The Prospects for the Sino-Philippine Arbitration and the Territorial Disputes in the South China Sea

Michael Sheng-ti Gau*

On January 22, 2013, the Philippines initiated arbitration against China under Article 287 and Annex VII of the UNCLOS.1 As said by the Notification and Statement of Claim (hereinafter the Notification), the goal of the arbitration is “to seek a peaceful and durable resolution of the dispute in the West Philippine Sea” between these two States.2 The Philippines challenges against China’s claims and entitlement in the eastern part of South China Sea (“SCS”) enclosed by the “nine-dash-line,” which the Philippines requests the Tribunal to declare as its exclusive economic zone (“EEZ”) and continental shelf.3

On February 19, 2013, China officially refused to join the litigation, based on, inter alia, its 2006 Declaration4 covering the disputes brought by the Philippines and depriving the Arbitral Tribunal of necessary jurisdiction to entertain the case.5

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* Professor of International Law at Institute for the Law of the Sea, National Taiwan Ocean University. The author may be contacted at: mikegau97@msn.com


3 Id. ¶¶ 31 (Sec. III: The Philippines’ Claims) & 41 (Sec. V: Relief Sought).

4 UN Division for Ocean Affairs and the Law of the Sea, Declarations and Statements, available at http://www.un.org/DEpts/los/convention_agreements/convention_declarations.htm#China upon ratification (last visited on Oct. 31, 2014). It reads: “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.”

The default rules were applied to establish the arbitral tribunal on June 25, 2013. At the first meeting of the Tribunal, the Permanent Court of Arbitration ("PCA") was appointed as Registry. Then, the deadline was fixed as March 30, 2014 for the Philippines to submit its Memorial. The Tribunal directed the Philippines to fully address all issues in the Memorial, including matters relating to the jurisdiction of the Tribunal, the admissibility of the Philippines’ claims, and the merits of the dispute.

As directed, the Philippines presented the Memorial, requesting the Tribunal to adjudge and declare that:

(1) China’s maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those permitted by the United Nations Convention on the Law of the Sea; (2) China’s claims to sovereign rights and jurisdiction, and to ‘historic rights,’ with respect to the maritime areas of the South China Sea encompassed by the so-called ‘nine-dash line’ are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China’s maritime entitlements under UNCLOS; (3) Scarborough Shoal generates no entitlement to an EEZ or continental shelf; (4) Mischief Reef, Second Thomas Shoal and Subi Reef are LTEs that do not generate entitlements to a territorial sea, EEZ or continental shelf, and are not features that are capable of appropriation by occupation or otherwise; (5) Mischief Reef and Second Thomas Shoal are part of the EEZ and continental shelf of the Philippines; (6) Gaven Reef and McKennan Reef (including Hughes Reef) are LTEs that do not generate entitlement to a territorial sea, EEZ or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyit and Sin Cowe, respectively, is measured; (7) Joshson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an EEZ or continental shelf; (8) China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its EEZ and continental shelf; (9) China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the EEZ of the Philippines; (10) China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal; (11) China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal; (12) China’s occupation of and construction activities on Mischief Reef: ⓝ violate the provisions of the Convention concerning artificial islands, installations, and structures; ⓞ violate China’s duties to protect and preserve the marine environment under the Convention; and ⓜ constitute unlawful act of attempted

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6 UNCLOS Annex VII, art. 3.
appropriation in violation of the Convention; (13) China has breached its obligation under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal; (14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things: ⓐ Interfering with the Philippines’ rights of navigation in the waters at, and adjacent to, Second Thomas Shoal; ⓑ Preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal; and ⓒ Endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal.8

Two critical questions must be asked now. If the Philippines wins the case, will China become legally unjustified to conduct those activities challenged by the Memorial? If the Philippines fails, will it lose legal justifications to counter against China’s activities as complained? Both answers seem negative. This problem concerning efficacy of the award9 warrants considerations.

The goal of this arbitration, as declared by the Philippines, is to facilitate the resolution of the complicated Sino-Philippine SCS disputes, through settling certain less-complex legal issues by the Tribunal bypassing the 2006 China’s Declaration.10 It seems, however, unachievable unless the following fundamental legal hurdles are removed.

