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Manila, Beijing, and Unclos: A Test Case? マニラ、北京、そしてUNCLOS（国連海洋法条約）　一つのテスト・ケース

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Introduction: International law and the South China Sea

After a long summer replete with tensions and incidents in both the South China[2] and East China Seas, the new year failed to bring renewed hopes for a peaceful resolution to the myriad territorial conflicts casting a shadow on the Asia-Pacific Region. Rather the contrary, renewed incidents, naval rearmament, claims and counterclaims, not always veiled threats to resort to force, and decentralized boycott campaigns and cyberspace clashes. One novelty was the decision by the Philippines to try a new tack in its clash with China, resorting to a tool not previously employed by any of the claimants,[3] namely a request for arbitration under UNCLOS (the United Nations Convention on the Law of the Sea). Although this gambit was rejected by China, and the fate of the case is uncertain at the time of writing, we will examine the legal positions of Manila and Beijing in the context of their wider dispute, and the far-reaching implications of the case.[4]

The request had to take into account China's decision to opt out of UNCLOS arbitration on certain issues pertaining to their conflict, above all the exact delimitation of maritime borders. Although the Philippines' arbitration request did not thus refer to maritime boundaries per se, it is still not completely clear whether the International Tribunal of the Law of the Sea (ITLOS) will accept the case. An arbitration tribunal, made up of five judges, has been convened, but has not yet ruled on whether it has jurisdiction. Of particular interest in light of the ongoing China-Japan territorial conflict over Diaoyutai/Senkakus is the fact that ITLOS is headed by a Japanese judge. Although not a party to the South China Sea dispute, Tokyo has provided a measure of support on maritime issues to Manila and Hanoi in recent years.

Some see the case as a test of whether international law and tribunals such as ITLOS can contribute to peaceful resolution of outstanding territorial disputes in Asia in a time of profound transformation. It is particularly relevant in view of the disparity in size and military potential between the Philippines and China, although the former is supported by other powers.

What exactly is Manila asking for? Bypassing China's derogation.

On 22 January 2013 the Philippine Government informed the Chinese Embassy in Manila that it had submitted an application for arbitration in accordance with UNCLOS.[5] This was rejected by Beijing, whose ambassador to Manila, Ma Keqing, delivered a note verbale on 19 February "stating that China rejects and returns the Philippines' Notification and Statement of Claim".[6]

The first thing to understand about the case is that UNCLOS provides for compulsory arbitration of certain disputes, but it also allows signatories to avoid arbitration by declaring a derogation in certain exceptional cases, that is a decision to opt out of arbitration. China did so, and the Philippines was thus forced to tread carefully when

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drafting its request, to prevent Beijing from resorting to these exceptions, which include the delimitation of maritime borders and military activities. The success of the Filipino case crucially depends on the ability to convince ITLOS that Manila is not seeking a ruling on any question on which UNCLOS allows Beijing to opt out of arbitration and indeed for which China did so. On the other hand, should China later decide to contest the proceedings, her first line of defense would be precisely that an arbitration tribunal lacks the power to issue a ruling on a matter covered by China's derogation.

The above is clear from the wording of Manila's submission, and the accompanying note addressed to the Chinese Embassy, whose first lines state that what the Philippines seeks is to "clearly establish the sovereign rights and jurisdiction of the Philippines over its maritime entitlements in the West Philippine Sea", without any mention of specific maritime borders.[7] In the application itself, Manila refers to the extent of China's EEZ, but does not dispute any specific line or territorial claims. Rather it notes how disproportionate and disconnected from the Law of the Sea Chinese claims are. In Introduction 1., the text says that the Philippines "challenge China's claims to areas of the South China Sea and the underlying seabed as far as 870 nautical miles from the nearest Chinese coast."[8]

Next, in Introduction 2., Manila opens fire on one of the pillars of Beijing's claims to most of the South China Sea, namely the so called "nine-dash line" defining the territory over which it demands "sovereignty" and "sovereign rights". In addition, in Introduction 3., the text states that within the "nine-dash line" China has "laid claim to, occupied and built structures on certain submerged banks, reefs and low tide elevations that do not qualify as islands under the Convention, but are part of the Philippines' continental shelf, or the international seabed", adding in Introduction 5. that, "in June 2012" the "Province of Hainan" set up a "new administrative unit" covering "all of the maritime features and waters within the 'nine dash line'" and later passed a law, which went into force "on 1 January 2013," providing for the "inspection, expulsion or detention of vessels 'illegally' entering the waters claimed by China within this area."[9]



China's territorial claims in the South China Sea (Wikipedia)

This is followed later in the Introduction by a straight demand for an award that, among others, "declares that the Parties' respective rights and obligations in regard to the waters, seabed and maritime features of the South China Sea are governed by UNCLOS, and that China's claims based on its 'nine dash line' are inconsistent with the Convention and therefore invalid."[10] Furthermore, in Introduction 7., Manila stresses that "The Philippines does not seek in this arbitration a determination of

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which party enjoys sovereignty over the islands claimed by both of them. Nor does it request a delimitation of any maritime boundaries. The Philippines is conscious of China's Declaration of 25 August 2006 under Article 298 of UNCLOS, and has avoided raising subjects or making claims that China has, by virtue of that Declaration, excluded itself from arbitral jurisdiction."[11] Actually, the submission itself devotes section 40 to preemptively attack Beijing's reliance on the 25 August 2006 declaration, stating that "the Philippines' claims do not fall within" it "because they do not: concern the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations; involve historic bays or titles within the meaning of the relevant provisions of the Convention; concern military activities or law enforcement activities; or concern matters over which the Security Council is exercising functions assigned to it by the UN Charter."[12]

It is thus clear that the "core" (a term employed by the Department of Foreign Affairs itself[13]) of Manila's case is a demand for a declaration that China's "nine dash line"[14] is not in accordance with UNCLOS. This refers to the concept of the "nine dash line" itself, and to the construction of facilities and declaration of territorial seas / EEZ around islets not considered islands under UNCLOS, which Manila claims are either inside her EEZ or in the high seas (without seeking, as already explained, a delimitation of either, or of China's own EEZ).[15]

Thus, the gist of the submission is two-fold: to seek to exclude the concept of a "nine-dash line" from the law of the sea, as not falling into any of the categories (such as territorial sea or EEZ) recognized by UNCLOS and by the customary law of the sea (which to a large extent UNCLOS codifies), and to try to prevent Beijing's de facto control of submerged features and islets (and the erection of artificial structures on them) from giving rise to accepted claims to territorial seas and EEZs. This dual response corresponds to Beijing's two-pronged strategy, namely trying to impose a new legal concept and, should that fail, relying on a combination of physical control over islets and existing legal categories (territorial sea and EEZ) to achieve the same purpose. In China's case, though, achieving her ultimate target through this fallback strategy would also require forcing a reinterpretation of the concept of an EEZ so that the rights of coastal states were expanded, including first and foremost the exclusion of military and intelligence-gathering activities by other countries.

