



Lingering Questions about the Philippines v. China Arbitration Case

By Serafettin Yilmaz / *Issue Briefings*, 12 / 2015

As the arbitration case initiated by the Philippines against China moves forward, new questions regarding jurisdiction and impartiality have arisen.

After the Philippine government took the territorial disputes with China to international arbitration, debate about the Tribunal's jurisdiction over the South China Sea disputes intensified. With its unanimous decision that it had the right to arbitrate in the dispute, the Tribunal put a symbolic end to the debate. However, question marks remain with respect to the nature, scope, practicality and implications of any potential ruling by the Court on the issue.¹

¹ Permanent Court of Arbitration, 2015, "The Tribunal Renders Award on Jurisdiction and Admissibility; Will Hold Further Hearings," Press Release, October 29. <http://www.pcacases.com/web/sendAttach/1503>



Questionable Jurisdiction

The Permanent Court of Arbitration's seventh press release on the issue states,

In light of limitations on the matters that can be submitted to compulsory dispute settlement under the Convention, the Philippines has emphasized that it is not requesting the Tribunal to decide the question of sovereignty over maritime features in the South China Sea that are claimed by both the Philippines and China. Nor has the Philippines requested the Tribunal to delimit any maritime boundary between the two States.²

From the statement above it could be inferred that the Tribunal recognizes that it has no jurisdiction over the key matters of sovereignty, maritime boundaries and contested areas but it can potentially arbitrate on other matters that do not fall into any of the above categories. By declining to adjudicate on the question of sovereignty, the decision appears to be compatible with the exception clause China inserted into UNCLOS at the time of signing, as other signatories such as Vietnam have also done. The exemption clause states that historical titles and claims are

² Permanent Court of Arbitration, 2015, "The Tribunal Renders Award on Jurisdiction and Admissibility; Will Hold Further Hearings," Press Release, October 29. <http://www.pcacases.com/web/sendAttach/1503>



outside the purview of the law.³ Furthermore, UNCLOS Article 287 gives the member states the option to accept or reject international arbitration.⁴

Then, what remains for the Court to “arbitrate” is to decide whether those sea features that China has been developing are either islands that are entitled to their own territorial waters (12 nm) or reefs or rocks. From the text of the Philippines’ filing, it can be understood that this is what it primarily hopes to accomplish. However, any Court ruling that those sea features cannot be entitled to their own 12 nm territorial waters means by default that it does not recognize China’s sovereignty in the SCS, which is conflicts with the essence of the Tribunal’s own statement that it does not have jurisdiction over sovereignty issues. This appears to be a potential risk that it is willing to take when it makes its final award.

Here the most contentious issue in the whole debate becomes the key determinant—the question of island build-up activities in the contested sea features. If the Tribunal rules that the newly-constructed islands cannot enjoy territorial rights, it

³ Julian Ku, 2014, “The Philippines’ Massive Lawfare Blunder in the South China Sea,” *The National Interest*, December 11.
<http://nationalinterest.org/feature/the-philippines-massive-lawfare-blunder-the-south-china-sea-11837>

⁴ United Nations, 1982, “United Nations Convention on the Law of the Sea,” December 10, pp. 129.
http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf



may lead to a collision with UNCLOS Article 87 on Freedom of the High Seas, which includes “freedom to construct artificial islands and other installations permitted under international law.”⁵ This suggests that the building of “artificial islands and other installations” on the high seas has the same legal status as freedom of navigation.

Impartiality

Other than these, there is another major problematic with respect to the PCA’s position on the case in question—the issue of impartiality and independence. One can find a sizable literature on the independence, impartiality, and political bias in international courts.

In essence, the argument goes that nationality, geography and/or vested interests may influence international judges. Posner and Yoo argue that international courts have to uphold certain state interests if the verdict is to be instrumental to international cooperation because “states will be reluctant to use international tribunals unless they have control over the judges. ... [I]ndependence prevents international tribunals

⁵ United Nations, 1982, “United Nations Convention on the Law of the Sea,” December 10, pp. 53–63.
http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf



from being effective.”⁶ Although China is not a party to the arbitration, a similar observation can be made of the case filed by the Philippines. Because China is not participating in the proceedings and the Philippines would oppose the appointment of arbitrators that would go against its arguments, the court will be unlikely to rule in China’s favor.

Furthermore, on the specific matter of international judicial appointments, three points are made: First and foremost, as Frédéric Mégret argues, “the international sphere is an environment uniquely sensitive to biases and occasionally wary of the claim that international lawyers can abstract themselves from the pull of politics and prejudice.”⁷ Secondly, experts and lawyers are appointed to international legal positions late in their careers, long after they made their opinion on various issues known, which brings up the question whether they are appointed based on merit or on their particular viewpoints. Finally, “the politicized nature of designation processes means that judges/experts are in fact sometimes chosen not despite their previous declarations, but on the very

6 Eric A. Posner and John C. Yoo, 2005, “Judicial Independence in International Tribunals,” *California Law Review* 93(1), pp. 3–72.

7 Frédéric Mégret, 2011, “International Judges and Experts’ Impartiality and the Problem of Past Declarations,” *The Law and Practice of International Courts and Tribunals* 10, pp. 31–66.



basis of having made them.”⁸ Indeed, a number of cases can be pointed out, especially those highly sensitive ones such as the Israeli-Palestinian dispute (e.g., the Ruling on Israeli Security Wall), where international opinion is divided over the impartiality of the international courts.⁹

Conclusion

In the face of such concerns, China’s decision not to participate in the arbitration and not to recognize the Tribunal’s jurisdiction makes sense. Practically speaking, China has nothing to gain by facing the PCA regarding an issue that China enjoys actual control and authority over. Now, since China has not attended or accepted the arbitration, it cannot be on the winning or losing side. The same cannot be said of the Philippines. Moreover, the PCA may also appear weakened if it rules in favor of the Philippines since it has no power to actually enforce its decision (i.e., jurisdiction on a non-compulsory basis). This has been the case many times before, as when the US, in 1986, “defied a clear order from the

⁸ Frédéric Mégret, 2011, “International Judges and Experts’ Impartiality and the Problem of Past Declarations,” *The Law and Practice of International Courts and Tribunals* 10, pp. 31–66.

⁹ Aaron Kalman, 2013, “ICJ treatment of Israel biased, as seen in Syria,” *Times of Israel*, September 25.
<http://www.timesofisrael.com/icj-treatment-of-israel-biased-as-seen-in-syria/>



International Court of Justice to withdraw support for the Contras and the mining of harbors in Nicaragua. Although the U.S. was condemned in the UN General Assembly, the reputational fallout was minimal and quickly forgotten.”¹⁰ Regardless of the Tribunal’s decision, the arbitration filed by the Philippines will likely intensify the debate over the nature, applicability and relevancy of international courts in the future.

¹⁰ Julian Ku, 2014, “The Philippines’ Massive Lawfare Blunder in the South China Sea,” *The National Interest*, December 11.
<http://nationalinterest.org/feature/the-philippines-massive-lawfare-blunder-the-south-china-sea-11837>



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