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The South China Sea Dispute: Why the Philippines used the Permanent Court of Arbitration to gain international sympathy in their fight with China

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1. Introduction

One of the features that define a state is sovereign control over territory, with the geographical position and the presence of natural resources contributing to a state's power potential. Territory is such a quintessential feature of states that, history has seen a number of disputes arise between states about who has the legitimacy to sovereign control over territory, these disagreements may fuel nationalist thoughts or even lead to violent interstate conflicts. The importance of territorial sovereignty leads one to assume that states would under no circumstances leave the settlement of these disagreements to a third party. However, history has proven that there have been times when states have turned to a third party to mediate. The third party may be any one of the 20 international legal institutions that exist in the international arena (Simmons, 2002).

Global Insight aims to provide members of the policy community with concise but trenchant analyses of topical issues. Comments and suggestions are invited.

In October 1998 Ecuador and Peru turned to representatives from Argentina, Brazil, Chile and the United States of America to arbitrate over a disputed segment of their border. Nicaragua submitted a request to the International Court of Justice to judge its dispute with Colombia over the islands of Providencia, San Andres and Santa Catalina and in November 2009, the Republic of Croatia and the Republic of Slovenia submitted their maritime and territorial dispute to the Permanent Court of Arbitration (Simmons, 2002). While 2013 saw the Philippines turning to the Permanent Court of Arbitration to arbitrate over their dispute with China over the South China Sea¹ in a case that has been seen as an important part of history with far reaching outcomes.

This policy brief will look at the reasons that motivated the Philippines to delegate the settlement of their territorial dispute to the Permanent Court of Arbitration, what they benefited from it and what this means for their relations with neighbor China.

2. Permanent Court of Arbitration

The PCA is an intergovernmental organization established by the 1899 Hague Convention on the Pacific Settlement of International Disputes during the first Hague Peace Conference. The Conference had been convened at the initiative of Czar Nicolas II of Russia “with the object of seeking the most objective means of ensuring to all peoples the benefits of a real and lasting peace, and above all, of limiting the progressive development of existing armaments.” The PCA was initially established as an instrument for the settlement of disputes between states and was then authorised to use its facilities for conciliation and for the arbitration of international disputes between states and private parties thus availing it for the resolution of certain commercial and investment disputes (PCA 2016).

As of March 2016, 119 countries are parties to one or both of the founding Conventions of the PCA.

The PCA is not a court, despite being referred to as one, it is rather an organizer of arbitral tribunals to resolve conflicts between member states, international organizations or private parties (UNCTAD, 2003). The PCA has jurisdiction over matters relating to territorial and maritime boundaries, sovereignty, human rights, international investment and regional trade and should not be confused with the International Court of Justice which is the primary judicial branch of the United Nations, while the PCA is not a UN agency.

The PCA embraces three bodies; a panel of members, an international bureau and an administrative council. The individuals who serve in the PCA are not necessarily judges, they are persons, nominated by member states, who are of known competence in questions of international law, of the highest moral standing and willing to accept the duties of arbitration. The Permanent Court of Arbitration is not a Non-Governmental Organization. The arbitrators charge and get paid by the case. There are fixed costs for certain procedures such as a non-refundable processing fee of €2000 (R31 478.67) however, there are no fixed costs for arbitration cases, the costs can vary from case to case and the costs are negotiable (PCA, 2016). In the PCA’s 117 year history, only 16 arbitration outcomes were accepted by the parties involved (UNCTAD, 2003), which leads to the question of the necessity of this institution and why states still submit cases.

In 2013 the Philippines turned to the PCA for arbitration in their dispute with China about who has legitimate sovereignty over the South China Sea even though Beijing had repeatedly said that it was against third party arbitration and wanted bilateral negotiations instead. The findings of the PCA were released on July 12 2016 (PCA, 2016) and came out in favor of Manila with Beijing maintaining its stance against third party arbitration.

3. Why the Philippines turned to the PCA to settle the South China Sea dispute and the implications for their relations with China

The Philippines found themselves involved in a fight with goliath- who has more influence, economic and military capabilities, so they sought out to level the playing field by delegating enforcement authority to the PCA. Delegating to the PCA was also a way to increase credibility for their claims against Beijing and raising the question of Beijing's willingness to accept and respect constitutional limitations of its own power in the future (Simmons, 2002). This legal route was also to negatively impact on their opponent's reputation by leaving China looking like a state that is opposed to international law and cooperation. Article 296 as well as Article 11 of Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS), states that the verdict is final and binding. Beijing's refusal to take part in the proceedings did not prevent the matter from going forward as provided for by Article 9, Annexure VII of UNCLOS. In accordance with Article 5, Annexure VII as well as to ensure the proceedings were fair to all parties, China was repeatedly provided with an opportunity to formally participate but opted to boycott the whole proceedings (1982 United Nations Convention on the Law of the Sea).