The submission refers to these submerged features when it states that "Even before its first official espousal of the 'nine dash line' China began to seize physical control of a number of submerged features and protruding rocks ... and to construct artificial 'islands' on top of them", adding that they include "Mischief Reef, McKennan Reef, Gaven Reef and Subi Reef" and that none of them "is an island under Article 121 of UNCLOS" but "at best low tide elevations, far removed from China's territorial sea, exclusive economic zone and continental shelf". The text also argues that "Because they are not above water at high tide, they are part of another State's continental shelf, or the international seabed" and claims that China acted "unlawfully" by seizing them and declaring "maritime zones around them."[16]

The text furthermore refers to "six small rocks that protrude above sea level within the Philippines' exclusive economic zone", namely "Scarborough Shoal", which China "seized" in 2012, claiming "a maritime zone for itself" extending to "approximately 70 M to the East", in accordance with the "nine dash line."[17] It is important to note that the submission explains that both China and the Philippines "assert sovereignty" over Scarborough Shoal but does not ask for a ruling on this matter. Instead, it stresses that, disregarding who should exercise

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sovereignty, "None of the rocks, which lie in close proximity to one another, generates entitlement to more than a 12 M territorial sea."[18] Once more, Manila seeks to bypass questions on the territorial extent of sovereignty, concentrating instead on its consequences according to UNCLOS.

Whatever the merits of the Filipino case, no one, and certainly not Manila or ITLOS can force Beijing to participate in the proceedings, make submissions, designate an arbitrator, and agree on the other three judges. However, there are two things that Manila can do. First of all, it could hope to get ITLOS to issue a ruling with Beijing absent. If the tribunal refused to do so, then it could at least try to portray China in a bad light, as a country not fully sure of the merits of its own case and reliant on might rather than right.

This was explained in some detail by Romel R. Bagares,[19] an international law professor at Lyceum Philippines University College of Law, who wrote that "unless the parties agreed to the contrary, the default mode for question of interpretation and application of the UNCLOS or relevant treaties is an arbitration under ANNEX VII" but in signing up to UNCLOS, states can "opt out of these compulsory procedures under the so-called Art. 298 exceptions, which, among other things, pertain to 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 as well as sea boundary delimitations, or those involving historic bays or titles". Bagares also explained that China had done so "in a formal declaration on August 25, 2006".

For these reasons, as discussed above, the Philippines was extremely careful when drafting its request for arbitration, in a bid to bypass this Chinese derogation. Manila wanted to make clear that its request covered only areas not included in Beijing's reservation, made under Art. 298 of UNCLOS, and that it was not asking for a ruling on those other areas.

This was also explained by another Filipino law professor, Dr Harry Roque,[20] who noted that, "Our submission of claims is crafted in a manner that will exclude all of China's reservations. For instance, the submission asked the tribunal to rule on the validity of the controversial 'nine-dash line,' since it does not constitute either China's internal waters, territorial sea, or exclusive economic zone. This asks the tribunal to rule, as an issue of interpretation of UNCLOS, whether the nine-dash lines complies with the Convention. Likewise, China has built permanent structures on reefs such as Mischief and Subi, which are permanently under water. The submission asks that the tribunal declare that since these are neither "rocks" nor "islands," they should be declared as forming part of our country's continental shelf, or the natural prolongation of our land mass".

China Says "No". Is a Ruling Still Possible?

As expected, China refused to submit to arbitration. It was no surprise on two accounts: Beijing's traditional hostility to international arbitration or submission to any kind of tribunal,[21] and the repeated warnings over the previous few months to Manila not to initiate such proceedings. On receiving China's response, the Philippines stated that, "China's action will not interfere with the process of Arbitration initiated by the Philippines on 22 January 2013. The Arbitration will proceed under Annex VII of UNCLOS and the 5-member arbitration panel will be formed with or without China."[22]

This begs the question of whether China's refusal is in itself in accordance with international law. The starting point must be

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the twin concepts of sovereignty and consent. The pillar of international law, sovereignty, basically means that states do not recognize any superior. Although qualified by concepts such as collective security, this remains very much the foundation of international law and the international system. From this comes the fact that states are only bound by those rules and decisions to which they consent. In the case of customary international law, it is the practice of states plus their belief in its compulsory nature, which provides the necessary consent. In the case of treaties, consent is provided through signature and ratification of conventions. Concerning arbitration, parties must voluntarily submit to the proceedings.

Has then China provided her consent? With regard to the applicable law, UNCLOS, we have noted that Beijing is a signatory, albeit with some reservations provided for in the text of the Convention itself. Therefore, with those exceptions, there is indeed consent as to the material aspects of the dispute.

Concerning arbitration, Beijing has rejected it. Or has she? It is true that, even before Manila filed suit, China had made clear that it would not accept arbitration. However, in international law (just as in domestic law) there are two ways to consent to arbitration. First, the parties to a dispute may agree to it once the dispute emerges and they are unable to reach a solution through other means. Second, they may agree in advance of any such dispute. This is what the Philippines believes China did when ratifying UNCLOS, as explained in the submission, which claims that since "The Philippines and China are both parties to UNCLOS … it follows that both parties have given their advance consent to the regime of settlement of disputes concerning the interpretation and application of the Convention established in part XV."[23] This is a view that Beijing has not squarely addressed. As we shall see later, China has rather resorted to insisting on its preference for bilateral negotiations and its interpretation of the 2000 Declaration on the Conduct of Parties in the South China Sea (DOC). However, China has not put forward any explanation as to how its advance consent contained in joining UNCLOS would not apply to it.

Thus, as provided for in Art. 3(b) of ANNEX VII UNCLOS, Manila appointed an arbitrator, Judge Rüdiger Wolfrum,[24][25] and expected Beijing to do likewise, with three others to be chosen by agreement between the parties. However, on 31 January, a spokesman for China's Foreign Ministry, Hong Lei, announced that Beijing had rejected Manila's request for international arbitration, adding that it was contrary to the "ASEAN consensus for bilateral negotiations", a reference to the 2000 Declaration on the Conduct of Parties in the South China Sea (DOC).[26]

With regard to the 2000 Declaration, however, Professor Bagares believes that it "actually allows resort to UNCLOS mechanisms, as is stated for instance in DOC principles 1, 3 and 4."[27]

Going beyond the impact of the ASEAN Declaration, the question that immediately emerged, following Beijing's formal refusal to take part in arbitration proceedings, was whether the case could move forward and an arbitration tribunal be convened anyway. The possibility that a party refuses to take part in a case is actually considered in the Convention itself, with Article 9 of Annex VII (Arbitration) UNCLOS reading "If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award … Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law."[28] That is, the Philippines could ask ITLOS to move forward,

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rule that it has jurisdiction over the case, and appoint the members of the ad hoc arbitration tribunal that will hear it. This would not, of course, assure that the tribunal would rule in accordance with the Filipino demands, since its members would have to ascertain the facts and applicable law, even without the benefit of Chinese submissions.

As Professor Bagares noted, this is Manila's position. The submission argues that "As the Philippines and China have failed to settle the dispute between them by peaceful means of their own choice, Article 281(1) allows recourse to the procedures provided for in Part XV, including compulsory procedures entailing binding decisions under Section 2 of Part XV", while "Article 286 allows these compulsory procedures to be initiated by any State Party in the court or tribunal having jurisdiction under Section 2". Who can choose which path to follow? The submission says that any party can initiate procedures, and that this includes "recourse to an arbitral tribunal under Annex VII of the Convention". This is the case unless the other party has made a declaration "pursuant to Article 287(1)", something that "neither the Philippines nor China" has done. The text also notes that "no agreement to the contrary currently exists" and that therefore there is no bar to arbitration proceedings.[29] We have already noted that Beijing holds, to the contrary, that such an agreement is contained in the 2000 Declaration on the Conduct of Parties in the South China Sea (DOC), a view that Manila rejects.