First, as the core of the confrontations, the Sino-Philippine territorial disputes over all the maritime features in the Kalayaan Islands Group and Scarborough Shoal are beyond the Tribunal’s mandate.11 Thus, the award of the Tribunal shall not affect the legal positions of both Parties concerning such territorial disputes. No matter what the award says, both parties would be justified to continue making their clashing territorial claims and the competition for territories goes on. The interference with Filipino traditional fishing and near-collision incidents both in the waters adjacent to Scarborough Shoal as indicated by Submissions 10 and 13 would prolong. Both China and the Philippines may insist on their territorial sovereignty

9 Applying the principle of res judicata, what is not decided by this Tribunal will not be affected by the award. In other words, those disputes (1) not submitted to the Tribunal for settlement and (2) submitted but beyond the jurisdiction of the Tribunal will remain disputed after the award is given. See Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 336-341, 343 & 345-347 (1953).
over the Scarborough Shoal and waters adjacent thereto. Each of them will grant the other only the right to innocent passage in such water. The Philippines will keep complaining that China violates its UNCLOS obligations to protect and preserve the marine environment at Scarborough Shoal, if China precludes (as it will) Philippine vessels from enforcing her laws upon Chinese fishing boats. Besides, China’s 2006 Declaration deprives the Tribunal of its power to adjudicate the disputes concerning military and law enforcement activities under Article 298(1)(b) of the UNCLOS. Consequently, the legality of China’s military and law enforcement activities in the adjacent waters of Scarborough Shoal and Second Thomas Shoal remains unchallenged.

Second, the Philippines’ Submissions 3-7 do not ask the Tribunal to review the legal status of all the maritime features in the Spratly Islands Group claimed by China for much longer time, but to adjudge only the (nine) maritime features that China currently occupies. Here, Philippine-occupied and Taiwan-occupied Islands claimed by China are not listed (Figure 1). Also excluded are those islands occupied by Vietnam and Malaysia but claimed by China. Significantly, the legal status of quite a few non-rock islands there would be overlooked by the Tribunal. China may thus be justified to continue using Spratly Islands as a whole and those ignored non-rock islands, including but not limited to Itu Aba, Thitu, and West York Islands, to claim EEZ and continental shelf in the Area concerned. Table 1 demonstrates that such Chinese maritime entitlements reach the location of Reed Bank and eight of those China-occupied maritime features (excluding Scarborough Shoal). The legality of such China’s maritime entitlements will not be addressed by the Tribunal.

For details, see L. Bautista, The Philippine Claim to Bajo de Masinloc in the Context of the South China Sea Dispute, 6 J. EAST ASIA & INT’L L. 497-529; Ran Guo, Legal Basis of China’s Claim over the Huangyan Island, J. EAST ASIA & INT’L L. 531-552.

It reads: “1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:… (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;..”

Supra note 8. [Emphasis added]


Id.

Supra note 11, at 210-211. The 12 non-rock islands are as follows: (1) Taiwan-occupied Itu Aba; (2) Philippines-occupied Thitu Island, West York Island, Northeast Cay, Nanshan Island, Loaita Island; and (3) Vietnam-occupied Spratly Island, Southwest Cay, Sin Cowe Island, Sandy Cay, Nanyit Island, and Amboyna Cay. See also supra note 15. [Emphasis added]
and remain unaffected by the award. It follows that the legality of China’s exercise of sovereign rights and jurisdiction based on such EEZ and continental shelf entitlements will remain undefeated. Even if losing the case in Submissions 3-7, China would remain entitled to maintain the disputed activities identified in Submissions 8-9.19

Third, the foregoing China’s maritime entitlements of EEZ and continental shelf in the Area concerned render a Sino-Philippine maritime delimitation dispute undeniable. Reed Bank and eight China-occupied maritime features identified by Submissions 3-7 fall within such overlapping zone, except for Scarborough Shoal. As the Tribunal has no authority to draw the sea boundary, the losing Party may safely argue that the award leaves unanswered the questions concerning “to which Party those five LTEs and Reed Bank belong” and “on which Party’s EEZ and continental shelf those three rocks sit.” The losing Party may thus contend that its (EEZ and continental shelf) sovereign rights and jurisdiction covering the waters surrounding Reed Bank and these eight features remain intact. As a result, the maritime confrontations identified by Filipino Submissions 8-9, 11 (in terms of Second Thomas Shoal), 12, and 14 will continue unabated.

Fourth, as the Tribunal is unauthorized to resolve Sino-Philippine territorial disputes in the SCS region, the U-Shaped Line drawn in the 1948 Map indicating China’s SCS territorial claims will not be affected by the award.20 Such version of U-Shaped Line can be justifiably kept on the map in any case. Concerning the advanced version of the U-Shaped Line allegedly used as boundary of Chinese maritime claims in SCS,21 it can stay under any outcome of this litigation. This is because the U-Shaped Line must be and (some dashes of it) has been removed after maritime boundaries between China and other SCS bordering State are drawn.22 In other words, this version of the U-Shaped Line is part of the overall maritime boundary delimitation settlement, making the issue of the U-Shaped Line concerning the application of Articles 74(1)23 and 83(1)24 of the UNCLOS. Covered by Article

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19 Supra note 8.
21 See Philippines’ Submissions 1-2, supra note 8. [Emphasis added]
23 It reads: “The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”
24 It reads: “The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of
such an issue has been precluded from adjudication by the Tribunal due to the 2006 China’s Declaration. As it is legally impossible for the award to address such an issue, non-deletion of the advanced version of the U-Shaped Line cannot be unlawful.

