

Preparing for the main event

Manila is considering special legal action to pursue its territorial claims against Beijing over Scarborough Shoal, but the risky, complex strategy may backfire

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Amid the manoeuvring and megaphone diplomacy that has surrounded the stand-off between China and the Philippines over the disputed Scarborough Shoal in the South China Sea, a potential legal time-bomb remains for China - even if the dispute eases.

At the height of the tensions, Beijing predictably rejected Manila's overtures to take the dispute over the shoal - known in Chinese as Huangyan Island or as Panatag Shoal to the Philippines - to the International Court of Justice, sticking to its long-held insistence that the matter should be resolved through diplomacy and bilateral negotiations.

On the surface, this has seemed to stymie the Philippines' move. The court requires the mutual agreement of both parties before a case of disputed sovereignty can be brought before it, so China's objections effectively killed such a gambit.

Tensions eased further this week when both pulled ships back from the shoal, but the wider sovereignty dispute remains - along with questions over how the Philippines will keep its legal case alive. Backed by international legal consultants, Manila officials are quietly exploring other legal avenues under which they can possibly force China to arbitration or a tribunal, even against its will.

"Do we have to have China with us as we go to ... settlement mechanisms," asked Philippines Foreign Secretary Albert del Rosario amid the stand-off, which ran for more than two months. "The answer is no."

Such remarks have sparked a flurry of interest in regional staterooms and universities in recent weeks, raising some intriguing questions. Is such action really possible? And what would be the impact?

On certain key levels, Del Rosario was technically right - the Philippines can take action unilaterally, according to a range of international lawyers and scholars familiar with the UN's Convention on the Law of the Sea, known by its abbreviation, UNCLOS. The political considerations, of course, in taking on China in such a fashion could dwarf even the considerable legal challenges.

Unlike the International Court of Justice, UNCLOS cannot be used to settle issues of sovereignty, but it can deal with a wide range of related disputes. To that end, it boasts a feature unique among UN conventions - it allows for a state to contest another's actions or positions without the consent of that state, through what is known as "compulsory binding dispute settlement".

China, which signed and ratified the convention soon after it came into force in 1994, has long seemed wary of such unilateral action. In 2006, it took the formal step of exercising its right to be exempted from such action in certain cases, such as those centred on military activities, maritime boundaries and historic waters.

However, as some international legal scholars have noted, such exceptions are not sweeping enough to be water-tight. A contested, unilateral action would still be possible over disputes centred on fishing rights within another country's claimed economic zone, or, for example, whether a rock or reef could be considered an island under the law, and therefore entitled to possible economic zone status.

The dispute over Scarborough Shoal and the contested rights of Chinese fishermen within the 200 nautical mile exclusive economic zone claimed by the Philippines could be one such case, some lawyers believe. Chinese officials say China has a historic right to Huangyan and its closer proximity to the Philippines is no defence in international law.

"Disputes concerning China's objections to activities within the [exclusive economic zone] of Southeast Asian claimants may be subject to the [compulsory dispute settlement] system," noted Robert Beckman, a scholar of international law at the National University of Singapore, in one recent paper presented to a conference in Kuala Lumpur.

Significantly, any push by the Philippines for a ruling could call into question China's controversial nine-dash line, the marker on which Beijing bases its ambiguous claim that stretches into the maritime heart of Southeast Asia.

Beckman's paper notes that such disputes would be primarily about Law of the Sea articles dealing with islands and "the rights and jurisdiction of China within the nine-dash line". China's historic claim to the South China Sea, expressed on maps published in China as the nine-dash line, bisects the economic zones of rival claimants the Philippines, Vietnam, Malaysia and Brunei. All of them also claim, in whole or in part, the Spratly islands that straddle the South China Sea.

Scarborough sits outside the Spratlys and so is claimed only by China and the Philippines. But the saga is being closely watched by other claimants.

"International law is one way of solving the dispute," said one veteran Southeast Asian envoy. "We know that it could be a better solution than having to negotiate with a power like China one by one. We are all watching to see if the Philippines is brave enough to take the first step down that road - and face a potential backlash from Beijing."

Jonathan Gimblett, a senior associate at Washington law firm Covington & Burling, warned that the path to forcing a nation to a tribunal against its will was potentially long and complex - and carried large political risks. Covington has done work on South China Sea issues for foreign firms and claimants, but currently does not represent any of the states involved.

"Ultimately, we can break things down to two key questions," said Gimblett, a former British diplomat who worked on boundary disputes. "Firstly, there is the legal question [as to] whether a given dispute is subject to UNCLOS' compulsory dispute resolution mechanism, given China's 2006 declaration. And that in itself can get very complicated.

"Then there is the political calculation, and that in many cases can be a far greater question than the legal issues. It is a pretty big step to attempt to take a sovereign state to arbitration against its will."

Some lawyers also note a strategic element to the ambiguities facing China's position. When a rival nation is unsure of what China claims, or how it claims it, preparing a legal challenge can become complex.

As Gimblett noted: "China has not clearly stated the international law principles on which it bases its claim to maritime areas within the nine broken lines. How one would characterise a given dispute could vary significantly depending on whether China's claim is one to maritime areas pertaining to Spratly features over which it claims sovereignty, or rather a claim to the entire South China Sea based on a theory of historic rights."

A paper submitted by Beckman to a conference in Tokyo noted a policy of on-going "deliberate ambiguity" from China over its claim to resources in the South China Sea.

"Serious questions are raised in Asean states on whether China intends to respect international law in general and the Law of the Sea Convention in particular when dealing with its smaller neighbours," said Beckman, who heads the Centre for International Law at the National University of Singapore.

"This is cause for considerable concern among Asean [the Association of Southeast Asian Nations]... One of the fundamental principles that Asean states have followed when dealing with the major powers on maritime security issues is that any co-operation must be consistent with international law, especially the Law of the Sea Convention."

He added that China, however, "seems to favour resolving the disputes through negotiation, especially bilateral negotiations, where other relevant factors such as history can be taken into account".

A contested case under UNCLOS, involving a panel of UN arbitrators, would be legally binding. But there is no guarantee that a tribunal under UNCLOS would agree to hear a case. As international courts have moral rather physical powers, actual enforcement is another matter - even though lawyers note that states generally follow their decisions.

In Beijing, one well-connected scholar said there was considerable doubt in Beijing over whether Manila was really interested in taking the legal route against China's wishes.

"Not only do they know that this would clearly be against China's wishes, but also they would risk a judgment going against them," said the scholar. "Is their claim really that strong? No. Ultimately, we do not think they are going to go through with it. We think they know that bilateral negotiations are the only meaningful way forward."

He also said he believed the Philippines, and other countries, underestimated Chinese expertise on Law of the Sea issues. "Through the UN, our experts have been getting a lot of experience over the years. We are familiar with the way UNCLOS works - and I think the Philippines may be ignoring that. We are prepared."