



# The role of international law in the South China Sea disputes

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## Overview

- Research questions paper:
  - How is international law argued by the parties to the South China Sea disputes?
  - What does that tell us about the role of international law in dealing with specific issues and influencing State behavior?
- Paper will analyze three specific issues
  - 2014 *Haiyang Shiyou* incident
  - 2015 *USS Lassen* incident
  - *Philippines v. China Annex VII* arbitration
- Today I will discuss some aspects of first and third issue





## 2014 *Haiyang Shiyou* incident – Legal and other arguments

- “Bifurcation” of the legal arguments
  - Sovereignty dispute over the Paracel Islands
    - Revisiting main issues of the dispute
  - Dispute over the activities of the *Haiyang Shiyou*
    - Next slides



## Dispute activities *Haiyang Shiyou* – Chinese perspective

- Viet Nam attempted to disrupt a duly notified drilling operation
- Continuation of routine oil and gas operations
- 17 M from Paracels and 150 M from the coast of Viet Nam
- Actions Viet Nam threaten the safety of the rig; negatively affects peace and stability in the region
- Viet Nam to immediately cease all actions violating China's sovereignty and undermining proper order at sea  
(Position paper 22 May 2014)
- “The waters between [Paracels] and [...] Vietnamese mainland are yet to be delimited [but] will never become Vietnam's EEZ and continental shelf **no matter which principle** is applied in the delimitation”
  - Indeterminate on status Chinese waters but admits that need for delimitation; implies that the 9-dash line is not such a boundary  
(Position paper 9 June 2014)
- Two sides have not yet [delimited] EEZ and continental shelf  
(Position paper 8 December 2014)



## Dispute activities *Haiyang Shiyou* – Vietnamese perspective

- Operating within the EEZ and continental shelf of Viet Nam
- Violates Declaration of Conduct and other relevant agreements
- Demand that China pull out the rig
- Requests the Chinese side to work with Viet Nam to put the situation under control with a view to maintaining peace and stability  
(Diplomatic note 4 May 2014)
- Vietnam has protested prior exploration activities China
- China refuses to withdraw the rig and engage in discussion on legality of its actions  
(Position paper 3 July 2014)
- “**Whatever the principle applied** [...] the area where the Chinese oil rig operated could never be within the exclusive economic zone or on the continental shelf of China”  
(Position paper 22 August 2014)



## ***Haiyang Shiyou* – The missing legal argument**

- Pending agreement [on a boundary], the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation (UNCLOS, article 74(3) and 83(3))
- *Haiyang Shiyou* incident raises issues of compliance with this provision



## ***Philippines v. China Annex VII arbitration – general***

- Philippines
  - Faith in rule of law
  - Law as equalizer, in particular UNCLOS as a constitution for the oceans
  - Part XV on dispute settlement vital for equalizing power of UNCLOS
  - UNCLOS does not recognize historic rights, but maritime entitlements are governed by UNCLOS
  - Historic rights conflict with the very character of UNCLOS
  - Case “is [...] of utmost significance to the integrity of the Convention and to the very fabric of the “legal order for the seas and oceans””

(Secretary of State Del Rosario at Hearings 7 July 2015)



## ***Philippines v. China Annex VII arbitration – general***

- China
  - Essence dispute is territorial sovereignty
  - Agreed to negotiate
  - Subject matter integral part of maritime delimitation
  - Manifestly no jurisdiction; non-participation has solid basis in international law
  - Contrary to Philippines emphasizes bilateral character of the dispute
- (Chinese position paper 7 December 2014)
  - The award is null and void, and has no binding effect on China
  - “Philippines and the Arbitral Tribunal have abused relevant procedures, misrepresented the law [...], have completely deviated from the purposes and objectives of the UNCLOS, and eroded the integrity and authority of the UNCLOS”
- (Foreign Ministry Spokesperson Lu Kang, 30 October 2015)



## Issue of historic rights – devil is in the details

- Philippines
  - “State party may not invoke alleged “historic rights” under general international law that derogate from the entitlements, rights or obligations the Convention expressly establishes” (Reichler at Hearings 7.7.2015).
- Similar argument in *Limits in the Seas; China Maritime Claims in the South China Sea* (US DOS publication)
  - Refers to drafting history and case law
- Both do not mention ICJ 1982 judgment in *Tunisia/Libya*  
“It seems clear that the matter continues to be governed by general international law [...]. It is clearly the case that, basically, the notion of historic rights or waters and that of the continental shelf are governed by distinct legal régimes in customary international law” (para. 100)
- UNCLOS provides “matters not regulated by this Convention continue to be governed by the rules and principles of general international law”



## Some concluding thoughts/points for discussion

- Two cases show development of certain legal arguments implying “dialogue”; Not so for other legal arguments
- China in arbitration moved from “bilateral/procedural” focus to also include a “systemic” focus
- Key legal arguments may be neglected due to framing of issues in a specific way
- Legal argument presented in broader context
- Legal argument of varying quality
  - Level of detail not necessarily linked to quality of argument
- Does the content of the law and way in which it is argued impact on State behavior?
  - Has an impact, but is one input in policy formulation
- What do key policy makers think the content of the law is?
  - What legal advice do they get and at what time?