

WEST PHILIPPINE SEA ARBITRATION UPDATE III

June 2014

China should reconsider its position and appear before the Arbitral Tribunal. Not only will China be in a much better position to defend its position and prove that the Declaration applies. More than anything else, China will also prove that it honours the commitment it made upon ratification that it agrees to be bound under UNCLOS and its dispute settlement mechanisms.

*“The Philippine-China Arbitral Case: Why China should reconsider its position of non-appearance in the case”
Center for International Ocean Law
5 May 2014*

Manila has rightly sought recourse in international law to manage the dispute through arbitration. For the sake of regional stability and its own interests, Beijing should follow suit.

*Ziad Haider
“Nine-Dash Mine: Why Beijing should let international law reign in South China Sea”
Foreign Policy, 15 April 2014*

. . . Manila was able to find something that Beijing valued even more than the territory: its reputation for complying with international law.

*Sean Mirski
Editor, Harvard Law Review
“Magnetic Rocks: Assessing China’s Legal Strategy in the South China Sea
The National Interest, 19 May 2014*

. . . it seems likely that the Tribunal might consider that it has jurisdiction to determine the question of characterisation of the land features as rocks or islands since that seems to fall well outside the scope of the Chinese reservation.

*Christopher Ward
“South China Sea on the Rocks: The Philippines’ Arbitration Request”
East Asia Forum, 21 April 2014*

DEADLINE SET FOR CHINA TO SUBMIT COUNTERMEMORIAL; CHINA DECLINES TO COMPLY

The Arbitral Tribunal handling the Philippine case against China on the West Philippine Sea has set 15 December 2014 as the deadline for China to submit its counter-memorial.

Meeting at the Peace Palace at The Hague on the 14th and 15th of May this year, the members of the Arbitral Tribunal issued draft Procedural Order No. 2, setting 15 Dec 2014 as the deadline for China to submit its Counter-Memorial responding to the Philippines’ Memorial that was submitted on 30 March 2014. Both the Philippines and China were given the opportunity to comment on the draft Procedural Order.

On 21 May 2014, the Permanent Court of Arbitration (PCA) received a Note Verbale from China reiterating its position that “it does not accept the arbitration initiated by the Philippines” and that the Note Verbale “shall not be regarded as China’s acceptance of or participation in the proceedings.”

The Arbitral Tribunal nevertheless adopted and issued its second Procedural Order on 3 June 2014. The Tribunal will determine the further course of the proceedings, including the need for, and scheduling of any other written submissions and hearings, at an appropriate later stage.



Foreign Affairs Secretary Albert F. Del Rosario

On China’s refusal to meet the December deadline: “We urge China to reconsider its decision and wish to reiterate that arbitration is a peaceful, open, and friendly mechanism that offers a durable solution to the disputes in the South China Sea.” (7 June 2014)

On a possible early decision: “Since China is not participating, perhaps we could get a quicker resolution from the tribunal. What we want to do

because China is not participating and because the situation is getting worse every day in the South China Sea, I am asking our retainers in the US if we can present a request to the tribunal if they can hasten the process.” (17 June 2014)

On possible provisional measures: “There is a term called provisional measure and we’re looking into that. It’s a study that is in progress.” (17 June 2014)

On a moratorium on certain activities: “We ought to maybe consider getting together and saying, ‘Let’s freeze all activities which escalate tension.’ Let’s call for a moratorium in terms of activities that escalate tension. Let’s do that while we work on an expeditious conclusion of the COC and effective and full implementation of the COC. . . I would like to initiate it. It’s a reasonable approach.” (16 June 2014)

On a special ASEAN ministerial meeting on the South China Sea issue: “There was a suggestion we try to do this again on the basis of further developments in the Paracels. This is in the ASEAN level. I’m not sure where that initiative is now but there is an initiative out there. It was proposed only recently.” (7 June 2014)

China's sovereignty claims are based on historic rights, but legal scholars have concluded that under UNCLOS, China's assertiveness and its reiteration of these claims do not constitute even a minimally persuasive position.

Ved Nanda
"Standoff in the South China Sea"

The Denver Post, 17 May 2014

Ved Nanda is the Thompson G. Marsh Professor of Law and director of the Nanda Center for International and Comparative Law at the University of Denver



As far as the "jurisprudence evidence" is concerned, the vast majority of international legal experts have concluded that China's claim to historic title over the South China Sea, implying full sovereign authority and consent for other states to transit, is invalid. The historical evidence, if anything, is even less persuasive.

