



## **Philippines v. China arbitration: be careful what you wish for** by Sourabh Gupta

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Sometime in late-spring/early-summer, an arbitral tribunal constituted under the United Nations Convention on the Law of the Sea (UNCLOS) will issue a highly-awaited final ruling on a Filipino protestation that China's maritime claims – and actions in defense of those claims – in the South China Sea are contrary to UNCLOS and thereby a violation of the Philippines' sovereign rights and freedoms. Received wisdom holds that Manila will carry the day in court, with the tribunal striking down in particular the more egregious of China's claims based on the Nine Dash Line. In anticipation of the ruling, Western governments and Southeast Asian states have begun to raise the diplomatic, military, and moral temperature on Beijing to adhere.

### **But what if the received wisdom fails to hold?**

The essence of the Philippines' argument rests on two complementary pillars. First, no insular feature in the South China Sea is anything but a 'rock' – hence none is entitled to a maritime zone beyond its 12 nautical mile (nm) territorial sea. As such, China's exercise of fishing, oil and gas development, and marine conservation rights as well as its construction of artificial islands on low-tide elevations beyond the 12 nm limit of appropriate-able features in the South China Sea is unlawful. Second, China exercises exclusive rights and jurisdiction to fishing resources and to the sea-bed up to the perimeter enclosed by the Nine Dash Line – i.e., in instances even beyond 200 nm – under the guise of 'historic rights.' Beyond the territorial sea, such claims have no basis in law, having been superseded by the Convention's exclusive economic zone (EEZ) regime.

The obvious counter-point to the first assertion would be that one or more of the claimed high-tide features in these waters are an 'island' as per Article 121(1)(2) of UNCLOS, hence Beijing is within its rights to engage in, and exercise provisional jurisdiction over, each of the listed activities within a 200 nm radius (or up to the territorial sea of the Philippines' archipelagic coast, if lesser) of that feature or features. From a practical standpoint, for Manila's assertion to prevail, it must conclusively show that Itu Aba – the largest insular feature of the Spratlys group that resides almost-exactly 200 nm adjacent to Palawan in the southern sector of the Sea – is a 'rock'. Because the tribunal is jurisdictionally barred from delimiting the feature's boundary, a ruling that Itu Aba is something other than a 'rock' would validate the legal basis for China's provisional exercise of jurisdiction to the sea and seabed in the Spratlys area – until this zone of overlapping

entitlement beyond the 12 nm territorial sea is delimited by a bilateral agreement.

The counter-point to the second accusation would be that in the intervening waters between the 200 nm limit and the Nine Dash Line in the South China Sea, China neither exercises jurisdiction over the seabed nor enjoys exclusive rights of any type. It solely exercises – and non-exclusively – a lesser set of local customary law-based 'historic fishing rights' that do not conflict with the exclusive rights and jurisdiction accorded to Manila by treaty law. If Manila is to prevail, it must prove any of the following in the intervening waters between the 200 nm limit and the Nine Dash Line: (a) that Beijing exercises fisheries-related rights and jurisdiction of an exclusive nature, as evidenced in actions that have denied access to foreign fishing vessels; (b) that Beijing claims jurisdiction over the sea-bed, as evidenced by interference with the oil and gas projects of other littorals; or (c) that Beijing's non-exclusive exercise of 'historic fishing rights' has no text-based or jurisprudential backing in sea law.

### **On both counts, the Philippines' arguments tread water.**

Having mischaracterized Beijing's claim in the intervening waters between the 200 nm limit and the Nine Dash Line as an exclusive one to the living and non-living resources of the sea and sea-bed, the Philippines fails to identify a single instance of China's exclusive usage of this water area for fisheries or physical interference with the oil and gas projects of other littorals (let alone any Chinese development activity here). Lacking substantiation, it points to a fisheries-related provincial maritime surveillance regulation, whose geographic remit coincides with the Nine Dash Line, as evidence of the former and the private writings of Chinese scholars and legal practitioners as evidence of the latter. Yet the surveillance regulation could equally be limited to deter foreign law enforcement vessels from denying Chinese artisanal fishermen their due non-exclusively exercised access rights to historic fishing grounds in this intervening water area (as is the case with Beijing's rights-preserving operations near Indonesia's Natuna islands where the PRC makes no seabed claim). Meanwhile, the private writings of Chinese legal scholars, their erudition notwithstanding, is not synonymous with state practice.