Some have suggested that Beijing's refusal to take part in the proceedings makes the case futile from a legal point of view, while conceding that it may play a political role in the conflict over the South China Sea. This is the view of Professor Myron Nordquist, of the Center for Oceans Law and Policy at the University of Virginia, who labeled the situation "quite bizarre", while conceding that Manila's move had accomplished "one of its purposes", namely "to bring attention to this and politically to give the Filipino government the argument that 'Hey, we tried to solve this peacefully and you wouldn't play'". His overall assessment of the case is that it is "not entirely futile", while warning that "it is doomed to failure because if the party won't consent to the arbitration there is then no enforcement". He adds, "how would they expect a country that didn't want to have a dispute settled by third parties to feel in any sense bound by a decision where they didn't even participate."[30]

Not everybody agrees with labels such as "bizarre" and "futile", however, as is clear in the response to Professor Nordquist by Julian Ku in the *Opinio Juris* blog. Ku agrees "that the situation is odd" but adds that "it is not unprecedented", stressing that "The Annex VII provisions clearly contemplate situations where one party refuses to appoint an arbitrator by giving the power to the President of ITLOS to appoint the rest of the tribunal. Moreover, general international arbitral practice is to allow arbitrations to proceed even when one party (like China) boycotts the whole proceeding". Concerning the role of a tribunal in such cases, Ku explains that the "tribunal typically continues to give notice to the boycotting party, and will reach a reasoned award based on its own assessment of the law and facts. It does not typically simply accept the participating party's submissions as true."[31]

Ku also questions Professor Nordquist's conclusion that the case is "doomed to failure because if the party won't consent to the arbitration there is then no enforcement", arguing that "China has already consented to Annex VII arbitration, at least with respect to allowing a tribunal to be constituted and to determine whether it has jurisdiction in a dispute. China consented when it acceded to UNCLOS. All China has done so far is refuse to appoint an arbitrator", adding that "as any private international commercial arbitrator could tell you, consent to an arbitration does

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not in any way guarantee enforcement". He concludes that, "if China had participated in the arbitration by appointing an arbitrator, I don't think it would have affected its likelihood of complying with any arbitral award. UNCLOS does not have any sanctions regime akin to, say the Dispute Settlement Understanding of the WTO, so China would not face any formal sanctions if it failed to comply with an arbitral award."[32]

As a result, Ku believes that the decision by Manila to continue with the case "is not really any more futile than if China had fully participated", since in either situation "China would likely not have complied with any unfavorable award." [33]

Concerning how likely ITLOS was to appoint an arbitration tribunal without Chinese participation, Professor Bagares noted that "available precedents – there are only seven such arbitrations conducted under ANNEX VII since the UNCLOS took effect in 1994 – seem to tell the Philippines it has little cause to worry as far as jurisdictional grounds are concerned."[34] This optimistic view was shared by Ku, who in another post wrote that, "the few Annex VII arbitral tribunals that have been constituted have generally not hesitated to rule on their own jurisdiction… Even worse from China's perspective, these Annex VII arbitral tribunals issued their jurisdictional decision at the same time as they issued the award on the merits."[35]

These views seem to be prevailing, since ITLOS went forward and assembled a five-member panel to hear the case. In addition to the member nominated by the Philippines, Germany's Judge Rudiger Wolfrum, the Tribunal's president, appointed the following Judges: "Jean-Pierre Cot (France) and Alfred Soons (the Netherlands) in April and Stanislaw Pawlak (Poland) in March", together with "Thomas Mensah of Ghana". The latter "replaced Judge Chris Pinto of Sri Lanka, who resigned from the arbitration panel in May shortly after his appointment because his wife is Filipino." [36] Mensah will preside over the arbitral tribunal.[37] Pawlak was appointed as China's representative, albeit by ITLOS President Shunji Yanai, not Beijing.[38] A press release by the International Tribunal on the Law of the Sea informed that "Further to consultations by correspondence with the parties on the matter, Mr Thomas Mensah has been appointed to serve as member and president of the arbitral tribunal".[39]

According to Raul Hernandez, spokesman for the Philippine Foreign Affairs Department (FAD), "The five-member arbitral tribunal will now organize itself and establish its own rules and regulations."[40] In addition, the tribunal will have to determine whether it has jurisdiction to hear the case. The case will only move forward after it has determined "that the complaint filed by the Philippines has legal merit and falls under its jurisdiction". On 11 July the tribunal met for the first time and according to the FAD "designated The Hague in the Netherlands as the seat of the arbitration and the Permanent Court of Arbitration as the Registry for the proceedings."[41] Thus, while the proceedings are moving forward, the key decision, that is whether the arbitration tribunal has jurisdiction, still has not been taken by the five judges.

The Reasons Behind Beijing's No.

As mentioned earlier, even before Manila initiated proceedings, Beijing had already warned the Philippines not to do so. Beijing also warned the Philippines not to discuss the problem with other countries or raise it in international fora, but Manila has pursued these three venues.[42]

On receiving the Filipino submission, Beijing rejected it, and this was accompanied by some statements by officials to the media. On 19 February, Chinese Spokesperson Hong Lei was

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asked to confirm whether "China has returned the Philippines' Notification on the submission of South China Sea issue to international Arbitration". In his reply he summed up Beijing's position, stating that "China's sovereignty over the Nansha Islands and their adjacent waters is supported by abundant historical and legal evidence", adding that "bearing in mind the larger interest of China-Philippines relations and regional peace and stability" Beijing had "remained committed to ... bilateral negotiations". Hong stressed that resort to negotiations was not just Beijing's approach but also "the consensus between China and ASEAN countries as stipulated in the Declaration on the Conduct of Parties in the South China Sea (DOC)". He stated that Manila's request for arbitration "runs counter to the consensus" and "contains many grave errors both in fact and in law, and includes many false accusations against China."[43] The idea that the DOC prevents the resort to arbitration had already been put forward by Foreign Minister Yang Jiechi at the July 2012 ASEAN Regional Forum Foreign Ministers Meeting, where he said that, "What is essential is that all parties exercise self-restraint in keeping with the spirit of the DOC, and refrain from taking moves that will escalate and complicate the disputes and affect peace and stability", adding that "the Convention has not given itself the authority to change the territory of countries and that it cannot be cited as the basis for arbitration in territorial disputes between countries."[44]

The tone of Hong's remarks was rather condescending, saying that the Filipino submission contained mistakes but not deigning to list them. Furthermore, he claimed that the Philippines had been given "word, not to take any action that magnifies and complicates the issue", in a thinly disguised reference to its internationalization. The spokesman hoped that the Philippines would revert "to the right track of settling the disputes through bilateral negotiations." [45] At another media conference the day after, Hong, when asked again about the issue, once more insisted that "Both the Philippines and China are signatories to the Declaration on the Conduct of Parties in South China Sea (DOC) and have made commitments on comprehensive and earnest implementation of the DOC", adding that "We disapprove of the Philippine Foreign Ministry's practice of bringing international arbitration and have made clear our opposition stance."[46] From 2010 Hong has served as "Deputy Director General, Department of Information, Ministry of Foreign Affairs (MFA)."[47]

