



*A Perfect Storm in the South China Sea:
The Consequences of Pending Arbitration between the Philippines and China*

Report by the World Engagement Institute

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Introduction

This report is the product of a working group convened by the World Engagement Institute in Chicago, with support from the Philippine Consulate General in Chicago. The group convened to address the concern that multiple elections are forthcoming in countries across the Asia-Pacific in 2016, at a time when China is acting belligerently in the South China Sea, and when an acute national security interest is pending before international arbitration. The working group believes that concerned states should convene in advance to coordinate their strategies for likely contingencies, post-arbitration, to avoid costly mistakes and to ensure the stability of regional and international security. Working group participation included contributions from members of government, academics, the legal community, the policymaking community, and the private sector.

Background

Contentious sovereignty claims in the South China Sea (SCS) have embroiled regional and international actors. More recently, tensions came to a head when the People's Republic of China (PRC) began dredging the ocean floor to create and/or enhance existing geological features in the SCS. The Philippines, Vietnam, and Malaysia contend that China's territory building activities are illegal under the United Nations Convention on the Law of the Sea (UNCLOS), and that freedom of navigation and national security are threatened by these activities.

The Philippine government filed a claim in January 2013 with the Arbitral Tribunal under Annex VII of UNCLOS at the Hague's Permanent Court of Arbitration (PCA). The case is pending and a final determination is expected in the near future. This report discusses the consequences of pending litigation before the Tribunal, and provides recommendations for post-arbitration enforcement and US foreign policy.

The Philippines v People's Republic of China: The Philippines' Perspective of Pending Arbitration

In 2009, the PRC caused international consternation when it asked the United Nations to circulate its nine-dash line claim to the community of nations. The nine-dash line map draws China's territorial claims around all of the SCS maritime territory, including many territories already claimed by other regional states in the SCS. China began territorial expansion on a number of geological features in the SCS, and recently completed construction on several features, including Fiery Cross Reef, Cuarteron Reef, and Johnson Reef. Recent military developments on Mischief Reef, for example, have caused concern not only among the ten Association of Southeast Asian Nation (ASEAN) states, but also hold important strategic and security concerns for the United States and other large Asia-Pacific powers.

The 2013 Philippine legal brief asked the PCA Tribunal to rule on four key issues:

- 1) Declare that China's rights to maritime areas in the SCS are established by UNCLOS and consist of its rights to a Territorial Sea and Contiguous Zone under Part II of UNCLOS, to an exclusive economic zone (EEZ) under Part V, and to a Continental Shelf under Part VI.
- 2) Declare that China's maritime claims in the SCS based on its nine-dash line are contrary to UNCLOS and invalid.
- 3) Require China to bring its domestic legislation into conformity with its obligations under UNCLOS.
- 4) Require China to desist from activities that violate the rights of the Philippines in its maritime domain in the West Philippines Sea.

The fundamental issue of the arbitration is the definition of geological features in the South China Sea and whether these features were entitled to maritime rights and/or EEZs. Traditional maritime law establishes that whoever owns the land, owns the sea around it. This principle establishes an ownership baseline that allows countries to claim a 200 nautical mile EEZ. The fundamental problem with the SCS dispute is that if all of the islands or rocks claimed by various countries in the SCS were granted 200nm EEZs, then overlapping zones of sovereignty would make implementation of freedom of navigation nearly impossible. Moreover, China's nine-dash claim is incompatible with other ASEAN states' claims in the SCS.

The Philippine legal brief asked the court to define which geologic features are classified as an island, a rock, or a low-tide elevation. Islands fit for human habitation or that can sustain economic life of their own would be granted 200nm maritime zones. Rocks would be granted 12nm maritime zones. Low-tide elevations would be granted no maritime zone. Clarifying which features received which maritime territory zone would greatly simplify many of the territorial disputes by eliminating claims of excess maritime sovereignty.

In practice, compliance with UNCLOS under the Philippine's legal position would ensure bilateral delimitation of maritime claims in circumstances where there are overlapping maritime claims. States would continue to recognize original baseline 200nm EEZs, but in disputed waters states would engage in cooperative activities under UNCLOS. Only in very specific situations would the proposal allow 12nm maritime zones to be established. This would grant a larger area where

freedom of navigation is unimpeded by conflicting maritime claims, and reduce the complexity of the excluded zones of maritime operation. The goal would be efficient, safe passage for merchant marines, and simplified commercial routes through the region.

The Philippine government expects a final decision on legal claims within six months. They expect a large degree of success based on the conduct of the case and the nature of the questions from the Tribunal. The anticipated result would be a favorable decision for the Philippines on China's nine-dash line claim, finding China's actions to be inconsistent with UNCLOS.

China's Anticipated Response

The PRC may respond to an unfavorable ruling in several ways. Initially, China may respond by claiming that the Tribunal's ruling is non-binding and illegal. They would seek to discredit and invalidate the Tribunal's actions through public and diplomatic criticism. Consequently, it is important that the Tribunal words its ruling in such a way that China will either be compelled to comply or that China will have a way to save face. If China has room to re-craft its message to the international community, then face-saving remains a viable long-term channel. For example, China could move to claim that its nine-dash approach is a line of allocation to sovereign territory and not a claim to maritime territory. This could create the opportunity for China to move, over time, to clarify that its claims are in fact based on UNCLOS and not rights related to maritime territory, as previously thought.

