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Complex Road Ahead for Legal Arbitration in the South China Sea

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The South China Sea (SCS) continues to occupy centre stage in geopolitical discourse due to the series of confrontationist incidents, and assertive actions by the claimants (directly involved parties) as well as those with stakes in the region. Two recent examples are, the large-scale land reclamation activities by China in the SCS, and the US naval aircraft overflying one of the artificial Chinese facilities. Both cases invited sharp politico-diplomatic exchanges and much comment/analysis among the strategic community. The rising trend of such instances is being interpreted as symbolic of hardened postures and consequent deterioration in regional security environment. Considering the resource rich character, and the importance attached to the large volume of maritime commerce (including significant amounts of oil, gas and strategic minerals) that transit the Western Pacific sea-lanes through the SCS, any escalation, in all likelihood, can potentially result in systemic effects.

Within this complex milieu and rising tensions in the SCS, the Permanent Court of Arbitration (PCA), dealing with the legal proceedings initiated by the Philippines against China, will hold its next hearing in July 2015. The key issues for deliberation during this hearing would be to evolve roadmap on three key issues related to the ongoing legal process. These are (a) 'to establish' court's jurisdiction in the case and, (b) to decide 'whether', and (c) 'how' to take the proceedings forward, particularly in light of China's continued refusal to be a party to the arbitration.[1] The judgement of the court on these aspects would be decisive in shaping the future of legal arbitration initiated by the Philippines. This article examines certain legal aspects like extant provisos,

emerging norms and case law precedents for their possible application/interpretation in the complex multilateral SCS dispute.

While the larger context of this arbitration including its origin, contours and the likely political effects after the release of China's position paper on SCS arbitration in December 2014 are covered elsewhere,[2] a broad overview of the events related to this legal process are highlighted as stage setting. These are:

(a) Although the contents of the initial 'Memorial', and the 'supplemental written' submissions by the Philippines to the PCA on 30 March 2015, are yet to be made public, those with access to these documents affirm that the case essentially revolves around two core issues.[3] First, Philippines has sought clarifications about China's maritime entitlement claims with 'territoriality and sovereign rights' connotations in accordance with the United Nations Convention on the Law of the Sea (UNCLOS)[4] provisions, i.e., the rationale used and the extent of Territorial Seas, Exclusive Economic Zone (EEZ) and Continental Shelf. Further, as China makes references to history for asserting 'undisputed sovereignty and sovereign rights over the islands and waters' within the Nine-Dashed Line claim of 2009, the specifics of such 'historic waters and rights' should also be provided by China. The second issue put forth by the Philippines for adjudication is on the 'applicability and validity of the regime of islands' apropos the features claimed as islands by China in the SCS.[5]

(b) China has refused to participate in these arbitration proceedings by reiterating its position that the ongoing dispute in SCS are essentially about territorial sovereignty over maritime features which lie outside the ambit of the UNCLOS dispute resolution mechanism. To add, its 2006 submission to opt out of dispute resolution mechanisms mentioned in the UNCLOS makes the current legal process redundant.[6] China's position paper on SCS legal arbitration, in addition to the abovementioned arguments also states that the initiation of arbitration proceedings by the Philippines is in violation of the 'letter and spirit' of the Declaration on the Conduct of Parties in the South China Sea (DoC) concluded in 2002 between the ASEAN member states and China.[7] PCA had set

16 Jun 2015 as the date for China to submit its response to the submissions made by the Philippines. However, China has not changed its position on the ongoing legal process, and continues with its present stance of refusing to be a party to the legal process.

(c) In a related earlier development in December 2014, Vietnam submitted a "Statement of the Ministry of Foreign Affairs of Viet Nam for the attention of the Tribunal in the Proceedings between the Republic of the Philippines and the People's Republic of China".[8] As is the case with other documents pertaining to the case, the contents of this submission also are not yet publicly available. By drawing inferences from the various articulations of Vietnamese leadership on this subject, some analysts believe that the statement argues for the court to consider it as a 'contemporaneous claimant', without actually seeking an intervention and joining the legal process as an 'engaged and involved party'.[9]

With this background, the key issues that the court would consider in its next meetings are of establishing court's jurisdiction, a decision on the admissibility of the Philippines' application, and lastly, to decide the functional nuances of arbitration.