Although some sources described Manila's submission as a "surprise move,"[48] and the timing may indeed have been so, it seems clear that China was at least aware of the possibility that this might happen. This would have given Beijing at least a few months to ponder a response. From the public statements by senior Chinese officials following the submission, however, we cannot see any great difference with Beijing's traditional stance on international arbitration, or more widely international relations. We can note, though, a lack of an immediate reaction by the regime's press, which took a few days to respond.[49] Basically, what Beijing is saying, confirming a decades-long policy, is that border disputes should be dealt with in bilateral talks, not multilateral fora or international courts or arbitration tribunals. This stands in contrast with Manila's description of arbitration as "a friendly, peaceful and durable form of dispute settlement that should be welcomed by all."[50] Accepting arbitration in this case may set a precedent[51] for the remaining territorial conflicts besetting China. In the past decades Beijing has settled some, while others remain open.

What are the ultimate reasons behind Beijing's reluctance to submit to arbitration? First, we may note that as a historically great country, the leading power in East Asia, China is

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reluctant to accept the possibility that foreigners may decide the fate of her borders. Her experience in the nineteenth and twentieth Century, when she was often subject to the hostile actions of other powers only reinforced this. Second, China has never fully accepted some key aspects of international law, as is clear from the persistence of the “nine dash line” concept or the insistence on keeping foreign warships away from her Exclusive Economic Zone (EEZ). Third, although it is impossible to predict what ITLOS will decide if an award is finally stipulated, it is rather unlikely that the result would strongly support China’s position. Even if only partially favoring the Philippines, an award could seriously undercut China’s ambitions in the South China Sea.

Concerning international law, which is to a large extent a creation of Western countries, and significantly the United States after the Second World War, we can note first of all that any rising power is likely to want to at least influence its future development. This may even include fundamental changes to some of its basic tenets. Thus, Japan tried to get a "racial equality clause" included in the Versailles Treaty, while the Soviet Union pressed for the concept of a "closed sea" for years. It comes as no surprise that China, which for centuries enjoyed substantial power in regulating relations with her neighbors on the basis of a tributary-trade system, may wish to shape the international legal arena. For the first time in a century and a half, Beijing is not just an object of international law, but also a player and potentially a shaper.

On the other hand, persisting in its refusal to accept arbitration could cast a shadow over China’s soft power, undermining the attempt to portray itself as a “peacefully emergent” power, in contrast with Western imperial powers. Thus, while China is hardly the only country ready to use force, and actually using it in East Asia, the recent succession of incidents coupled with the refusal to entertain arbitration may run counter to the narrative of Beijing as a "different" emerging power, one resorting to politics, economics and culture as the tools of statecraft. The damage to Chinese prestige would be lessened if the number of incidents involving other claimants to the South China Sea increased. An example could be the recent death of a Taiwanese fisherman at the hands of the Philippine Island's Coastguard. The incident prompted Chinese General Luo Yuan to say that "Opening fire on a Taiwanese fishing boat is not only a provocation to Taiwan, but to the entire Chinese family", adding that Beijing should aid Taiwan if the Philippines did not apologize. He suggested coordination between Taiwan's and China's coastguards, military exchanges, and a "cooperation" agreement between fishermen associations on both sides of the Taiwan Strait.[52] Taipei, however, did not take the bait, and after imposing some harsh sanctions, later agreed to compensation, an apology, two parallel investigations (with mutual aid), the opening of criminal proceedings, and most significantly the launch of negotiations on a fisheries agreement. The goal would be to conclude a deal similar to that with Tokyo, whereby sovereignty is left for future discussion while the parties set up fishing zones and implement other confidence-building and coordination measures to prevent incidents. At the time of writing the sanctions have been withdrawn and the fisheries talks are proceeding.

More generally, if Beijing managed to combine her military might with Taiwan's soft power, its ability to more effectively influence events would grow. This is more easily said than done, however, due to Taiwan's complex internal dynamics and attempts to raise its international profile while improving relations with China. Taiwanese politics and foreign policy defy simplistic labels. It was an allegedly pro-Chinese president who signed a fisheries agreement with Japan, while many allegedly

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pro-independence politicians were quick to condemn the Philippines following the death of fisherman Hung Shih-cheng.

For China to make a U-turn and submit a territorial conflict to arbitration would be a surprising decision. A compromise solution involving a stay of the proceedings may be a more realistic possibility, but if Beijing believes that time works in her favor, this would be unlikely. Such a feeling may rest on a perception that China's naval power is growing, not just in absolute but in relative terms compared with her neighbors and the US. It is difficult to judge whether this is the case. On the one hand, China is clearly accelerating the expansion of its naval power, but so are countries like Japan and India, not to mention Vietnam. Even the Philippines, traditionally considered to have a very weak navy, has announced plans to upgrade it, and is receiving military aid from both the US and Japan. Manila has recently received a second Hamilton-class cutter from the US, the BRP Ramon Alcaraz, which reached Subic Bay on 4 August[53], whereas Japanese Prime Minister Abe Shinzo, in his latest trip to the Philippines, confirmed that Tokyo would be providing 10 smaller craft to the country's Coastguard.[54]

Another contributing factor may be the possibility that Washington, having paid heavily for the wars in Afghanistan and Iraq, is losing the economic strength and the political will to intervene in Asia. Conversely, many analysts, running in the opposite direction, have begun to highlight China's potential economic and financial weaknesses which may slow down her high growth rates, and the moral and naval rearmament that countries such as Japan, Vietnam, and the Philippines are conducting. A key variable may be the degree of coordination among the maritime democracies (and Vietnam), and we also have to bear in mind Russia's role.

Beijing will assess all these myriad contradictory reasons in deciding whether to keep upping the ante in terms of military pressure, or whether it may be wiser to negotiate from a position of strength.

The Japanese Connection: Justice Yanai Shunji. Another noteworthy aspect of the arbitration case is the fact that the ITLOS is currently headed by Yanai Shunji, a Japanese jurist and former diplomat. He is a good example of one of the aspects of Tokyo's post-occupation engagement with international institutions, namely the ascent to significant positions of a number of Japanese officials. Of course, as a judge Yanai's duty is to disregard his own nationality, but we cannot avoid briefly noting that Japan is one of the countries involved in a territorial dispute with Beijing. The fate of maritime disputes in the Asia-Pacific goes straight to the heart of Japan's national interests, a fact compounded by UNCLOS' regulations that link possession of tiny islands to vast rights to the surrounding seas. Furthermore, two different strands of Japanese opinion will be following the case. On the one hand, those Japanese voices keen to emphasize cooperation and the rule of law as the foundation of peace and conflict resolution. On the other, those more hawkish realists who would like to draw a line in the sand. Thus, a critical mass of Japanese as well as Chinese observers and decision makers will be closely watching the arbitration case.



Yanai Shunji

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Because of all this, should Yanai decide to press for a continuation of the case despite Beijing's absence, China might react by attacking him on the basis of his nationality, and, all the more so, when and if a final ruling is released, should it go against Chinese interests.

