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The China – Philippines Dispute in the South China Sea: Does Beijing have a Legitimate Claim?

By Robert Beckman

Synopsis

China's objection to the Philippines' latest move to explore for hydrocarbons off Palawan has raised the temperature over the Spratlys. The best way forward is for both parties to put aside their dispute and allow for joint development while refraining from unilateral activities.

Commentary

AFTER RELATIVE calm for the past few months, the dispute between China and the Philippines over the South China Sea has flared up again. The latest exchanges between the Philippines and China were triggered by Manila's announcement that it would open new blocks off Palawan for exploration of hydrocarbons. China has objected to the reported actions because it argues that some of the blocks are in areas over which it claims rights and jurisdiction.

The critically important question is whether China has a legitimate claim under international law to rights and jurisdiction in the waters where the blocks are located. If so, it would mean that the blocks in question are within an "area in dispute", and the

objections of China to unilateral actions by the Philippines are valid.

Is China Claiming 80% of the South China Sea?

China has a long-standing historic claim to sovereignty over the features in the South China Sea known as the Spratly Islands, which it refers to as the Nansha Islands. China has consistently objected to sovereignty claims of the Philippines, Vietnam, Malaysia and Brunei over some of the islands.

The infamous nine-dashed line found in Chinese maps of the South China Sea has prompted critics to describe its claim as a “territorial waters” claim; they assert that either China is claiming sovereignty over all the waters within the nine-dashed line or it is claiming 80 % of the South China Sea as its own.

However, the Chinese Ministry of Foreign Affairs has reiterated that China is not claiming sovereignty over all of the South China Sea. Although China has not completely clarified its nine-dashed line, in official diplomatic notes to the United Nations, it has claimed sovereignty over the Spratly Islands and their adjacent waters.

It is generally agreed that “adjacent waters” refers to the 12 nautical mile (nm) territorial sea which can be claimed from any land territory, including islands. Further, China has also stated in its official diplomatic notes that the Spratly Islands are entitled to an exclusive economic zone (EEZ) and continental shelf under Chinese law and under the 1982 UN Convention on the Law of the Sea (UNCLOS). A State does not have sovereignty in its EEZ or on its continental shelf, but it does have “sovereign rights” and jurisdiction for the purpose of exploring and exploiting the natural resources of the sea-bed and subsoil in its EEZ and on its continental shelf.

Philippines claims Reed Bank is not an area in dispute

The Philippines claims that it has sovereign rights to explore and exploit the hydrocarbon resources in the blocks in the Reed Bank because it claims a 200 nm EEZ measured from straight baselines connecting the outermost points of the outermost islands in its main archipelago.

The Philippines has not claimed an EEZ or continental shelf from any of the disputed islands in the Spratlys over which it claims sovereignty. Rather, its position seems to be that even if some of the features near Reed Bank are islands because they are naturally formed areas of land above water at high tide, these islands should only be entitled to a 12 nm territorial sea, not to an EEZ or continental shelf.

The position of the Philippines is based on the distinction in UNCLOS between “islands” and “rocks”. Although islands are in principle entitled to a territorial sea, EEZ and continental shelf, “rocks” which cannot sustain human habitation or economic life

of their own are only entitled to a 12 nm territorial sea.

The practical effect of the position of the Philippines is to reduce the “areas in dispute” in the Spratly Islands to the islands themselves and the 12 nm territorial sea adjacent to them. Since the blocks in the Reed Bank are more than 12 nm from any disputed island, they would not be within an area in dispute, but would fall solely within the EEZ of the Philippines measured from its archipelago.

Can China maintain that the Reed Bank is an area in dispute?

China could maintain that some of the features in the Spratlys near Reed Bank, such as Nanshan Island (Ma Huan Dao / Dao Vinh Vien / Lawak), are “islands” under UNCLOS because they are naturally formed areas of land above water at high tide. Further, China could maintain that some of these islands are entitled to an EEZ and continental shelf because they are capable of sustaining human habitation or economic life of their own.

If China claims that some of the islands near Reed Bank are entitled to an EEZ and continental shelf, it can maintain that it has sovereign rights and jurisdiction under UNCLOS to explore and exploit the hydrocarbon resources in these zones. Consequently, the EEZ and continental shelf measured from the disputed islands will overlap with the EEZ of the Philippines measured from its archipelago. The “area in dispute” will then be the disputed islands, their 12 nm territorial sea, and the areas where the EEZ and continental shelf of the islands overlaps with the EEZ of the Philippines.

If the blocks in question near Reed Bank are in an area in dispute, this has implications for the activities that can lawfully be undertaken by the Philippines and by China. Recent international arbitral decisions have found that unilateral exploration and exploitation activities in “areas in dispute” are contrary to UNCLOS, especially if they involve drilling.

Best Way Forward

For now, the most that can be said is that China has a basis under UNCLOS and international law for claiming sovereign rights and jurisdiction to explore and exploit the hydrocarbon resources in the waters surrounding some of the Spratly Islands. Accordingly, its protests to the Philippines can be seen as a legitimate action to preserve its rights.

The best way forward may be for the two countries to side-step the sovereignty disputes and the rock-island disputes and enter into negotiations to define the areas in dispute that can be subject to joint development arrangements. In the meantime, they should exercise restraint and refrain from any unilateral activities which would

exacerbate the already complex disputes.

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