The first core issue to be decided by the courts would be to 'establish its jurisdiction' vis-à-vis the submissions made by the Philippines. It is pertinent to mention that the Philippines has not objected or disputed/challenged China's Nine-dashed Line claim in a direct sense, instead using the provisions contained in Articles 287 and 289 of UNCLOS for dispute resolution that by 'letter of the law' are not exempt from the mandate of arbitration.[10] This approach by the Philippines to seek mandatory arbitration can be termed as 'ingenuous and innovative', but not without its pitfalls. The Philippines has cited Annex VII of UNCLOS for initiating the legal process (to which China is no longer a party consequent to its 2006 declaration). The Philippines has opted for the PCA, which like the International Court of Justice (ICJ), is empowered to deliberate, among other issues, on questions of sovereignty (ownership), territoriality (Territorial Seas), and maritime entitlements like fishing rights, EEZ and the Continental Shelf.

PCA, through its third and fourth press releases, has also indicated that China's refusal to participate may not have an adverse impact on its considerations to progress with the arbitration proceedings. In this regard, the court has cited Article 9 Annex VII of UNCLOS and other relevant Rules of Procedure established for this particular case.[11] It is pertinent to mention that the International Tribunal for the Law of the Sea (ITLOS), another international legal body established after the operationalization of UNCLOS, went ahead despite Russia refusing to participate in the proceedings in the *Arctic Sunrise* case that also involved Netherlands. In addition, there are prior instances where one of the parties withdrew midway through the course of ongoing legal proceedings, which did not affect the courts ability to progress the cases. *Corfu Channel* case involving the *United Kingdom V. Albania* (1947-48); and the case involving *Nicaragua V. the United States - Military and Paramilitary Activities* (1984-86), both at ICJ, can be cited as relevant examples.

The second critical aspect that the court would deliberate upon is the admissibility of Philippines case. The two issues that the Philippines would have to convince the court are; (a) the 'viability and veracity' of its submissions are indeed worthy of consideration for mandatory arbitration, and (b) more importantly, to prove that it is seeking recourse to legal process after due efforts for resolution and conciliation have been unsuccessful. These would essentially decide if the court has to proceed further.

If convinced about the 'whether' part of its jurisdiction, the court will have to consider the 'what and how' of the legal proceedings. While this stage of legal process lies in future, it is pertinent to examine a few salient issues, as these would pose 'tough choices and dilemmas' not only for the court, but also for the other claimants in the SCS dispute.

First of these is the mandate of court's jurisdiction in its scope and geographical extent, which would dictate the 'ambit of issues' and its application to 'whole or a discrete part' of the South China Sea. While the Philippines' claim is essentially about ownership (sovereignty) over the Kalayaan Group of Islands (KGI) within the Spratlys, it also entails questions about sovereign rights, which may extend upto 200 Nautical Miles (NM) in case of EEZ and upto 350 NM for the Continental Shelf.

Even if the court was to decide on limiting their arbitration to the Spratlys, it raises interesting questions for the claimants and the court. The claimants would have to make a considered choice about 'active intervention', wherein they become party to the legal process. This is especially important for Vietnam, which currently controls the most number of features in the Spratlys. Its current stance of an 'interested and affected but disengaged' party would be tested. A similar situation, though of lesser magnitude, would be faced by Malaysia that claims and controls some land features in the region. Would Brunei and Indonesia, both not party to PCA member community, remain as indifferent considering their maritime entitlements would also be affected?

Using historical and empirical evidence, and considering the stakes involved alongwith the pressures of domestic politics, it is assessed that all claimants would eventually apply for intervention to be considered as affected parties and, it would be surprising if it were otherwise. The recent case involving *Nicaragua V. Colombia* (2007–2012) where Costa Rica and Honduras intervened could be cited as an example. This would make the case a multilateral issue thereby adding further complexity to an already contentious legal process. The court would also be required to address the question of Taiwan, which not only controls the largest island feature in the Spratlys (Ibu Ata) but has a similar claim position as China in the SCS. The vexed import of this issue is further amplified when the court would have to consider the status of Taiwan which is not recognised as a 'state' in the UN and, therefore, not a party to UNCLOS.

It is useful to mention that the claims by each of the involved parties consist of two interesting mixes. Without prejudice to the claim positions taken by countries involved in SCS dispute, their assertions are a combination of historical recall, cartographic evidence, scientific information and recourse to 'old as well as new' ownership/entitlement norms for claiming sovereignty and sovereign rights. In most cases, the claimants have made 'concurrent use of selective and expansive interpretations' of customary and codified law, judicial precedents, and 'emerging norms' to justify their claims. The second blend is the intersection and overlap among the claimants as far as the sovereignty, territoriality and sovereign rights are concerned. The court would have to disaggregate each of these strands, which in many instances, are closely intertwined thus adding further ambiguity to SCS disputes.