From substance to procedure: the impact of Beijing's refusal to submit to arbitration.

The first thing we need to remember is that, as many observers warn, the ITLOS may take years to issue a ruling[55] or even to decide whether it has the power to do so. What could be the impact of the proceedings during this long wait? The following have been pointed out[56]:

- Strong opposition from China, beginning with her "indignant response" to the original request.
- Strained Sino-Filipino relationship.
- Greater obstacles to the conclusion by ASEAN and China of a binding Code of Conduct on the South China Sea.

In addition, we should note that China's rejection of the proceedings was a possibility that was likely already anticipated by the Philippines. However, Manila could still benefit from China's decision not to participate in arbitration. First, because it puts China on the defensive and makes her look less than fully confident in the strength of her case. Second, since as already discussed, ITLOS may still be entitled to issue a ruling.

On the other hand, some Chinese voices are warning of the impact on bilateral relations during the proceedings. Ruan Zongze, vice president of the China Institute of International Studies (CIIS), an institution under the Chinese Foreign Affairs Ministry, during an official tour of Southeast Asia, said: "We can anticipate a difficult period of time in the next four years" because of the arbitration. He cautioned that economic relations would not be immune to the case, warning that the arbitration proceedings "will certainly not be conducive to bring back Chinese visitors or delegations". Reiterating that China would not take part in any international arbitration proceedings, he encouraged Manila to engage Beijing bilaterally, adding that arbitration would "escalate" regional tensions.[57]

Why did the Philippines Choose to Act Now? Does Time Favor Beijing or Manila?

What prompted Manila to initiate arbitration in January 2013? Ian Storey noted the following factors[58]:

- Futility of past attempts at negotiation.
- "Developments in the South China Sea last year", first and foremost the takeover of Scarborough Shoal in April and May and Beijing's notification to the Filipino authorities that it was "permanent".
- ASEAN's lukewarm reaction to Philippine attempts to discuss the issues at the organization's summit in July, when then chair Cambodia refused to include the discussions of the issue in the final communiqué, arguing that it was a bilateral matter. As a result, for the first time in 45 years, the summit ended without any communiqué being released.[59]
- The issuing by Hainan Provincial Government, in November 2012, of "regulations allowing for the boarding, detention and expulsion of foreign vessels within its jurisdiction". This legislation, which came into force on 1 January 2013, aroused anxiety across the region.

We could also add that it may have seemed the right moment to try to put the spotlight on the conflict at a time when the Philippines was hoping to win greater diplomatic and military

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support from Washington and Tokyo. Although the US officially takes no position in the territorial dispute itself, it is clear that it cannot allow China to attain mastery of the South China Sea any more than she could look the other way while Germany tried to become the master of the Atlantic. This is simply a geopolitical imperative, bearing no connection to the nature of the power. In recent years American military assistance to the Philippines has increased, in the form among others of hardware provision and increased rotational deployments. With regard to Tokyo, she is currently finalizing the details on the provision of some 10 patrol boats to the Philippines,[60] while also supporting Vietnam in her territorial conflict with China.[61]

Manila may have felt that a clear move could strengthen her case in the eyes of other maritime nations in the Asia-Pacific. Domestic opinion may also be an issue, with the government attuned to the growing number of Filipinos calling for rejection of Beijing's demands.

With regard to whether time favors Beijing or Manila, we have already discussed the ways in which Chinese capabilities relative to other littoral states and the United States may increase or decrease in the coming years. If we set aside military capabilities and economic strength, and look at morale and the willingness to employ force in the territorial disputes with China, Beijing may perhaps have already lost its best chance. It seems that a number of countries, and not just those like Vietnam or the US, with a strong military tradition, may be increasingly ready to contemplate the use of force. Limited force, since we should not forget that Beijing is after all a nuclear power. In the case of the Philippines, this may be facilitated by the ceasefire between the government and the Muslim rebels, which if consolidated may allow the military to gradually redirect its resources and training towards maritime conflicts, instead of counterinsurgency. It is too early to be sure whether this will become a reality, though. Concerning Japan, the country has taken modest but relentless steps towards her "normalization" as a military power over the last decades, but powerful domestic constituencies remain reluctant to foreign entanglements and suspicious of the employment of force. In addition, large question marks continue to hover over her economy and demography. In a sense, for China the problem may be that naval rearmament has not kept pace with her increasingly robust rhetoric and, having alerted her neighbors and other powers, it becomes more difficult to achieve clear superiority at sea and in the air. Perhaps Beijing forgot Bismarck's dictum not to fight a two-front war, or, more generally, not to run the risk of a crisis on two fronts. This may be even more of a problem if her neighbors coordinate their efforts. However, despite some clear intentions to do so, this is far from easy. On the one hand, no one really wants to provoke Beijing. On the other hand, many countries, for example most ASEAN member states, are rather reluctant to openly challenge China, whose power they contemplate with a healthy dose of respect. This may explain, for example, the cautious and often muted response to news of Manila's arbitration request. .

Just a final note in this section, concerning two recent developments that may have an impact on Chinese policy towards the South China Sea, or more widely the settlement of maritime disputes. First of all, the decision by Beijing to consolidate most of her existing maritime security agencies under the aegis of the "State Oceanic Administration". This may facilitate command and control and help avoid unintended escalations.[62] Second, China's successful bid for permanent observer status in the Arctic Council saw Beijing "repudiate" her earlier position "that no state had sovereignty in the Arctic, a clear slap at Russian claims" and "state that it respected the sovereignty of

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all the states claiming territory in the Arctic but accept that the decision will be made in the future—a sharp contrast to its rigid insistence on its "core interests" and sovereignty in the Senkakus and the South China Sea".[63] The latter is a reminder that China can still be, and sometimes is, pragmatic and flexible. This is clearly the case in the Arctic, an area rich in natural resources and significant in terms of future trade routes.

The Philippines and World Public Opinion: Is Manila Playing the Right Cards?

Manila has made it clear that it intends to push for a ruling in absentia, and explains why UNCLOS provides the basis for such a ruling since the Convention does not grant parties to a dispute the possibility of blocking the proceedings by refusing to appoint arbitrators.

However, some Filipino voices are openly admitting that a hypothetical arbitration award in the country's favor would not be de facto enforceable, and that its value would basically lie in providing moral support for Manila in its quest to win over public opinion abroad. On 18 May, Supreme Court Associate Justice Antonio Carpio said that whatever the outcome of the arbitration case, Manila's only recourse against Beijing would be to "appeal to world opinion". At a commencement speech at the Pamatasan ng Lungsod ng Maynila, he explained that if the ruling went against the Philippines, China would be able to enforce it thanks to her naval strength. On the other hand, if Manila won, since UNCLOS does not provide any enforcement mechanism, the Filipino Government would have to ask the UN Security Council to implement the decision. However, this would be subject to a veto by any of the five permanent members, one of them China. Carpio made it clear that Beijing "will naturally veto any enforcement measure against itself."[64] Carpio was nevertheless optimistic, saying that, "With a favorable decision from the arbitral tribunal, and world opinion also in our favor, time will be on the side of the Philippines."[65]

Regardless of the outcome of this submission, it is clear that Manila is hoping to seize the initiative in the court of public opinion, pushing China into a corner and presenting itself as the reasonable party in favor of the rule of law and negotiated settlement, as opposed to Beijing's alleged reliance on pure military might. Beijing's position is that on historical grounds most of the South China Sea "belongs" to China, with "belongs" in brackets because it is still not clear whether this fits with notions such as territorial waters and EEZs or we are talking about a new legal category, and that negotiations should be undertaken on a bilateral basis and excluding non-littoral states. The insistence on bilateral dealings is tempered by an acceptance of negotiations with ASEAN. Beijing's critics also stress the gradual emergence of a number of features including a complex mixture of fishing vessels and quasi-military agencies. On the other hand, China sees the presence of these recently consolidated agencies in those waters as a logical extension of her territorial claims, and regards as defensive the operations that other countries may judge offensive.