Another short-term PRC response is likely to be a continuation of current policies, including aggressive behavior towards countries in the SCS (including the US) and a firm reliance upon bilateral negotiations to resolve disputes. With regard to interaction with ASEAN states, the PRC will likely continue to be obstructionist in terms of establishing a code of conduct on maritime disputes until such a time that China's land reclamation activities, including military airfields, are complete.

The worse-case scenario would be that the PRC blocks freedom of navigation short-term in the region to protest the ruling and reactions from regional claimant states. The fallout would have an immediate commercial and economic consequence in the region. This would create a global crisis as responses are rapidly formed to address the blockage and economic impact. High costs and short time frames for response historically create ripe opportunities for miscalculation and can lead to the escalation of conflict.

Enforcement Challenges

A ruling in favor of the Philippines is likely to be met with PRC non-compliance, criticism, and aggressive behavior. The key legal question is whether there is an enforcement mechanism. Enforcing international legal decisions is historically very difficult. Not only does it require a state to forgo its national interests to comply with a ruling, but it also means that an international "policeman" is equipped to enforce any deviation from the ruling. The international system has no enforcement capacity that can enforce legal rulings, short of the UN Security Council, upon which China sits. Consequently, the main leverage for upholding a ruling is predominantly in the

court of public opinion and soft power. These will be the primary tools available for establishing compliance.

It is unlikely that economic coercion will sway China's behavior because it has succeeded in effectively separating strategic issues from economic/trade issues. In fact, it is more likely that China will economically coerce other states in order to persuade them to refrain from criticism of China's actions. For example, the UK originally signed on as an observer to the Philippine's arbitration case. Following a visit by President Xi Jinping to the UK in October 2015 that promised large investment opportunities for the British economy, Prime Minister Cameron withdrew his request for observer status. Such is the weight that China's power has on national interests.

The United States may also face difficulty in persuading China to comply with the PCA ruling for two reasons. First, the US is not a party to UNCLOS. There is a long history of Congressional debate on the merits of ratifying UNCLOS, but no such action has officially been taken for fear of blocking economic interests, redistributing resources unfairly from EEZs, and limiting US sovereignty and flexibility. Asking China to comply with UNCLOS without ratifying the agreement opens the US to criticism of its hypocrisy. Second, the US has a history of ignoring international tribunal rulings and pursuing its national interest. Should China do the same? These shortcomings provide the US with little moral authority to pressure China to comply. In addition, China's growing nationalism, coupled with its historic grievances, presents a strong façade against which weak international criticism will have little effect. Only sustained, multilateral, long-term diplomacy may have a chance to weaken China's resolve to ignore the ruling.

Recommendations

The complexity of the SCS maritime claims, coupled with the challenges of enforcing any PCA ruling, underline the difficulty and sensitivity with which this issue must be handled. The following are recommendations for US foreign policymakers and other states in a coalition against China's nine-dash line claims.

- 1) Develop an informed group of citizens and government policymakers who are educated about this issue. High political costs impose barriers to action. Greater public awareness increases pressure on governments to act resolutely to solve this issue, and lessens the political damage that could be created by difficult and sometimes costly decisions.
- 2) The realities of *realpolitik* suggest that international rulings often hold less sway than national interests. Does the US have large enough interests to really become involved with this issue? There is a solution out there, but it is a politically challenging one. The US must clarify its interests to the American public and Congress, and begin to persuade both of what needs to be done to ensure that American interests in the SCS are upheld. 2016 is a particularly important year with the looming US presidential election. The Obama administration and members of Congress can help to set the agenda for the next presidential administration by clarifying and amplifying the US position to the domestic American public and media, and to foreign governments. Clarifying intent and capabilities to achieve those objectives is critical.

- 3) States in the SCS are calling for more US involvement with this issue, and it would be a missed opportunity for the US to fail to remain engaged in this specific issue, and more broadly in the region. This suggests a strategic opportunity for the US to further implement its proposed Rebalance/Pivot to Asia. Opportunities include passing the Trans-Pacific Partnership (TPP), diplomatic visits to the region, military troop rotations, a reevaluation of the US military force structure (particularly the US Navy), conducting freedom of navigation operational patrols (sailing or flying), modernizing and strengthening bilateral security alliances in the region (Japan, Korea, Australia, the Philippines, and Thailand), supporting partners (Singapore, India, Indonesia, and Vietnam), reexamining the ban on lethal weapons sales to Vietnam, and increased pressure on China to shape its behavior. The US government must take seriously this opportunity for deepening and enhancing American involvement in the region. Powerful countries, predominantly the US, must lead a coalition against China's behavior. If the US does not lead, China surely will, and the fallout may be that ASEAN states could be more readily drawn into China's orbit and obliged to comply with its interests.
- 4) Provide China with a way to save face. This is a component of both the wording of the Tribunal's ruling and the careful choreography of diplomats as they push China to comply with a ruling. Foreign policymakers should anticipate China's reactions and allow for a course of least resistance as they manage the post-arbitration enforcement.
- 5) The US should reopen the UNCLOS signatory discussion: does the US gain legitimacy by leading through example? Currently, the US capability to pressure China to comply with UNCLOS is limited by its lack of signatory status to the Convention.
- 6) The Philippines and the US should promote discussion about the SCS through conferences and workshops in Southeast Asia prior to the Tribunal's final decision. A key focus should be to convene conferences and seminars that create synergies with other interested states in order to develop contingency plans for China's potential reactions to the ruling. The time to prepare policymakers for difficult decisions is now, not after antagonistic reactions to the ruling occur. Coordinated contingency plans should be developed ahead of time through dialogue and consultation.

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