Mohan Malik

"Historical Fiction: China's South China Sea Claims"

World Affairs, May/June 2013

Professor Malik is with the Asia-Pacific Center for Security Studies, Honolulu



As a responsible member of the international community, one would hope that they would conform to all the treaties, covenants, and agreements that they have entered into, not just with us but with so many other countries, especially UNCLOS.

President Aquino's response when asked about China's decision not to comply with the deadline set by the Arbitral Tribunal, 5 June 2014

I think China has a particular responsibility to help upholding international law, rules, and norms, and I urge China to live up to those commitments also in dealing with China's neighbours when it comes to certain border disputes.

Anders Fogh Rasmussen
NATO Secretary General
19 May 2014 (photo: nato.int)



From the point of view of a country which must survive in an international system where there are big countries and small, outcomes cannot be determined just by might is right. I think international law must have a big weight in how disputes are resolved.

Singapore Prime Minister Lee Hsieng Loong
Council on Foreign Relations, New York
24 June 2014 (photo: cfr.org)



The relevant parties in the SCS should clarify as precisely as possible the nature of their claims as well as the legal basis for those claims. It would be a monumental development if the concerned parties would also agree to seek solution through a third party mechanism, either through arbitration or judicial adjudication, or even through other regional mechanism.

Prof. Dr. Hasjim Djalal
2nd ARF Seminar on UNCLOS, Manila, 27 May 2014
(photo: innercitypress.com)



If we take the fundamental spirit that we have infused into international law over the ages and reformulate it into three principles, we find the rule of law at sea is actually a matter of common sense. The first principle is that states shall make and clarify their claims based on international law. The second is that states shall not use force or coercion in trying to drive their claims. The third principle is that states shall seek to settle disputes by

peaceful means. My government strongly supports the efforts by the Philippines calling for a resolution to the dispute in the South China Sea that is truly consistent with these three principles.

Japan Prime Minister Shinzo Abe
Shangri-La Dialogue, 30 May 2014 (photo: mofa.go.jp)

In the face of the regional situation becoming increasingly severe, both nations are closely coordinating. I reaffirmed with President Aquino today the significance of the three principles of the rule of law, which I outlined at the Shangri-la dialogue and at the G7 meeting.

Japan Prime Minister Shinzo Abe
Excerpt from Press Statement after his meeting with President Benigno Aquino III
Tokyo, 24 June 2014





We are deeply concerned by tensions in the East and South China Sea. We oppose any unilateral attempt by any party to assert its territorial or maritime claims through the use of intimidation, coercion or force. We call on all parties to clarify and pursue their territorial and maritime claims in accordance with international law.

G7 Summit, Brussels, 4 June 2014
(photo: european-council.europa.eu)

In my opinion, Vietnam should do the same as the Philippines in order to challenge the “nine-dotted line” policy . . . The Philippines can confidently bring suit against China’s “nine-dotted line” policy in international court. They are aware of this and always have made sure to stick to the rules of UNCLOS. Vietnam should follow suit.

Daniel Schaeffer
Former French Military Attache to China, Thailand, and Viet Nam, and expert on Chinese issues at Asia Centre, France
DtiNews, 21 June 2014



Today, we have reaffirmed the importance of resolving territorial disputes in the region peacefully, without intimidation or coercion. And in that spirit, I told him that the United States supports his decision to pursue international arbitration concerning territorial disputes in the South China Sea.

President Obama during his visit to Manila
28 April 2014
(photo: state.gov)



The two leaders underscored the importance of all parties concerned resolving their territorial and maritime disputes through peaceful means, including international arbitration, as warranted, and in accordance with universally recognized principles of international law, including the United Nations Convention on the Law of the Sea.

Excerpt of Joint Statement of President Obama and Prime Minister Najib Kuala Lumpur, 27 April 2014
(photo: state.gov)

The best bet for China’s neighbors to change its strategic calculus appears to be the approach of the Philippines: directly challenging Chinese territorial claims in international arbitration under the UN Convention on the Law of the Sea (UNCLOS).