While framing arguments to restore the traditional fishing rights of its nationals in the territorial sea of the Scarborough Shoal, the Philippines substantiates the lawful basis of China's Nine Dash Line as a 'historic rights' line. Like Beijing, Manila insists that historically-consolidated, local custom-based traditional rights do exist in maritime spaces. Like Beijing, Manila reaches beyond the text of UNCLOS to locate these rights within the body of general international law, which it argues is compatible with UNCLOS' purposes (and in the process breaks cleanly with the US State Department's legal

analysis of the Nine Dash Line). Like Beijing, furthermore, it argues that such privately-acquired rights can be exercised on a non-exclusive basis in foreign maritime zones. Unlike Beijing though, Manila argues that application of these history-based rights in foreign maritime zones is restricted solely to their territorial sea.

Yet on this last point, jurisprudence has categorically ruled otherwise. “Historic rights” which “states may possess ... by virtue of bilateral agreement or local custom” are “not qualified by the maritime zones specified under UNCLOS.” Contrary to their being restricted to the territorial sea, such ‘historic rights’ operate “for all intents and purposes equivalent[ly]” within the territorial sea and the EEZ of the foreign coastal state, and the latter, furthermore, is obligated to pay due regard to these rights. Therefore, as long as artisanal Chinese fisherman exercise their ‘historic right’ to these intervening waters up to the Nine Dash Line – which has now become part of the Philippines’ EEZ – non-exclusively, these rights and practices (which Manila confirms has been long-standing, uninterrupted, and unopposed) and the Line can remain a permanent feature of the South China Sea’s political landscape.

The Philippines’ claim that Itu Aba is nothing other than a ‘rock’ betrays a similar dissonance between legal pleading and prevailing jurisprudence. Manila admits that interpreting the distinction between an ‘island’ and a ‘rock’ requires taking the textual provision of Article 121(3) of UNCLOS at face value – which, from a practical perspective, would mean that the presence of fresh water (and, to a lesser extent, food and space for shelter) is a sufficient criterion to demonstrate that a feature can “sustain human habitation” and escape status of a ‘rock.’ It then widens the goalposts to require that fresh water and cultivable soil be available in adequate supply to be capable of sustaining a “stable community” of people; further, that the settlement be more than for just a military purpose. Itu Aba still fits most of these expanded criteria – it hosts four groundwater wells which provide 65 tons of freshwater daily, including freshwater of commercially-saleable purity from its best well, a diversity of indigenous and locally-grown fruits and vegetables, and a variety of basic infrastructure and civic services.

Confronted by the presiding judges that the legal arguments regarding the feature’s status betray confusion between entitlement and delimitation (with the latter jurisdictionally ruled out), Manila conceded that it seeks the latter (via a back door ruling on the feature’s entitlement) to remedy the “inherently inequitable” status quo (whereby Itu Aba’s provisional entitlement reaches the Palawan coastline). Yet the subject matter of the arbitration constituting an integral part of maritime delimitation was precisely the reason China, lawfully, exercised an opt-out of the arbitration in the first place.

UNCLOS makes no demand that an entitlement or delimitation question be sorted out solely, or even primarily, by legal decision; only that it be resolved peaceably. And in no instance, has an international court or arbitral tribunal applied Article 121(3) to determine whether a specific feature is an ‘island’ or a ‘rock’ – having always found ways to navigate

around the question. Doing so would require a judicial bench that is audacious in the extreme to break with precedent in a case as politically-charged as *Philippines v. China*, and where the balance of evidence lacks verification but nevertheless tilts firmly in favor of the (non-participating) major power.

The Philippines will not walk away empty-handed from the proceedings. Had the Notification and Statement of Claim of Beijing’s violation of Manila’s maritime rights and freedoms been confined to the territorial sea and EEZ of the Scarborough Shoal in the northern sector of the South China Sea, Manila could have had a famous, albeit modest, victory. China’s occupation of the Shoal in 2012 was after all, the proximate provocation that led to the filing of the claim. By enlarging the strategy to encompass claims that pertain also to the Spratlys in the southern sector of the Sea, Manila may have bitten off more than they can chew. The consequences of this misjudgment might not be trivial. Be careful what you wish for.

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