International arbitration was a way to gather world interest and support in order to make it difficult for Beijing to 'bully' Manila either through bilateral negotiations or economic means. The legal route also serves to make diplomatic settlements more attractive and offers the concerned parties an opportunity to reassess their position on the contested matter before the findings are released. Legal ambiguities are clarified and sub-issues resolved during the litigation process; the judges' questions, interim rulings as well as experts' opinion on the matter indicated that the ruling would favor Manila, giving Beijing the opportunity to reconsider their strategy before the ruling came out (Simmons, 2002).

Taking China to the PCA could have been about more than just the territorial dispute, but also acting as an inspiration for the other five Southeast Asian

states with disputes with China to push the Association of South East Asia Nations (ASEAN), to which the Philippines, Brunei and Vietnam are members of, to take a firmer stance against the Chinese claim. ASEAN would be forced to agree on the ruling and what it means for the decades-long process of negotiating a SCS code of conduct with Beijing.

The United States of America has shown interest in the SCS dispute; supporting the claims made by the Philippines, even though it is not a member of ASEAN because they are of the opinion that if China is allowed to bully its neighbors and define a new area of geopolitical dominance, it will destabilize Asia and the world (Bower, 2016). The USA's support has not earned them any favor with Philippines' President Rodrigo Duterte, following the release of the PCA ruling on the SCS dispute, he has come out strongly against the USA several times. He has said that he is concerned about the prospect of the former colonial power in the Philippines, wanting to manipulate his country against China (Wen and Xiaochen, 2016). The US ambassador to the Philippines, Ambassador Goldberg, and President Barack Obama² have both not been spared; being called "a gay son of a whore" by President Duterte. (Foreign Staff, 2016). These outbursts by President Duterte may be seen as signs that he is not interested in maintaining the same relations as his predecessor with regards to the USA and instead is leaning towards mending fences with China. It may also be an act of good faith by Manila directed at deterring Beijing from assuming an aggressive position against them following the PCA judgement that came out in their favour.

The PCA findings left Beijing with a difficult choice to make; either accept the findings made by an international system they believe to be biased against their interests or assert their claims even more aggressively thus risking conflict with their neighbors. China responded by releasing a string of official statements, including a new White Paper,

reiterating their positions and warning that it would decisively respond to any provocations against Chinese interests in the South China Sea with the Communist Party pledging to the Chinese population that the Chinese Communist Party will protect and defend the country's sovereignty and territorial Integrity. Although Beijing seems to be alone in adopting a less favourable position on international arbitration initiated by a smaller and weaker neighbour, it shares this stance with other major powers. Both India (against Bangladesh) and Russia (against Netherlands) refused to participate in compulsory arbitration under the UNCLOS, however both of them ultimately came to observe the spirit of the final verdict (Graham A, 2016).

The verdict is binding, regardless of the stance taken by Beijing however, the Arbitral Tribunal cannot enforce it. This gives the Philippines the option of calling upon the international community to "enforce" the verdict on its behalf. It can do so by calling upon major naval powers such as America, Japan, and Australia to conduct Freedom of Navigation Operations close to Chinese-occupied artificial islands in the area. Such actions could strain ties between Manila and Beijing even further, leading to possible instability in the Asian region.

The Philippines have shown that they favour a peaceful resolution of the dispute with China. President Rodrigo Duterte is set to dispatch former President Fidel V. Ramos, who has a stellar record in dealing with the South China Sea disputes, as a special envoy to China in efforts to revive bilateral negotiations. President Duterte has said what is important for his administration is to rebuild strained ties with China, reawaken strong bilateral investment ties and leverage the verdict to extract concessions from China; no Chinese imposition of an exclusion zone in the Spratley or/and harassment of Filipino fishermen . The Filipino President has said that it will be a tall order, but he is willing to take the strategic leap of faith in the interest of peaceful management of fundamentally intractable disputes.

Manila's actions have left Beijing with possibilities on the way forward; respond to Manila's efforts by reviewing their approach to the South China Sea dispute following which they could either take a decision to double down on their assertive and coercive actions or revise their SCS strategy and join Manila in the quest to peaceful settlements.

Recommendations

The challenge of achieving and maintaining international order among states that are not equal in size, financial or military capabilities and are driven by self-interest presents an appropriate starting point for the need of international legal institutions such as the International Court of Justice and the Permanent Court of Arbitration. Although these institutions do not have the authority to enforce their decisions, they provide states with an opportunity to clear legal ambiguities, resolve sub-issues, mobilize international support for their causes as well as level the playing field between states.

Arbitration cannot solve the dispute between the two neighbours; only they can, which is why the Philippines will still need to talk to China. The Arbitration Tribunal merely gave Manila a bargaining chip to use in their negotiations with Beijing. Efforts should be focused on mutual exploration of the South China Sea seabed rather than on gaining sovereignty over the territory. Alternatively, the two states could form a conciliation commission which would be listed under UNCLOS as a measure for reconciliation. The commission would be formed under mutual consensus and it would only give advisory opinion on how to resolve the conflict without advising on matters of sovereignty and would consist of an unbiased panel. This would give both states an opportunity to show their commitment to international law.

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