Speaking to the press, Defense Secretary Voltaire Gazmin said that "E di mas maganda para sa atin pag hindi sila mag-participate (It would be favorable for us if they [China] do not participate)", adding that "Well, the natural reaction [would be to ask] … why they don't want to face the tribunal."[66] While Manila tries to portray Beijing as a bully, ready to use might regardless of right, China attempts to appear as a reasonable power trying to reach a reasonable solution to the different disputes through bilateral negotiations. Furthermore, Beijing seeks to present Manila's actions as running counter to the gradually developing understanding with ASEAN, exemplified by the DOC. Also, Beijing often seeks to portray the Philippines as an obstacle to better relations with Washington.

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For the Filipino strategy to work, though, the Philippines will have to construe and relay a narrative able to displace the powerful public relations machinery of the PRC, and not everyone believes they are achieving the goal. In the same piece by Julian Ku quoted earlier, he says that "For this to work, though, the Philippines has got to try to educate the global media more effectively", adding that "Headlines from USA Today, for instance, describing China as rejecting 'UN Mediation' only make things murkier for them. China is going to play the 'we-just-want-to-negotiate-unlike-you-troublesome-Filipinos' card. The Philippines needs to play the 'we-are-just-asking-for-the-arbitration-that-you-consented-to' card."[67] We could thus be witness to a harsh and long battle in the world press and social media, with each side trying to appear as the reasonable one while painting the other as not only the aggressor but a threat to global peace and stability.

Concerning the possibility of the Philippines shaming Beijing into becoming more flexible, Ku is skeptical, noting that "domestic public opinion in China leans in the opposite direction". We should note here that the different countries in the region have fanning the flames of their own public opinions. We should also note that this is a complex, bidirectional process, even more so with the advent of the Internet and the social media. On the one hand we can see Beijing and other governments and political leaders covering themselves in the mantle of nationalism. In the other, though, we can also see citizens and private organizations pushing their own governments to be more assertive vis-à-vis their neighbors. In democracies, parties and politicians will inevitably be forced to at least partially acknowledge and take up such demands. Even in authoritarian systems, however, as in China and Vietnam, no ruler can afford to completely ignore public opinion. Thus, as a result of these dynamics, to an extent future Asian and world leaders may find it extremely difficult to make the kind of concessions necessary to secure lasting peace in the Pacific. Could a future Chinese administration renounce the nine-dash line? Similarly we may ask ourselves whether a Filipino administration may survive a gesture seen as appeasing Beijing.

To this we must add the risk that, faced with an internal crisis, the Chinese Communists may react like the Argentine Junta in 1982, in an attempt to rally domestic public opinion behind a cause transcending ideological, regional and social divisions. Telling their own population that the South China Sea belongs to them may help the regime in the short term, but could lead to protests if it is unable to deliver. In his unofficial history of the Falklands War, Hugh Bicheno explains how territorial conflicts may be useful to "distract the masses", but "it creates an issue others will exploit to question the Nationalist credentials of whoever is refraining from recovering the lost lands."[68] The growing signs of economic deceleration may tempt some Chinese leaders. On the other hand, though, they may also have the opposite effect, leading them to temporarily moderate their public statements for fear of not being able to live up to the expectations raised.

The Philippines are not alone in seeking to communicate more effectively their position to other governments and public opinion, countering Chinese statements. Sources in the Abe Administration have also expressed an awareness of the need to devote more efforts towards this goal.

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Prime Minister Abe (left) and President Acquino in Manila, July, 2013

An In Absentia Ruling: A Step Forward for the Rule of Law or Counterproductively Pushing China into a Corner?

We must bear in mind the fact that a judgment in absentia, that is without Beijing appearing before the tribunal, could be counter-productive. This was the case in the 30s when, pushed into a corner by the Lytton Report, critical of its policy in Manchuria, Japan chose to withdraw from the League of Nations. Yanai may thus be reluctant to push China into a corner, for fear of seeing Beijing withdraw from the international institutions and normative regimes from which it was long excluded by a combination of US and Allied policy and the country's isolationist policies under Mao, and which she has gradually joined over the last few decades. The normalization of US-China relations under Nixon, and the later gradual opening up of the country to the world, rank among the most significant developments of the last third of the twentieth century. Thus any person in a position of responsibility is sure to think more than twice before doing anything that may threaten them.

This may be one of the reasons why some scholars have tried to find a way to make UNCLOS and China's claims compatible, so that the former may perhaps bend and not break, and the latter may feel that she can regain at least part of her historical status without the need to openly confront Western-inspired international law. Thus, while in the above mentioned address, Justice Antonio Carpio said that "scholars of the law of the sea all over the world" considered China's 9-dash line as "without basis in international law,"[69] in an article for NAPSNET Policy Forum Mark Valencia (currently a visiting senior scholar at the National Institute for South China Sea Studies, Haikou, China) tried to find a way out of this conundrum. He suggested China issue a statement clarifying her position concerning the South China Sea, and provided a draft. The text put forward tries to place Beijing's claim to most of the South China Sea within the framework of UNCLOS. Valencia explains that the convention "does not define historic title, historic rights or historic waters" and tries to assuage seafaring nations' fears by stating that "China's claim of historic rights is distinct from the concept of historic waters in that the latter is commonly considered to imply a regime of internal waters that does not permit freedom of navigation and over flight. China has not and will not impede the freedom of navigation for commercial and normal peaceful purposes" This is followed by some criticism of the United States for, among others, not ratifying UNCLOS while pushing China to comply with it. Valencia also explains that Beijing does not see Washington as "neutral", one of the reasons being that while "The U.S. also insists that China negotiate these issues multilaterally with a bloc of claimants and non-claimants. China believes that settlement of the disputes should be negotiated by 'sovereign states directly concerned' as stipulated in the 2002 ASEAN-China agreed Declaration of Conduct in the South China Sea (DoC) and that non-regional parties should not be involved."[70]

Valencia seems to favor a solution involving a reinterpretation of international law to take into account China's status. He writes that, "Of

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course the legal purists who think international law is absolute and unchanging and are wedded to the status quo –which favors Western powers—will criticize this position. But the reality is that 'international law is the arms of geopolitics' and its evolution and interpretation will be influenced by rising nations –just as they have been influenced by today's 'global leaders'."[71]

