

The Sino-Philippine Maritime Row: International Arbitration and the South China Sea

By Peter A. Dutton

On January 22, 2013, the Philippines shook up decades of stagnation in discussions with China over their territorial disputes in the South China Sea – known as the West Philippine Sea in Manila – by initiating an international arbitration process under the United Nations Convention on the Law of the Sea (UNCLOS) over recent Chinese actions. These disputes concern sovereignty over the Spratly Islands, Scarborough Shoal and the rich maritime resources around them. With this action, the government of Benigno “Noy” Aquino III sought to “operationalize [the President’s] policy for a peaceful and rules-based resolution of disputes ... in accordance with international law.”¹ In doing so, the Philippine authorities took China and the other members of the Association of Southeast Asian Nations by surprise and pushed back against what they see as heavy-handed Chinese behavior.² Despite China’s rejection of the process, international arbitration will continue.³

Though short-lived, seeing the Chinese scramble to respond to the Philippine submission must have been a welcome change in Manila after a year of disasters in which a single Philippine Navy frigate on a fisheries law enforcement patrol was outmaneuvered at Scarborough Reef and the Philippines lost control of the feature, lost access to the resources in its sheltered harbor and lost the ability to protect the reef’s fragile ecosystem and rare species from Chinese poaching.

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China simply projected its superior maritime law enforcement fleet and the sheer number of its civilian fishing vessels to overwhelm the few Philippine vessels present at the reef.⁴ Meanwhile the People's Liberation Army Navy displayed its strength in nearby waters.⁵ After what appeared to be an agreement for both sides to withdraw and return to the status quo ante, the Philippines complied and the Chinese did not.⁶ In fact, after the Philippine ships departed, the Chinese placed a physical barrier across the reef's narrow entrance and posted a Chinese law enforcement vessel to prevent any Philippine attempts to return.⁷

This unhappy conclusion taught the Philippines two lessons about dispute resolution with China over South China Sea issues: first, the Chinese have superior power and will use it; and second, in the face of such power further negotiations over sovereignty and resource claims are fruitless unless power-based dynamics are replaced with a process in which the weak and the strong are equals. Accordingly, Manila chose to move its contest with China to the mandatory dispute resolution process of UNCLOS to which both China and the Philippines are parties.

What Are the Dispute Resolution Provisions of UNCLOS?

UNCLOS provides states with four different ways to settle disputes about its application or interpretation. Two are permanent international courts and two are arbitration procedures. Countries are free to choose their preferred venue when they accede to the Convention. The two courts involve sitting judges with a written, public track record and significant experience, while arbitral panels are formed on an ad hoc basis and so allow the parties a degree of control over who judges their case. If a state does not record its choice of procedure, the rules of UNCLOS deem it to have accepted arbitration.⁸ China submitted two formal statements on sovereignty and procedural issues to the United Nations Division for Ocean Affairs and the Law of the Sea, but never made a declaration concerning dispute resolution.⁹ Accordingly, in order to litigate the issues in contention with China, the only option for the Philippines was to initiate arbitration.

Each party has the right to appoint one of the five members of the Arbitral Panel. The Philippines chose Judge Rudiger Wulfram, a respected German judge who has sat on the International Tribunal for the Law of the Sea (ITLOS) since 1996. The Chinese government had 30 days from January 22 to appoint an arbitrator – a right it refused – even though it was permitted to choose a Chinese national. The rules specify that since China refuses to participate, the President of ITLOS, currently Japanese Judge Shunji Yanai, a former

ambassador to the United States, will make the choice on China's behalf. Assuming the Chinese continue to refuse to participate, the remaining three arbitrators – including the President of the Arbitral Panel – will also be appointed by Judge Yanai.

Now that the Chinese have rejected the process, the panel will proceed without them, providing a small victory for Manila and potentially swinging international public opinion toward the Philippines.