As part of the legal proceedings, a critical appraisal of sovereignty (ownership) claims vis-à-vis the *Uti Possidetis* (as you possess, so may you possess) doctrine would be mandated. Some experts are of the view that the doctrine is only applicable in the absence of *terra nullius* (Nobody's land). The principles of *juris* (matter of law) and *de facto* (matter of fact) principles are also expected to play a crucial role. This doctrine and the principles rooted in ancient Roman law emphasise the maintenance of *status quo* for ensuring stability of interstate boundaries and territorial sovereignty. All the SCS claimants were former colonies, but also trace independent sovereign nationhood prior and post this period. While the colonial period remains an uncomfortable legacy, the *juris* principle is found useful, in part, to assert territorial and maritime claims as successor states. In a similar vein, by citing the state practice during the independent sovereign era, the *de facto* principle is used to support claim positions elsewhere within the SCS. It would be interesting as to how court establishes a balance between the above doctrine and the principles, and their interpretation/application to the SCS dispute, if the case initiated by the Philippines is accepted for arbitration.[12]

An important issue that would figure in the legal process is the veracity and admissibility of supporting historical data, especially for deciding the territoriality and maritime entitlements. The existing judicial precedent indicates that 'historic' rationale can be used for claims to territorial seas and certain discrete maritime entitlements. Generally, the courts have been sceptical about according territoriality/sovereignty based on historicity, but are more amenable to recognising maritime rights as long as the claimant is able to produce adequate evidence, especially as regards fishing. A large section of legal community is of the view that the 'historic rights/waters' doctrine has lost its relevance in current context, particularly in light of the 'definitive, directive and prescriptive' delimitation norms mentioned in UNCLOS.[13] However, a discrete set of experts and scholars still support the 'historic' regime drawing upon the judgement in *El Salvador V. Honduras* case where three operative principles: formal claim, continuous and effective exercise of relevant jurisdiction, and international acquiescence can be used for claiming 'historic waters and rights' in contemporary context.[14] The aspect of 'historic bays' with linked context of 'internal waters' is left out of consideration, since it is not germane to this discussion.

Another important issue would be the admissibility and cognizance taken by the court on cartographic information, both historical and contemporary, that each of the involved state has publicised in support of its claims. Considering the accuracy of survey and cartographic skills, which were not so advanced earlier, besides the purposes for which such maps/charts were prepared, the ICJ in 2007 during the *Nicaragua V Honduras* case re-emphasised the 'limited' evidentiary value of maps. This aspect is important as the ICJ reaffirmed this its earlier judgements during the frontier dispute between *Mali V. Burkina* Faso (1986), *Botswana V. Namibia* (1999) in the Kasikili/Sedudu Island case and, more recently in the *Honduras V. Colombia* (2012), thus providing an established precedent and a norm, which will be crucial for determining ownership (immutable sovereignty) issues. The exact remarks of the court are reproduced here in some detail for providing the right context:

> "The Court recalls that, "of themselves, and by virtue solely of their existence, [maps] cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights".....[M]oreover, according to the Court's constant jurisprudence, maps generally have a limited scope as evidence of sovereign title."[15]

Conclusion

There are many other complex (and interesting issues) that would be deliberated upon by the court given the complex and contentious nature of the case like rolling back of claims or implementation of adverse judgement among the claimant states vis-à-vis the current possession/control of a feature. However, these are post judgement issues and could be the subject of a later analysis. Besides legal aspects, the larger geopolitical and politico-diplomatic issues would also come into play, 'if' and 'as' the case progresses. An immediate evidence of hardened positions by the SCS claimant states is apparent after Malaysia, considered as a 'safe player in SCS', decided on a more robust response against the ongoing Chinese coast guard ship intrusion into its claimed waters.[16] To conclude, the road ahead for SCS claimants and the court is not only uncertain but also complex; and it would be interesting to watch as to how the stakeholders balance their domestic/foreign policy dynamics.

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NOTES

[1] Permanent Court of Arbitration at The Hague, *Fourth Press Release, 22 April 2015*, http://www.pca-cpa.org/showfile.asp?fil_id=2910, (accessed 7 June 2015).

[2] Raghavendra Mishra, 'China's Position Paper on South China Sea Dispute with the Philippines: An Analysis', http://www.maritimeindia.org/CommentryView.aspx?NMFCID=5379, (accessed 7 June 2015).