Ian Forsyth
former U.S. Defense Department analyst on East Asia
“A Legal Sea Change in the South China Sea: Ramifications of the Philippines’ ITLOS Case”
China Brief Volume: 14 Issue: 11
4 June 2014



. . . this arbitration process is based on international law. We shall support the stance of the [Philippine] government . . . As well as our association (JPPFL), we have expressed our support. . . .

Kenji Kosaka
President, Japan-Philippines Parliamentary Friendship League (JPPFL)
Manila, 5 May 2014

Although sovereignty disputes regarding the disputed land features in the SCS are not justiciable under UNCLOS proceedings, the Philippine arbitration case challenges the validity of China’s nine-dash line and its assertion of “sovereign rights and jurisdiction” to essentially the entire SCS—a claim that is, on its face, justiciable under UNCLOS.

Steven Groves and Dean Cheng
“A National Strategy for the South China Sea”
The Heritage Foundation,
24 April 2014

24th ASEAN SUMMIT

Nay Pyi Taw, Myanmar, 10 -11 May 2014



We expressed serious concerns over the on-going developments in the South China Sea. We called on all parties to the DOC to undertake full and effective implementation of the DOC in its entirety in order to create an environment of mutual trust and confidence; to exercise self-restraint, not to resort to threat or use of force, and to resolve disputes by peaceful means in accordance with the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea (UNCLOS).

Chairman's Statement, 24th ASEAN Summit
Nay Pyi Taw, Myanmar, 11 May 2014 (photo: mofa.gov.mm)

They also expressed their strong opposition to the use of coercion or force to unilaterally alter the status quo in the East China and South China Seas. They called on claimants to refrain from actions that could increase tensions to clarify and pursue claims in accordance with international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS); and they reaffirmed their support for the rights of claimants to seek peaceful resolution of disputes, including through legal mechanisms, such as arbitration, under the convention.



Excerpt from Joint statement of Japanese Defense Minister Itsunori Onodera, U.S. Secretary of Defense Chuck Hagel, and Australian Defence Minister David Johnston, Shangri-la Dialogue, 30 May 2014 (photo: defense.gov)



During his 9 May 2014 meeting with Secretary Del Rosario, Japan Parliamentary Senior Vice-Minister for Foreign Affairs Norio Mitsuya stressed the important partnership between the Philippines and Japan as both countries confront similar challenges in the region while sharing common values of freedom and democracy. He emphasized Japan's support for the Philippines' arbitration case as it adheres to international law.

It's a legitimate right of the government of the Philippines to pursue that avenue... We think that that's the right approach.

Canadian Ambassador Neil Reeder, Interview with the Philippine Star, 5 June 2014

Britain supports the Philippines' decision to seek international arbitration to settle its maritime dispute with Beijing. What we do not support is any kind of escalation and provocation because by the use of naval forces or to create new facts on the ground is something that will increasingly lead to a reaction.

British Ambassador Asif Ahmad, Interview with the Philippine Star, 5 June 2014

I believe that the time has come for all the main players in the SCS to recognize, as the Philippines already has, that, in some of the situations currently confronting them, the advantages of resorting to impartial third party determination may outweigh the risks.

Jerome Cohen

"Lawfare or Warfare? Let Impartial Tribunals Help Cool East Asia's Law of the Sea Crisis"
The Diplomat, 29 May 2014

Given all the tension, it is time for a legal proceeding allowing both sides to present their best arguments and obtain a judgment... Other countries should take a similar stand or risk sending China a message that it can keep trying to bully its rivals into submission.

Editorial

New York Times
"Risky Games in the South China Sea"
2 April 2014

Scarborough Shoal is about 200km from Luzon, 650km from China. The claim to Half Moon Shoal is even more outrageous. That is the reef where the Philippines arrested Chinese fishermen allegedly with a catch of giant turtles, a protected species. Knee-jerk protests have erupted from Beijing. The reef is 110km from Palawan, nearly 1,500km from China.

Philip Bowring

"Beijing's dangerous arrogance in the South China Sea"
South China Sea Morning Post
18 May 2014

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FOREIGN SERVICE INSTITUTE

Department of Foreign Affairs

2330 Roxas Blvd. Pasay City, 1300

Tel. No. +632 8343509 Fax. No. +632 8315983

fsiphilippines@fsi.gov.ph www.fsi.gov.ph