It is positive to see leading scholars trying to bridge the gap between China and other countries. However, Valencia's depiction of UNCLOS as Western-oriented drew some fire, with Vietnam's Tuan Pham (an associate professor at the University of New South Wales) commenting in the forum that "The UNCLOS gained wide acceptance not because it favors Western powers, but because countries large and small all over the world, including all countries around the South China Sea, have subscribed to it, a major exception being the predominant western power, the USA. Non-western powers and smaller maritime countries in particular approved of the UNCLOS and associated international legal mechanisms because they give them protection against big powers, western and others." Pham also explains that "China's 'historical rights' claim are tenuous and one-sided at best (Malay and Indonesians cruised the SCS and Indian ocean long before the Chinese ventured far from their shores)" and warns that "legitimizing these rights would open a Pandora's box of conflicting historical claims all over the world, as perceived national boundaries have fluctuated and overlapped in the seas even more than on land."[72]

In his reply, Valencia argued that, "UNCLOS is not the only law applicable to claims in the South China Sea. General international law was developed mainly by Western colonial powers and favors their interests", adding that "It is true that legitimizing historical claims would open a Pandora's jar – just as the U.S. did by its unilateral Truman Proclamation of 1945."[73] Pham, however, disagreed on historical rights, and offered an alternative way out, saying that "It is not true that historical rights (beyond territorial waters) have been ignored by the UNCLOS and that countries are therefore entitled to make new interpretations about them. Article 62 of the UNCLOS specifically refers to the duty of coastal states to 'minimize economic dislocation in States whose nationals have habitually fished in the [exclusive economic] zone'. This appears to be a perfectly reasonable basis for the peaceful resolution of possibly overlapping historical fishing claims. (People of course did not exploit continental shelves in ancient history.)" He also defended US President Truman's proclamation, arguing that "it opened the way for all coastal countries to exploit resources they did not have access to previously, and to protect themselves from the richer maritime powers". He also criticized the concept of "historical rights", saying that "on land" they had "been a major cause of two world wars and countless other conflicts that continue to this day."[74]

Beyond the respective merits of the two views, this exchange reflects one of Beijing's challenges, namely building a coalition to defend her posture on the South China Sea. Unless China is able to do that, accusations of "colonial" and "Western-oriented" international law are likely to be contested by post-colonial non-Western commentators.

This does not mean that Chinese views enjoy no support from other countries. The history of the contacts and negotiations between ASEAN and Beijing concerning the South China Sea show how the former is by no means a unified bloc.[75] While Manila has received a measure of support, many capitals would like the regional organization to provide a forum to reach a lasting settlement with China, or at least to defuse tensions and develop limited agreements and confidence building measures, rather than becoming a regional alliance against Beijing. The problem for China is that

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none of the countries sympathetic toward, or at least pragmatically leaning towards Beijing, is a major immediate neighbor. Thus the history of ASEAN-China contacts concerning the South China Sea is a bittersweet tale. On the plus side for Beijing, no hostile regional bloc has emerged. On the negative side, no regional understanding with China has developed that could accommodate Beijing's needs. It is nevertheless possible that the interpretation of UNCLOS may evolve in the South China Sea to partially accommodate Chinese interests, to an extent that other parties may find acceptable, while China on the other hand agreed not to push for changes in other bodies of water, as Beijing seems to have done in the Arctic to facilitate her accession as permanent observer to the Arctic Council.

We can thus conclude that chance, and decades of effort at becoming a respected member of the international community, has placed a Japanese citizen at the heart of a key legal case. This is an additional reason why the case will be keenly followed in Japan, since although not directly involving the country it is related to her own territorial disputes with China. Yanai's presence just adds an additional Japanese connection to the proceedings.

Although some scholars hold that UNCLOS allows the ITL to issue a ruling in absentia, the court may be reluctant to push Beijing into a corner. Although not likely, the possibility that Beijing may react to the pressure, including the Philippines' arbitration case, by withdrawing from UNCLOS has been addressed by some authors. Again we can note Mark Valencia, who recently cautioned about "The danger of pushing China too far on law of the sea". In his piece, Valencia discusses what the consequences may be, and reminds his audience that "some of China's political analysts and particularly military officers seem to be questioning why China ratified the law of the sea treaty in the first place", adding that "Part of the explanation is that China assumed - obviously incorrectly - that the dispute settlement mechanism could be avoided by direct negotiations". This may be a key issue. It is not uncommon for countries to sign a treaty despite not feeling comfortable with some of its provisions, out of a mixture of hope that they can be avoided (among others, through derogations) and consideration for the positive aspects of the text. In this regard, Valencia explains that "China and other developing countries viewed the treaty as a package deal with many 'bargains' between the maritime powers and developing countries, including extensive navigational rights for maritime powers in exchange for the deep seabed mining provisions."[76]

Valencia concludes by warning that "China could withdraw from the treaty" and that, although "China would still be subject to the decision of the tribunal in the Philippines case", Beijing "would then be legally free to 'pick and choose' the convention's provisions and interpret them in its favour - just as the US does now."[77]

Ripples Across the Pacific: the Arbitration Case and US Reluctance to Ratify UNCLOS.

A final aspect to consider is the potential impact of the US non-ratification of UNCLOS. Although Washington signed the convention and successive administrations have shown their support for UNCLOS provisions, going as far as "unofficially" implementing most of the text which granted the US greater benefits than any other country, there has never been a two-thirds majority in the Senate to ratify it. Some of the main sticking points, such as the International Sea Bed Authority, are unrelated to the Filipino arbitration submission. However, should ITLOS refuse to proceed with the case against China, it could give ammunition to critics, many of whom are already skeptical concerning the role of International law and institutions in shaping Chinese behavior.

Speaking to the *Manila Bulletin* during a trip to

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the Philippines, Walter Lohman, director of the Asian Studies Center at The Heritage Foundation, said ''If (UNCLOS) can't determine that (China's) nine-dash map is invalid, what can it do?'' He added, ''The debate (over the ratification of UNCLOS in the US) will be pretty much over. If UNCLOS is not worth enough that it can't declare something in keeping with its provisions, if they can't declare something as invalid, what is it?''[78]

We can thus see how the case may have an impact on the international law of the sea going beyond the immediate area involved to the entire structure of UNCLOS.

On the other hand, there have been reports that the United States may provide imagery from unmanned airplanes to the Philippines, which Manila could use as evidence before the arbitration court. Foreign Secretary Albert del Rosario confirmed this, saying that “It’s useful for us to be gathering this information which can be utilized for our arbitration case. I think to that extent, it might be useful”. Del Rosario added that this would be useful “because of our interest of what’s going on within our exclusive economic zone [EEZ] and our continental shelf”, adding “We want to know if there are any intrusions”.[79]

Conclusion.

The decision by Manila to initiate international arbitration proceedings against Beijing under UNCLOS marks a turning point in the long-standing dispute over the South China Sea, or more broadly over the different bodies of water surrounding China. This is even clearer when seen in conjunction with other recent developments such as the Chinese decision to start employing patrol planes and embarked helicopters (operating from Coastguard cutters) around the Senkaku Islands, Tokyo’s provision of patrol boats to the Philippines, and Japanese Prime Minister Abe Shinzo’s recent reference to the Falklands in an address to Parliament. Broadly speaking, we are seeing a widening of the actors involved, and of the methods, both diplomatic and military, they are resorting to.