Last but not the least, the Philippines’ Submissions may even aggravate the Sino-Philippine relations in SCS. By asking the Tribunal to review only the (nine) China-occupied maritime features for assessing the *totality* of China’s maritime entitlements in the Area concerned, the Tribunal is requested to indirectly endorse the settlement of the Sino-Philippine territorial disputes in the Kalayaan Islands Group for those maritime features currently *unoccupied but claimed* by China since 1930s. If the Philippines’ premise is taken, the award would probably be seen as (1) *dismissing* China’s territorial claims over those foreign-occupied islands, or (2) *rendering* these territorial claims useless for China to claim EEZ and continental shelf. [Emphasis added] It will be unimaginable for China to accept any award based on such premise. If disputed actions continues after the trial, it will be easily interpreted as China’s defiance of the UNCLOS and international law. Such accusation based on misunderstanding will only block the ultimate peaceful resolution of the SCS territorial and maritime disputes.

Therefore, from legal and policy perspectives, the Tribunal is advised to think twice before making its award.

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25 UNCLOS art. 298(1)(a)(i).

26 *Supra* note 20, at 104-106. [Emphasis added]
Figure 1: Relevant Maritime Features Occupied by the PRC, Taiwan, and the Philippines

Source: Map by Jui-Hsien Huang

27 The Frog-egg like features are occupied by the PRC Government and identified by Submissions 3-7 of the Filipino Memorial.

28 Taiping Island (Itu Aba) is occupied by Taiwan.

Table 1: Distance between 3 biggest Islands and 9 maritime features in the Spratly Islands under Submissions 3-7 of Philippines’ Memorial

<table>
<thead>
<tr>
<th>Categorization Given by the Philippines</th>
<th>Names of the Maritime Features</th>
<th>Location Coordinates(^{30})</th>
<th>Distance(^{31}) from Itu Aba (M) 10°23' N, 114°22' E</th>
<th>Distance(^{31}) from Thitu Island (M) 11°06' N, 114°17' E</th>
<th>Distance(^{31}) from West York Is(M) 11°05' N, 115°02' E</th>
<th>Position in Philippines’ Submission</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low-tide elevation under UNCLOS Article 13</td>
<td>Mischief Reef  美濟礁</td>
<td>9°52'-9°56' N, 115°30'-115°35'E</td>
<td>77-78</td>
<td>114</td>
<td>91-93</td>
<td>4-5, 12, 14</td>
</tr>
<tr>
<td></td>
<td>McKennan Reef  西門礁</td>
<td>9°54' N, 114°28' E</td>
<td>42</td>
<td>91</td>
<td>101</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>Gaven Reef  南熏礁</td>
<td>10°10'-10°13'N, 114°13'-114°15'E</td>
<td>7-9</td>
<td>56-58</td>
<td>75-77</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>Subi Reef  滅碧礁</td>
<td>10°54'-10°56' N, 114°04'-114°07' E</td>
<td>21-22</td>
<td>31-32</td>
<td>63-65</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Second Thomas Shoal 仁愛礁(Ayungin Reef)</td>
<td>9°39'-9°48' N, 115°51'-115°54'E</td>
<td>90-91</td>
<td>125-128</td>
<td>99-104</td>
<td>11, 14</td>
</tr>
<tr>
<td>Rocks under UNCLOS Article 121(3)</td>
<td>Johnson Reef  赤瓜礁</td>
<td>9°42' N, 114°17' E</td>
<td>49</td>
<td>98</td>
<td>110</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Cuarteron Reef  華陽礁</td>
<td>8°51'-8°52'N, 112°50'-112°53'E</td>
<td>143-145</td>
<td>181-182</td>
<td>211-213</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Fiery Cross Reef  永暑礁</td>
<td>9°30'-9°40'N, 112°53'-113°04'E</td>
<td>86-114</td>
<td>120-143</td>
<td>153-181</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Reed Bank  禮樂灘</td>
<td>11°06'-11°55'N, 116°22'-117°20'E</td>
<td>128-193</td>
<td>121-181</td>
<td>71-132</td>
<td>Paras. 6.16-6.22 of the Memorial</td>
</tr>
</tbody>
</table>

Source: Compiled by the author from the National Oceanic and Atmospheric Administration website.


\(^{31}\) The distances are calculated by the Latitude/Longitude Distance Calculator provided by the National Weather Service, National Hurricane Center of National Oceanic and Atmospheric Administration, available at http://www.nhc.noaa.gov/gccalc.shtml (last visited on Oct. 31, 2014).