This process presented China with several challenges. First, although the Chinese government has a strong preference for bilateral diplomatic negotiations to resolve disputes, its status as a party to UNCLOS and its continuing failure to reach a settlement with the Philippines has exposed it to the risk of litigation. Additionally, if the arbitration goes forward, Beijing may be at a disadvantage because several Chinese assertions about their South China Sea rights are not well supported in international law.¹⁰ China's leaders may also have concerns about avid nationalists who are sensitive to any perception that the government lost control of a high profile issue to a small Southeast Asian state and a Japanese judge. Nonetheless, now that the Chinese have rejected the

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What Did the Philippines Claim?

As UNCLOS specifically allows countries to exclude sovereignty disputes, maritime border disputes and claims to historic title – and China is on record as doing so – the Philippines cannot litigate ownership of the Spratly Islands nor can the arbitrators draw a maritime boundary for the two parties.¹¹ Even so, the Arbitral Panel may find that it has jurisdiction to decide some of the other issues that have most frustrated the government of the Philippines. In its official *Notification and Statement of Claims*, the Philippines made four distinct claims: China's nine-dashed line is invalid; China occupied mere rocks on Scarborough Reef rather than significant features; China's structures on submerged features are illegal; and Chinese harassment of Philippine nationals at sea is also illegal.

China's Nine-Dashed Line is Invalid. First, the Philippines asked the Arbitral Panel to determine that China's nine-dashed line claim to the South China Sea's waters is contrary to UNCLOS and therefore invalid.¹² This is really the heart of the dispute between China

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and other claimant states such as the Philippines. Manila asserts that only international law, as represented by UNCLOS, and not one state's version of history or other extraneous factors, can be the basis for legitimate maritime rights today. While the Chinese govern-

ment has never openly stated its policy on the meaning of this line, China did officially submit a picture of it to the U.N. in 2009¹³ in opposing a joint claim by Vietnam and Malaysia to continental shelf rights in these waters based on UNCLOS.¹⁴ While this case by the Philippines is the first legal challenge to China's expansive historical claims, Vietnam, Malaysia, Brunei and possibly Indonesia all hold similar grievances against their neighbor to the north and could benefit from it.

China claims that it is allowed to assert broader maritime rights in the South China Sea than UNCLOS authorizes because "UNCLOS plus," that is, UNCLOS plus other factors such as history, legitimizes its sovereign rights to the South China Sea.¹⁵ Indeed, China's domestic law claims that notwithstanding UNCLOS, China still has other "historic rights" in the surrounding

oceans.¹⁶ But, if China were to convincingly claim that the nine-dashed line is based on some kind of "historic title," then presumably the Arbitral Panel does not have jurisdiction to hear this issue because China exercised its right to exclude the matter from consideration. However, China's claim of "historical title" to such a vast expanse of waters may be viewed by the panel as so unreasonable in light of existing law that the panel may construe UNCLOS as preventing China from making the claim. Indeed, if China is allowed to make such a claim, could Spain and Portugal assert ownership of the world's oceans based on their historic pasts? The Arbitral Panel may choose to shed some light on the legal limits of historical title claims.

China Occupied Mere Rocks. Second, the Philippines claims that China "occupied certain small, uninhabitable coral projections that are barely above water at high tide, and which are 'rocks' under ... UNCLOS."¹⁷ The heart of its claim is that "none of the Spratly features occupied by China is capable of sustaining human habitation or economic life of its own."¹⁸ If the Arbitral Panel agrees, then

even if China does have sovereignty over the tiny features, as rocks they are legally incapable of generating resource zones (exclusive economic zones or continental shelves). Thus, taken together, the first two Philippine claims assert that neither the nine-dashed line nor geography is a legitimate basis for China to assert jurisdiction over the waters beyond 12 nautical miles from these small rocks.

Chinese Structures on Submerged Features are Illegal. The third Philippine claim is that China “occupied and built structures on certain submerged [features] that do not qualify as islands under UNCLOS, but are parts of the Philippine continental shelf.”¹⁹ Some of the submerged features within the nine-dashed line are as close to the Philippines as 50 nautical miles and as far from China’s Hainan Island as 550 nautical miles.²⁰ This assertion claims China has no legal rights to the continental shelf far from its coastlines. Those rights belong to the Philippines since UNCLOS gives a coastal state continental shelf rights “throughout the natural prolongation of its land territory.”²¹ The Notification specifically challenges Chinese-built structures in four places – Mischief Reef, McKennan (Kennan) Reef, Gaven Reef and Subi Reef – that are submerged at high tide. They lie between 130 and 230 nautical miles from the coastline of the Philippine Island of Palawan and are a much greater distance from the coast of China.²² Accordingly, the Philippines claims the Chinese structures are an illegal intrusion on the Philippine continental shelf.

