



## **The Philippines' South China Sea Memorial: Sailing into the Wind** by Gregory Poling

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On March 30, the Philippines submitted a memorial detailing its arguments and evidence against China's nine-dash line and other aspects of Beijing's South China Sea claims to an arbitration tribunal at The Hague. The 10-volume, nearly 4,000-page document marks a bold step by Manila, and one that Beijing seems to have believed never would actually happen. The Philippines chose the right course. Now the international community must weigh in and convince China of that fact.

China has refused to take part in the case since it was first brought by the Philippines in January 2013. It has also exerted considerable pressure on Manila to abandon the arbitration proceedings. As the deadline for the memorial approached and pressure failed to alter the Philippine position, Beijing switched to the carrot. It reportedly offered Manila incentives to drop the case, including trade benefits and a mutual withdrawal of ships from Scarborough Shoal, which China occupied in April 2012. But the Philippines did not budge. An incident near a reef in the Spratly Islands on March 29 helps explain why.

Second Thomas Shoal is a submerged reef, part of which breaks the waterline at low tide. It lies on the Philippines' presumed continental shelf but, like every feature within the nine-dash line, is claimed by China. The Philippine Navy intentionally grounded the BRP *Sierra Madre* on the reef in 1999 to garrison troops as a deterrent to further Chinese expansion in the area.

Every few months for 15 years, the Philippine Navy has sent fresh troops and supplies to Second Thomas Shoal. Last year, with memories of the Scarborough Shoal seizure still fresh, Chinese ships began regularly patrolling near Second Thomas and harassing Philippine ships that approached. It escalated these provocations in early March by running off a vessel carrying supplies and, allegedly, construction materials, for the Filipino garrison. Manila responded by dropping supplies to its troops from the air.

On March 29, the Philippines sent another ship, but this time it invited foreign press along to document the Chinese response. The resupply ship was harassed by a Chinese Coast Guard vessel that demanded it leave the area and repeatedly turned across the smaller boat's path, forcing it to veer away to avoid a collision – all while foreign journalists watched.

Eventually the Philippine ship entered shallower waters and escaped, delivering long-overdue supplies and troops to replace the garrison at Second Thomas Shoal.

The incident underscored a lesson that the Philippines learned well after Scarborough Shoal: China has no intention of compromising on its claims, restricting them to the bounds of international law, or treating fellow claimants as equal parties to the disputes.

Despite frequent insistence from Beijing that its claims in the South China Sea are based on international law and encompass only the "islands and adjacent waters" within the nine-dash line, Chinese actions tell a different story. Second Thomas Shoal is not an island or even a rock. It is a low-tide elevation that is not subject to any independent territorial claim under the UN Convention on the Law of the Sea or customary international law. The shoal belongs to whomever has sovereignty over the continental shelf on which it rests – by all indications the Philippines.

China has not restricted its underwater claims to the continental shelf of the Philippines. In January three Chinese ships patrolled James Shoal, a completely submerged feature on Malaysia's continental shelf, and held a ceremony swearing to defend Chinese sovereignty over it. Where Beijing makes tenuous legal arguments for its claims to Scarborough Shoal and disputed islets in the Spratlys, it offers none for its claims to Second Thomas or James Shoal.

Such claims, along with increasingly aggressive tactics by Chinese maritime forces, have pushed more complacent nations closer to the Philippine position. Malaysian officials have grown increasingly vocal in meetings with ASEAN counterparts since the Chinese patrols at James Shoal. Even in Indonesia, which had previously tried to distance itself from the dispute, officials appear to be growing concerned. On March 12, an official with the office of the coordinating minister for political, legal, and security affairs acknowledged that the nine-dash line does in fact illegally overlap Indonesia's exclusive economic zone north of the Natuna Islands. Foreign Minister Marty Natalegawa tempered that statement a week later, but reiterated that Indonesia considers the nine-dash line unacceptable. Officials in Jakarta seem to be recognizing that, if allowed, Beijing will stake claim to everything within the nine-dash line – islands, waters, and the seabed beneath.

Negotiations have failed so far to make much progress on managing, much less resolving, the South China Sea disputes. No other claimant has the military capabilities to resist determined Chinese aggression, the Philippines least of all. And the United States will not intervene militarily except in the case of an outright act of war. That leaves the Philippines only one recourse – the law. Manila is paying a cost for its

case, but it has correctly determined that the cost of complacency would be higher.

Many of the Philippines' neighbors, including Indonesia, Malaysia, and Vietnam, have vouched for Manila's right to pursue legal action but have shied away from more forthright support for the arbitration case. Extraregional players have been more vocal, especially Japan and the United States. The US government grew more explicit in its criticism of the nine-dash line this year, with Assistant Secretary of State Daniel Russel calling it illegal during testimony before Congress. On the same day that the Philippines filed its memorial, the State Department issued a press statement supporting the effort for "greater legal certainty and compliance with the international law of the sea."

US support for the Philippines' case against China is about more than supporting a treaty ally or curbing the atavistic tendencies of a rising power. It is about defending an international system of law and norms. Nearly every nation, including China, is a signatory to the Law of the Sea. Even those that have not ratified it, including the United States, operate under its rules. And the most fundamental of those rules have been recognized by the International Court of Justice and others as customary international law.

Nations large and small have restricted their maritime claims to the bounds of international law, even in those areas where they consider themselves to have a special prerogative, such as the Caribbean for the United States and the Arctic for Russia. If China, by virtue of size or force of arms, is free to ignore that framework, then the entire edifice risks being discredited. And no nation, China included, would find its security and prosperity better served by a return to the pre-20th-century system of might-makes-right relations.

Whether the arbitration tribunal will find that it has jurisdiction in the Philippines' case is uncertain. But if it does, the judges will rule at least partially in the Philippines' favor. That ruling will not restrict China's claims to above-water features in the nine-dash line, but it will likely invalidate its claims, such as to Second Thomas Shoal, that clearly violate customary international law.

Beijing maintains that it will not abide by any such ruling. The Philippines can only hope to protect its interests by pursuing the case anyway. That leaves the international community, and the United States in particular, to convince China that preserving the international rule of law and playing the part of a responsible power will serve its interests better than will thumbing its nose at the community of nations.

*PacNet commentaries and responses represent the views of the respective authors. Alternative viewpoints are always welcomed.*