[3] Mark E. Rosen (2015), 'Using International Law to Defuse Current Controversies in the South and East China Seas', Center for Naval Analyses: Arlington, Virginia, https://www.cna.org/sites/default/files/research/COP-2015-U009819.pdf, (accessed 06 June 2015).

[4] United Nations Convention on the Law of the Sea (hereafter UNCLOS), Montego Bay, Jamaica, 10 December 1982, 1833 *U.N.T.S.* 397.

[5] See UNCLOS Part VIII, Article 121 for the details on 'Regime of Islands'.

[6] On 25 August 2006, China made a declaration under UNCLOS Article 298 stating, "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention."

[7] Ministry of Foreign Affairs of the People's Republic of China, 'Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014', http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml, (accessed 06 June 2015).

[8] Permanent Court of Arbitration at The Hague, Third *Press Release, 17 December 2014*, (accessed 7 June 2015).

[9] Prashanth Parameswaran, 'Vietnam Launches Legal Challenge Against China's South China Sea Claims', *The Diplomat*, 12 December 2014, http://thediplomat.com/2014/12/vietnam-launches-legal-challenge-against-chinas-south-china-sea-claims/, (accessed 06 June 2015).

[10] The supporting arguments for the Philippines claim to the Kalayaan Group of Islands (KGI) in the Spratlys are available at, 'The West Philippine Sea- The Territorial and Maritime Jurisdiction Disputes from a Filipino Perspective : A Primer', updated version, 15 July 2013, The Asian Center and Institute for Maritime Affairs and Law of the Sea, University of the Philippines, http://philippinesintheworld.org/sites/default/files/FINAL_West%20Phil%20Sea%20Primer_UP%20(15%20July%202013).pdf, (accessed 05 June 2015). Further, the Department of Foreign Affairs in Philippines also released a document in local language titled "West Philippine Sea - Isang Sipat" in January 2015 to promote greater understanding of maritime disputes and the supporting evidence for its case issues among the local populace; see,

[11] The Rules of Procedure in the instant case are available at http://www.pca-cpa.org/showfile.asp?fil_id=2504.

[12] Aaron Xavier Fellmeth, and Maurice Horwitz, *Guide to Latin in International Law,* (Oxford: Oxford University Press, 2009), pp. 286-288; and, Parry, Clive, John P. Grant, J. Craig Barker, and Clive Parry. *Parry & Grant Encyclopaedic Dictionary of International Law*. Oxford: Oxford University Press, 2009, pp. 655-656. *Uti possidetis* - An archaic maxim meaning that a state that has acquired possession of territory with intent to annex it has thereby established sovereignty over that territory. Derived from Roman private law, the doctrine was first applicable to Spanish colonies in the Americas, later extended to

Brazil and later still to the African continent. The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved ….[and] the doctrine is of great importance, for it may be relevant to the proper interpretation even of subsequent boundary treaties. Moreover, it aptly enshrines the vital principles of stability of state boundaries. The principle has an application beyond the purely colonial context and was considered in relation to the break-up of the former U.S.S.R. and the former Yugoslavia. *Uti possidetis juris* -["So that you may (rightly) possess]: - A modern principle according to which a change in sovereignty over a territory, especially due to independence following decolonization, does not *ipso facto* alter that territory's administrative boundaries as established by colonial authorities out of respect for succession to legal title by the new sovereign. *Uti possidetis de facto- (* So that you may possess in fact): A principle that was formerly invoked on occasion by postcolonial states to the effect that the boundaries of newly independent states upon decolonization should be defined by the limits of the territory actually administered by the colonial authorities and/or newly independent state rather than the administrative boundaries delimited by the colonizing states.

[13] Clive Ralph Symmons, *Historic Waters in Law of the Sea: A Modern Re-Appraisal*, (Leiden: Martinus Nijhoff, 2008), pp. 292, 299-300.

[14] Ibid, pp. 286, 296-297.

[15] *Territorial And Maritime Dispute (Nicaragua V. Colombia), International Court of Justice, Judgment of 19 November 2012*, http://www.icj-cij.org/docket/files/124/17164.pdf , accessed 12 June 2015.

[16] Prashanth Parameswaran, 'Malaysia Responds to China's South China Sea Intrusion', *The Diplomat*, 09 June 2015, http://thediplomat.com/2015/06/malaysia-responds-to-chinas-south-china-sea-intrusion/, (accessed 12 June 2015).