Beijing had repeatedly warned Manila not to resort to arbitration, and as expected has refused to take part in the case. The question remains whether ITLOS will nevertheless appoint an arbitration tribunal, in China's absence, as UNCLOS seems to permit. At the time of writing a five-member panel has been convened. Thus, the case may ultimately result in an award in absentia. However, before that happens, the five judges will have to meet and determine whether they have jurisdiction over the case. A Japanese judge currently heads ITLOS, adding a further twist to the story, given Tokyo's support for Manila and Hanoi. Some say that a ruling in favor of the Philippines would be pointless since it is unlikely that it will ever be implemented. Other voices, particularly in the Philippines, acknowledge this possibility but hope that such a ruling would provide ammunition in the long running soft power battle between Manila and Beijing. There are even fears that pushing Beijing too far may result in her leaving UNCLOS, leading to additional tensions and growing possibilities of open conflict. Others see the arbitration as a chance to put Beijing on the defensive, countering not only the message that the South China Sea belongs to China, but also the narrative that portrays Beijing as a responsible moderate power seeking to resolve territorial disputes through dialogue. Between these two extremes, there are those who hope that the case, together with other developments, from rearmament by countries like the Philippines to Chinese pragmatism in the Arctic, may lay the foundation for a negotiated solution to the South China Sea dispute. This third view may be based on the idea that such a solution requires a more robust posture, and military capabilities by other claimants and interested third parties, but at the same time the realization that trying to push Beijing into a

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corner would be counterproductive.

On an even more general plane, the case may constitute a turning point for the law of the sea (or more widely, public international law) and for relations between China and other countries. With regard to the law of the sea, the core of the Filipino case is the incompatibility between UNCLOS (and customary law) and China's concept of a "nine dash line", which Manila claims has no place in that convention. Should ITLOS rule accordingly (a possibility, since there is indeed nothing similar in the text of the convention) Beijing may just ignore the award. In an extreme case, although this seems unlikely, she could also react by withdrawing from UNCLOS. Less dramatically, China could also harden further her attitude toward Western-inspired international law and institutions. In a way, since the late 1970s Beijing has been playing a balancing game between her desire to recover her status as a great power, and her need to play by the rules of the US-dominated post-WWII system in order to rehabilitate her economy and shore up her soft power. To a great extent she has been successful. A ruling against China, however, could make such a balancing act much more difficult. On the other hand, should the case prompt renewed negotiations, it could facilitate a peaceful multilateral settlement of the South China Sea issue. In that case, despite the initial tensions, it could enable China to recover her great power status in parallel with growing influence on, but no dramatic break from, international law.

China is not, however, the only actor that is walking a careful line. Washington and its allies have also been employing a two-pronged approach to the PRC. On the one hand, they have opened their markets, invested massively, and generally welcomed Beijing into the international community including the United Nations Security Council and the World Trade Organization. This was first motivated by the US desire to play off Beijing against Moscow, and later by a dense web of interlocking economic interests, ranging from massive debt purchases to widespread investment in China and industrial relocation. The result is a complex relationship, involving cooperation and competition. The latter includes insisting on freedom of navigation, and disputing by word and deed China's interpretation of coastal rights in an EEZ, as well as rearming or helping China's neighbors rearm. By rearmament we not only mean the acquisition and deployment of additional weapons systems, but also moral rearmament, as Abe's frequent references to Margaret Thatcher make clear. In a way, they have been trying to shape and constrain, without ultimately blocking, China's ascent. While this may seem reasonable from these countries' perspective, it is easily seen by Chinese observers as undue interference in the country, reminiscent of past interventions. The case may also raise questions about the sustainability of such policies.

The Philippine's submission ultimately prompts the question of whether right or might will determine the fate of territorial claims in the South China Sea. The question is whether international law and diplomacy will play a significant role in securing a peaceful settlement, or at least an interim compromise that countries can live with for some decades, or whether it will be pushed aside leaving the fate of this area to be determined by force of arms. The answer to this question need not be black or white, in the sense that international law does not operate in a vacuum. While made of rules and institutions, it reflects at least to some extent the balance of power at any given time. The case could also end in a compromise agreement featuring international law and the simultaneous amendment of international law. A wide range of options remains open. Countries are rearming, yet they keep talking. Beijing is increasingly robust in some areas, while pragmatic in others like the Arctic. The Philippines themselves is a good example of the complex mix of policies followed by

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governments. She initiated arbitral proceedings, yet at the same time is rearming and negotiating regular troop rotations with the United States and Japan. A glimmer of hope may be found in the fisheries agreement between Taiwan and Japan, an arrangement which Taipei is seeking to replicate with Manila and which is a practical implementation of the principle of "economic cooperation today, talks on sovereignty later".

What is clear is that, whichever scenario prevails, the consequences will be felt throughout Asia and the Pacific and beyond for decades to come.

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Notes

[1] This article emerged from the research for A. Calvo "Shunji Yanai between Manila and Beijing", *The Tokyo Diplomat*, 13 February 2013, Shingetsu News Agency.

[2] The Vietnamese and the Filipinos respectively call this the Eastern Sea and the West Philippine Sea. "South China Sea" is the generally accepted version term in both official and academic usage internationally, although it would not be surprising to see this reconsidered at some point in the future if tensions persist. Some voices are already calling for the adoption of "South-East Asia Sea".

[3] Ian Storey, "Manila Ups the Ante in the South China Sea", *China Brief*, Vol 13 Issue 3, 1 February 2013, The Jamestown Foundation,

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available here

[4] "If the UN tribunal decides to hear the case, any ruling it issues will have wide-ranging legal, political and strategic implications," Ian Storey, "Manila Ups the Ante in the South China Sea", here

[5] A link to a scanned PDF copy of the original "Application and Statement of Claim" can be found at "Statement by Secretary of Foreign Affairs Albert del Rosario on the UNCLOS Arbitral Proceedings against China to Achieve a Peaceful and Durable Solution to the Dispute in the WPS", Department of Foreign Affairs, Republic of the Philippines, 28 January 2013, available here

[6] "The Department of Foreign Affairs' Statement on China's Response to the Philippines' Arbitration Case", website of the Department of Foreign Affairs of the Philippine Government, 19 February 2013, available at here

[7] Note accompanying the "Application and Statement of Claim", Department of Foreign Affairs, Republic of the Philippines, 22 January 2013, available here

[8] "Application and Statement of Claim", Department of Foreign Affairs, Republic of the Philippines, 22 January 2013, p. 1, available here

[9] "Application and Statement of Claim", here

[10] "Application and Statement of Claim", here

[11] "Application and Statement of Claim", here

[12] IV. Jurisdiction of the Tribunal. 40. "Application and Statement of Claim", p. 16, here

[13] "This excessive claim is the core issue of the Philippines' arbitration case against China." "The Department of Foreign Affairs' Statement on China's Response to the Philippines' Arbitration Case", website of the Department of Foreign Affairs of the Philippine Government, 19 February 2013, available here

[14] Further details of the "nine-dash line", including a copy of a map on a 7 May 2009 letter to the United Nations Secretary General , appear on II. Factual Background 10-11-12. "Application and Statement of Claim", p. 4-5, available here

[15] II. Factual Background. B. Submerged Features and C. Insular Features "Application and Statement of Claim", pp. 6-10, here

[16] II. Factual Background. B. Submerged Features. 14. "Application and Statement of Claim", pp. 6-7, here

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