One of the critical, but unstated, pieces to this portion of the claim is that in 2011 Chinese vessels actively interfered with attempts by Philippine companies to perform seismic research for hydrocarbons beneath Reed Bank.²³ Reed Bank lies within China’s nine-dashed line, but is just off the coast of the island of Palawan and is therefore geographically a part of the Philippine continental shelf. If the Philippines can convince the Arbitral Panel that China’s nine-dashed line is invalid, that China has no other valid basis to claim continental shelf rights in the region and that Reed Bank is legally part of the Philippine continental shelf, then these Philippine companies will be legally free to pursue the development of lucrative hydrocarbon deposits without Chinese interference.

Chinese Harassment is Illegal. Finally, the Notification asserts that the Chinese “interfered with the exercise by the Philippines of its rights.”²⁴ This portion of the claim refers primarily to Scarborough Reef, the vast majority of which is submerged, but on which there are a few rocks above water at high tide that technically could be claimed as the sovereign territory of China. However, even if China has sovereignty over these small rocks, they generate at most a small Chinese zone of 12 nautical miles, rather than encompassing the entirety of

the much larger submerged reef. Thus, the Notification claims that China's seizure of the whole reef was unlawful, as is China's continued interference with the right of Philippine citizens to "enjoy access to the living resources within this zone."²⁵ The Scarborough Reef incidents are only the latest in a string of assertions by Philippine fishermen that China used physical intimidation against them. In June 2011, for instance, Manila protested an incident in which Chinese vessels allegedly opened fire against Philippines fishermen in the disputed section of the South China Sea.²⁶ The Philippine claim seeks to stop all such Chinese interference.

What Comes Next?

Despite China's recent rejection of the international arbitration process, the Sino-Philippine row is far from over. First, China still has an opportunity to change its position and litigate the issues, or

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at least to litigate whether the Arbitral Panel has jurisdiction over any of the Philippine claims. Although such a change may be unlikely, doing so would reassure China's increasingly anxious neighbors that it is committed to institutional rather than power-based resolution of disputes. China's second option – and perhaps the most likely – is to continue to refrain from participating and to hope for a favorable outcome. If China loses the case, it could declare the process void and ignore its results. Failing to participate and especially ignoring an adverse verdict, however, would convince China's

neighbors that China does not intend to play by international rules. In response, others in the region and beyond would have to seek ways to bolster a rules-based order that gives all claimants an equal weight against a larger China.

Third, China may believe its best option is to try to isolate and coerce the Philippines into dropping the arbitration. This too may backfire by increasing international disapproval, which has already reached considerable levels. Additionally, it may be ineffective in the end, since the Philippines learned during the Scarborough Reef incident that it is less economically and politically exposed to Chinese pressure than some other regional states. Perhaps worse for China is that if it chooses the path of coercion, then Beijing itself will have proven the "China threat theory" it so decries.

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Finally, given the risks and ramifications of each of these options, Beijing may decide to engage in quiet negotiations with Manila to withdraw the case. Doing so, however, would require the Chinese to give the Philippines something meaningful, such as renewed access to Scarborough Reef, assurances that Philippine oil and gas development can proceed without harassment and a pledge that negotiations on a final outcome will continue in good faith. However, such negotiations can only be successful if the Philippines acts as a discreet and reasonable negotiating partner. If Beijing chooses this fourth approach, and if Manila engages in quiet diplomacy, then there is some hope that a productive accommodation can be reached. In that event, international litigation will have served President Aquino's purpose to find "a peaceful and rules-based resolution of disputes ... in accordance with international law."²⁷

ENDNOTES

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