peace with the Allies in 1951 and the Bilateral Treaty of Peace with the Republic of China. Since it was not clear to which country the renunciation was made in favor of, then the islands became what in international law is called as *territorium nullius*.

Prof. Yorac elaborated on this concept of *territorium nullius*, defining it as "territory over which there exists no effective sovereignty and which is therefore, subject to acquisition by occupation". These may include either uninhabited islands or even inhabited ones, if those who inhabit the latter do not constitute a political society.

Thus, when Tomas Cloma, a private citizen, made a declaration in 1956 asserting ownership by discovery and occupation over the "33 islands, sands cays, sands bars and coral reefs and fishing grounds in the Spratlies covering an area of 64,976 square nautical miles", he was in effect taking advantage of the nature of the islands as either abandoned and/or having the status of a *territorium nullius*.

Other international law scholars would belittle the Philippine actions and legal claim as this was only recently affirmed on June 11, 1978, when President Marcos issued Presidential Decree No. 1596 declaring most 19 of the islands, cays, shoals and reefs as belonging to the Philippines and forming an integral part of Philippine territory.

Malaysia's claim came much later, in 1980, when it issued a new official map which claimed continental shelf encroaching upon a portion of the Spratly group and part of the Palawan group.

Another set of legal arguments the Philippines is using to bolster its claim in the Spratlys is the UN Convention on the Law of the Sea or UNCLOS, to which it is a signatory and a ratifying country, specifically citing the islands as part of its Exclusive Economic Zone or EEZ.

Xavier Furtado, a visiting Assistant Professor in International Relations at De La Salle University noted in a 1999 paper two idiosyncratic problems when citing UNCLOS to bolster the Philippine claims. According to him:

one such issue is the definition of an island. According to UNCLOS, an island can be used to generate an EEZ. The drafters of the Convention, not wanting small uninhabitable rocks and occasionally submerged features to be used as base points, defined an island as "a naturally-formed area of land, surrounded by water, which is above water at high tide". The Convention is careful to differentiate between legitimate islands and "rocks which cannot sustain human habitation or economic life on their own". In spite of this clear definition, some claimants (the Peoples' Republic of China particular) have used submerged features in the Spratly chain to claim territorial waters and EEZ.

For example, both the PRC and the Philippines claim Scarborough Reef which lies some 215 kilometres west of the Philippines. While some features of the Reef are submerged, others manage to remain above sea level at all times. However, as those features are unable to generate any sort of economic activity and are uninhabitable, they cannot be used to claim an EEZ. In spite of this, the PRC and the Philippines continue to engage in an open confrontation over who has legitimate control over Scarborough Reef. More importantly, this has contributed to further confusion over the definition of an island as outlined in UNCLOS.

Another problematic aspect of UNCLOS as it relates to the Philippines is the Convention's provisions on archipelagic states. Prof. Furtado explains:

Part IV of UNCLOS defines an archipelago as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such". UNCLOS affords archipelagic states, such as the Philippines, specific privileges in terms of drawing baselines for territorial/sovereignty purposes. Specifically, such states have the right to draw baselines around the fringes of their outermost islands. In doing so, archipelagic states are allowed to claim the waters within these boundaries as sovereign territory. Having established their periphery, archipelagic states can then claim their territorial sea and other maritime spaces as would any other state. As a result, it is possible that substantial areas of the ocean (which otherwise would be considered part of the high seas) would come under the sovereign jurisdiction of a single state. In the case of the Spratly dispute, the Philippines has benefited the most from these provisions and, at various times, has attempted (rightly or wrongly) to use them to justify its claim to the Kalayaan group.

However, Prof. Furtado says that :

it has proven very difficult to reconcile UNCLOS with existing provisions in the Philippine Constitution regarding internal waters. Article 1 of the 1987 Constitution states that "the waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines". To reinforce this assertion, the Philippine Government made the following statement: The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or the high sea from the rights of foreign vessels to transit passage for international navigation.

On 10 March 2009, President GMA signed into law, RA 9522 or "*An Act to Amend Certain Provisions of Republic Act No. 3046, as amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines, and for Other Purposes*".

The said law was however questioned before the Supreme Court by Profs. Merlin Magallona, and Harry Roque, Akbayan Party-list Rep Rissa Hontiveros and 38 other UP Law students, and among other grounds it asserted, the key point for our discussion from that petition is that RA 9522 has effectively weakened the Philippine claim over the Spratlys or Kalayaan Islands Group as it is called there in such petition, by classifying such islands as a "regime of islands" which means "a group of islands whose ownership is being contested by the Philippines and other claimant countries." aside from putting these islands effectively outside of the outermost points of the baseline.

The Supreme Court, however, has not yet resolved this case, up until now. Perhaps it may help if the Supreme Court can clarify some of the changes effected by the new law on the Philippine baselines, whether they are legally valid or not, as that will determine whether the Philippine claims to the Spratlys will be helped or not, especially when it involves the interplay of what is in the Philippine Constitution, which has a provision on the national territory based on the Treaty of Paris that gives the Philippines a bigger territory than what is provided for by RA 9522 and interpretation of how far UNCLOS provisions on archipelagic waters can be implemented within Philippine jurisdiction.

Given the intricate link of this case to the Philippine claims over the Spratlys, it is best to await its outcome and then define the subsequent courses of action later.

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